IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. JERRIN LAVAZIE HICKMAN, aka Jerrim Lavezie Hickman, Defendant-Respondent, Respondent on Review.	Multnomah County Circuit Court No. 081235225 CA A144741 SC S061409

REPLY BRIEF OF PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Multnomah County
Honorable MICHAEL H. MARCUS, Judge

Opinion Filed: March 20, 2013
Reversed and Remanded
Before: Schuman, P.J., and Wollheim, J., and Nakamoto, J.

Continued…

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INTRODUCTION

In its brief on the merits, the state proposes a rule for the admissibility of eyewitness identifications that occur in court and without any preceding attempts at pretrial identification. Such identifications are subject to the foundational first step of the test that this court announced in *State v. Lawson/James*, 352 Or 724, 291 P3d 673 (2012). But the fact that such identifications occur in the courtroom provides no basis for exclusion under the second step. Defendant and the *amici* disagree, proposing rules of their own. However, those rules are both unworkable and inconsistent with the role of the jury.

ARGUMENT

A. The rules that defendant and the *amici* propose would require an unprecedented and unwarranted intrusion into the role of the jury.

The arguments of both defendant and the *amici* rest on the premise that an in-court identification is inherently unreliable unless a proper pretrial-identification procedure precedes it. The state disagrees with that premise. Some first-time, in-court identifications are reliable and some are not. And because such identifications are sworn testimony about the witness's first-hand observations, our system requires us to trust juries to tell the difference. The rules that defendant and the *amici* propose would allow trial courts to keep that

kind of evidence from the jury because it might be unreliable. Such a rule would be an unprecedented and unwarranted intrusion into the role of the jury.

The parties agree that the first step of the *Lawson/James* test applies to all identifications. That is because the first step is foundational. *All* testimony must have a proper foundation to be admissible, regardless of whether the testimony purports to describe the witness's first-hand observations. Therefore, applying the first step of the *Lawson/James* test to identification evidence is consistent with the role of the jury, regardless of whether the identification occurs pretrial or in court.

The second step of the *Lawson/James* test, however, is more than a foundational inquiry. It requires the trial court to assess the reliability of the identification and exclude it under OEC 403 if its unreliability presents too great of a danger of unfair prejudice. Applying that step to a pretrial identification is consistent with the role of the jury. If a party wants to present evidence of a pretrial identification at trial, it must do so through a witness who describes the identification. That kind of testimony merely repeats an out-of-court statement about someone's observations.[1] Testimony that is based on an

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[1] That is true even if the testifying witness describes her own pretrial identification. The actual identification already occurred and, therefore, it and

Footnote continued…

out-of-court statement traditionally is either excluded or subject to the trial court's reliability assessment before the jury is allowed to consider it because the reliability of the out-of-court statement depends on more than the testifying witness's credibility.

But an in-court identification that has not been tainted by out-of-court influences is different because it is sworn testimony about the witness's first-hand observations that occurs in the jury's and defense counsel's presence. Therefore, the identification's reliability is based entirely on the testifying witness's credibility. In that context, an application of the second step of the *Lawson/James* test would be nothing more than the trial court's evaluation of the testifying witness's credibility and, therefore, an interference with the jury's function.[2]

Once an in-court identification satisfies the foundational first step of the *Lawson/James* test, a trial court has made the preliminary determination that the identification is based on the witness's own perceptions and, therefore, that it is

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(…continued)
the circumstances under which it was made were not subject to the jury's and defense counsel's contemporaneous assessment.

[2] To be clear, a credibility assessment involves more than a determination of whether a witness is lying. It also requires considering whether the witness is simply mistaken because of factors such as faulty memory, impaired perception, or misinterpretation.

nothing more than testimony regarding the witness's first-hand observations. Our system does not, and should not, allow the trial court to further screen that kind of evidence for reliability before submitting it to the jury. To do so would require the trial court to make a credibility determination that our system reserves for the jury. When it comes to sworn testimony about a witness's first-hand observations, the trial court's gatekeeping role is limited to ensuring that the testimony has a sufficient foundation.

The rules that defendant and the *amici* propose expand that role beyond its traditional confines, necessarily causing it to invade the jury's role of determining witness credibility. Defendant's rule does that by applying the second step of the *Lawson/James* test to in-court identifications like the ones at issue in this case. The *amici* go a step further and propose a *per se* exclusionary rule for such identifications. In no other context do we authorize the trial court to screen the reliability of a witness's testimony about her first-hand observations before allowing the jury to hear the testimony.[3] Our adversary system depends on the scrutiny of a jury and the cross-examination of opposing

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[3] In fact, our system assigns the jury the role of judging witness credibility under even the most extreme circumstances. For instance, if the testimony has a sufficient foundation, a trial court must allow a witness to testify even if the witness has a clear motive to lie or convictions reflecting dishonesty.

counsel—rather than a judge's assessment—to test the credibility of such testimony.[4]

B. The rules that defendant and the *amici* propose are also unworkable.

In addition to being at odds with the role of the jury, the proposed rules of both defendant and the *amici* seriously misjudge the realities of criminal investigations. The *amici* claim that first-time, in-court identifications involving strangers are a "small subset" of identification evidence and that they "occur only rarely." (Am Br 4, 18). The *amici* also contend that "there is no valid reason at all why the state would fail to subject a witness who is available to testify, and of whom the state intends to elicit an identification, to a non-suggestive, out-of-court identification procedure." (Am Br 4). The *amici* are mistaken in both respects.

The state routinely relies on in-court identifications. The vast majority of criminal trials involve relatively low-level offenses. The police must focus their investigations on the issues that appear to be the most important. In many

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[4] Defendant and the *amici* point to the studies that show that cross-examination is ineffective at revealing to juries the deficits in eyewitness-identification evidence. But even if those studies apply with equal force to an identification that occurs exclusively in front of the jury, the better way to address the problem is through expert testimony and specialized jury instructions versus keeping the evidence from the jury altogether. That approach addresses many of defendant's and the *amici's* concerns while also preserving the role of the jury.

cases, even ones involving witnesses who are strangers to the defendant, the perpetrator's identity is obvious and the police will usually not conduct pretrial identification procedures. The police lack the opportunity, time, and resources to conduct a pretrial identification procedure with every witness in every case. For all of those reasons, many criminal trials include at least one witness who identifies the defendant for the first time in court and who is a stranger to the defendant.

In addition, there are a number of reasons why the police might be unable to attempt a pretrial identification with a particular witness. Lack of cooperation is the most common reason. In those cases, the state often has no choice but to subpoena the uncooperative witness and ask him for the first time during trial whether he can identify the defendant. Moreover, the police cannot predict at the time of their initial investigation which witnesses will be available for trial and which ones will be unavailable. As a result, defendant's and the *amici*'s proposed rules would require the police to attempt pretrial identifications with every single eyewitness, even in cases involving numerous eyewitnesses.

C. The prosecutor's pretrial instructions did not negatively impact the reliability of D's and N's in-court identifications.

Defendant and the *amici* correctly note that several events associated with D's and N's in-court identifications occurred outside of the courtroom.

But despite what defendant and the *amici* appear to argue, the presence of those kinds of events does not automatically render an in-court identification inadmissible. Nor does it somehow transform the in-court identification into an out-of-court one that is subject to both steps of the *Lawson/James* test. To be clear, the state's argument is that the in-court aspects of an in-court identification, whether or not those aspects are suggestive, are not a basis for exclusion under the second step of the *Lawson/James* test. Those aspects occur in court and under the scrutiny of defense counsel and the jury. That remains true of *those* aspects even if the identification might have also been influenced by an out-of-court event. To provide a basis for exclusion, the out-of-court event must have negatively affected the reliability of the in-court identification.

Defendant and the *amici* correctly note that the prosecutors provided pre-identification instructions to D and N, that they provided those instructions outside of the courtroom, and that pre-identification instructions can potentially influence the reliability of identifications. However, defendant and the *amici* fail to persuasively explain how those instructions detracted from the reliability of the in-court identifications. For the reasons described in the state's brief on the merits, the instructions would not have detracted from the reliability of D's and N's identifications and, in fact, they would have added to their reliability. (Pet Br 34-36). Defendant and the *amici* have not shown otherwise.

Defendant contends that the pre-identification instructions were flawed because they did not communicate to the witnesses that the shooter might not be in the courtroom. (Resp Br 11-12). But defendant also acknowledges that such an admonition would likely have no effect on an in-court identification because it is obvious to the witness which person in the courtroom is the defendant. (Resp Br 15 n 5). That acknowledgement demonstrates that the arguably suggestive factor that defendant challenges has nothing to do with the pre-identification instructions. Instead, it is merely something that is inherent in any in-court identification, regardless of the pre-identification instructions that are provided. That it is obvious during an in-court identification which person is the defendant is a factor that is fully visible to defense counsel and the jury.

Defendant and the *amici* both discuss what they refer to as the "secret signal" arrangement between D and the prosecutor. (Resp Br 12-14; Am Br 44, 50-53). The *amici* suggest that the import of the arrangement was that D should "remain silent if she did not recognize the shooter in the courtroom." (Am Br 10). The *amici* argue that the arrangement violated defendant's Sixth Amendment and Due Process rights to counsel. (Am Br 50-52). That argument is not properly before this court because defendant has never raised it. This court should reject the argument on that basis.

Regardless, the argument fails for several other reasons. As the state discusses in its brief on the merits, the prosecutor's comment to D that she

should give him a "look in the eye" if she recognized the shooter in the courtroom was neither a "secret signal" arrangement nor was it something that negatively affected the reliability of D's in-court identification. (Pet Br 34-36, 36 n 15). In addition, the premise of the amici's argument is that the state was attempting to prevent the jury from knowing if one of its witnesses was unable to identify defendant. The record refutes that premise.

The state's conduct with other witnesses in this case is inconsistent with an intent to keep secret an eyewitness's inability to identify defendant. In addition to calling D and N, the state called many eyewitnesses to the stand. Some were able to identify defendant as the murderer and some were not. Marco Anderson, Raymond Grant, Steven High, Tonya Granberg, and Shawana Pskar were eyewitnesses to the murder, but each was either unable or unwilling to identify defendant. (Tr 1406, 1423-27, 1802, 1811-12, 1814, 2163). The state made no effort to hide that aspect of their testimony. If the *amici* were correct and the state intended to withhold D's potential inability to identify defendant, it makes no sense that the state would call numerous other eyewitnesses to the stand and make no effort to conceal their inability.

The strongest evidence against the *amici's* suggestion that the state meant to keep secret D's potential inability to identify defendant was the prosecutor's pre-identification instructions to N. In addition to telling N that she should not feel compelled to identify someone if she did not recognize the shooter in the

courtroom, the prosecutor told N that she should expressly tell the court and the jury if she *did not* recognize anyone in the courtroom as the murderer. (Tr 1796-97). The *amici* do not explain why the state would want to keep D's possible inability to identify defendant a secret, but not N's. Overall, defendant and the *amici* fail to show how the state's pre-identification instructions did anything but increase the reliability of D's and N's in-court identifications.

D. Defendant attributes concessions to the state that the state did not make.

Defendant appears to misunderstand two important aspects of the state's argument. The first is with regard to the reliability of D's and N's in-court identifications. Defendant claims that the state "tacitly concedes that the identifications are not reliable by failing to argue to the contrary." (Resp Br 9). The state makes no such concession and it expressly argued to the contrary in its brief on the merits. Specifically, the state argues that D's and N's in-court identifications were reliable enough to satisfy the first step of the *Lawson/James* test. (Pet Br 29-32). Therefore, the identifications were testimony about D's and N's first-hand observations, and as such, were not subject to potential exclusion under the second step of the *Lawson/James* test. (Pet Br 32-38).

A second aspect of the state's argument that defendant misunderstands is with regard to N's trial testimony. N testified that she got a good look at defendant immediately after the shooting when he ran up to her car window and

tried to get into the car. (Tr 1781, 1799-1800). Defendant argues that the state conceded in the trial court that defendant could not have been the man who tried to get in the car. (Resp Br 5, 17). The state made no such concession.[5]

Citing to page 3137 of the trial transcript, defendant points to a statement that the prosecutor made during his oral response to defendant's motion for a new trial. (Resp Br 5, 17; Am Br 13-14, 28 n 25). Defendant based his motion on a claim that he had discovered new evidence. When the prosecutor made the statement that defendant has interpreted as a concession, the prosecutor was arguing that defendant's proffered evidence was neither new nor likely to have changed the jury's verdict. (Tr 3132-37). To illustrate that point, the prosecutor acknowledged that there was a conflict in the evidence regarding who approached N's car window and pointed out that defense counsel relied heavily on the testimony of Officer Mast to argue to the jury that defendant could not have been that person. (Tr 3132-37). The prosecutor was not conceding that defense counsel's argument was factually true; he was merely paraphrasing the argument to make the point that the issue of who had

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[5] Initially, the *amici* also attributed that concession to the state. (Am Br 13-14, 28 n 25). However, the *amici* have since filed an amended brief that redacts the references to the state's alleged concession. The *amici's* amended brief has also removed assertions that D and N originally told that the police that they would be unable to identify the shooter if given the chance to do so because the record does not reflect that D and N made those statements.

approached N's car window had already been raised at trial and argued to the jury.[6]

E. The evidence pointed to no suspect other than defendant.

In an attempt to rebut the state's harmlessness argument, defendant now suggests that the evidence revealed multiple "alternative suspects." (Resp Br 26). According to defendant, one of those suspects was Dontae Porter. (Ans Br 27). But as the state explained in its brief on the merits, the evidence conclusively disqualified Porter as a suspect. (Pet Br 42).

Defendant also points to Moncello James as a suspect. (Ans Br 30). However, the eyewitness who initially identified James as the shooter, recanted her identification two days after the murder, explained that she had been mistaken because of a lack of sleep and intoxication, and testified that James was not the shooter. (Tr 33-34, 1815). In addition, James's DNA was not on

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[6] And the evidence was far from conclusive regarding whether N was mistaken about seeing defendant approach her car window. N was sure that defendant was the person who she saw and no other witness conclusively contradicted her. Officer Mast was unable to identify defendant as the person who he saw at the scene because he did not see that person's face. (Tr 2114-15). Moreover, the record is unclear as to the exact timing of when Officer Mast saw that person in relation to when N saw defendant run up to her car window. The record allows for the possibility that one of those events happened after the other and that, therefore, defendant could have been *both* the person who N saw *and* the person who Officer Mast saw. At most, there was a potential conflict in the evidence and resolving that factual dispute was a credibility determination for the jury.

the ski mask that the shooter wore and three other witnesses specifically testified that James was not the shooter. (Tr 48, 1397, 1407-08, 2064, 2161). In contrast, *no one* at trial, except for defendant himself, testified that defendant was not the shooter. The only suspect to whom the evidence pointed was defendant and it did so beyond a reasonable doubt even without D's and N's identifications.

CONCLUSION

For the reasons contained in this reply brief and the state's brief on the merits, this court should reverse the judgment of the Court of Appeals and affirm the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 20, 2014, I directed the original Reply Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ryan Scott, attorney for respondent, and Matthew G McHenry, attorney for amicus curiae, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,046 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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