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-Appellant, Respondent on Review.	Multnomah County Circuit Court No. 081235225 CA A144741 SC S061409

BRIEF ON THE MERITS 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…

RYAN SCOTT #955267
Scott and Huggins Law Offices
1549 SE Ladd Avenue
Portland, OR 97204
Telephone: (503) 471-1338
Email: ryan@scotthugginslaw.com

Attorney for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
ANDREW M. LAVIN #033696
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
andrew.m.lavin@doj.state.or.us

Attorneys for Petitioner on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

Other Authorities

BRIEF ON THE MERITS OF
PETITIONER ON REVIEW, STATE OF OREGON

STATEMENT OF THE CASE

A jury convicted defendant of murder after he shot the victim at a crowded house party. At trial, several eyewitnesses identified defendant as the man who murdered the victim and who then walked into the street, firing several shots into the air. Two of those identifications occurred for the first time at trial with no preceding police procedures, suggestive or otherwise. Defendant appealed, assigning error to two of those courtroom identifications. The Court of Appeals reversed, holding that the two courtroom identifications were potentially too unreliable to be admissible under the test that this court set forth in *State v. Lawson/James*, 352 Or 724, 291 P3d 673 (2012). But the identifications at issue in this case are fundamentally different than the identifications that were at issue in *Lawson/James*.

Each of the eyewitness identifications in *Lawson/James* involved police attempts to obtain pretrial identifications of the defendants. It was in that context that this court decided the case and announced the new admissibility test. Here, the two identifications at issue occurred for the first time in the presence of the jury. The exclusively in-court nature of the identifications eliminated the specific danger that the *Lawson/James* test was designed to prevent—the jury's inability to properly assess an identification's reliability

when suggestive pretrial procedures are involved. First-time courtroom identifications like the ones in this case do not present that sort of danger because the jury is able to see all of the suggestive aspects of the procedure for itself and is therefore able to understand and properly assess the potential for unreliability. Therefore, this court should clarify that the *Lawson/James* test applies differently to identifications of that kind.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

In *Lawson/James*, this court considered the admissibility of eyewitness identifications that involved suggestive pretrial police procedures. In that context, this court announced a test for the admissibility of identification evidence that involves the consideration of several variables affecting the reliability of eyewitness identifications. How does that test apply to an in-court identification if no attempt at a pretrial identification preceded it?

First Proposed Rule of Law

If no out-of-court identification procedures preceded the in-court identification at issue, several of the *Lawson/James* variables are inapplicable and the danger of unfair prejudice is necessarily low. That is because an identification of that kind is itself sworn testimony that occurs entirely in the presence of the jury and the defense attorney. As such— and in contrast to an identification that follows suggestive pretrial police procedures—any unreliable

aspects of the identification are exposed to everyone in the courtroom. Accordingly, the trial court's gatekeeping function is minimal and the credibility of an untainted in-court identification is for the jury to determine.

Second Question Presented

If eyewitness-identification evidence was erroneously admitted, does the error warrant reversal regardless of whether the error prejudiced the defendant?

Second Proposed Rule of Law

No. OEC 103(1) provides that "[e]vidential error is not presumed to be prejudicial." Article VII (Amended), section 3, of the Oregon Constitution requires that a defendant's conviction be affirmed if there is little likelihood that the trial court's error affected the verdict. An error under *Lawson/James* is "evidential error." As such, the error should not result in reversal unless the reviewing court determines that the error prejudiced the defendant.

SUMMARY OF ARGUMENT

The *Lawson/James* test for the admissibility of eyewitness identifications consists of two steps. The first is foundational. If an identification clears that foundational threshold, its evidentiary weight is generally for the jury to consider. The second step of the test serves a different purpose. Rather than ensuring an adequate foundation, it requires the exclusion of the eyewitness identification if the defense establishes that certain variables, typically suggestive police procedures, create a substantial danger of unfair prejudice.

The particular danger that the second step seeks to address is more specific than the identification's potential unreliability—it is that the jury will be unable to properly assess that unreliability. Suggestive police procedures present that danger because the jury cannot observe the procedures firsthand and the jury is therefore less able to evaluate the corrupting influence that the procedures can have on the identification's reliability.

Eyewitness identifications that occur entirely in front of the jury do not present that danger. The jury can see for itself the potentially suggestive aspects of the courtroom environment, observe how the state elicits the identification, and watch the witness identify the defendant. Identifications of that kind are nothing more than trial testimony regarding the witness's first-hand observations. Our adversary system operates on the premise that juries, with the assistance of cross-examination, are uniquely capable of evaluating that sort of testimony. While first-time courtroom identifications are subject to the foundational first step of the *Lawson/James* test, the second step provides no basis for excluding such identifications because the danger of unfair prejudice is extremely low.

Here, the trial court correctly allowed two eyewitnesses to identify defendant during trial. The state provided a sufficient foundation for the identifications. In addition, neither witness had been exposed to any police identification procedures. With the exception of one variable—the pre-

identification instructions, the entire identification procedure occurred in full view of the jury. And the record shows that those instructions dramatically decreased the suggestiveness of the procedure. Therefore, exclusion of the identifications would not have been appropriate. To conclude otherwise would be to needlessly interfere with the jury's role as trier of fact.

Even if erroneously allowed, the courtroom identifications at issue did not prejudice defendant because it is unlikely that they affected the jury's verdict. Those two identifications were not the only ones that occurred during defendant's trial. Two other eyewitnesses also identified defendant as the murderer. Moreover, three additional witnesses provided physical descriptions of the murderer that matched defendant's appearance and that excluded the only alternative suspect. In addition, the state presented compelling physical and circumstantial evidence of defendant's guilt. Lastly, defendant's own trial testimony irreparably undermined his defense and clearly pointed to his guilt. Therefore, even if this court concludes that one or both of the two courtroom identifications at issue were problematic under the *Lawson/James* test, it should nevertheless affirm defendant's murder conviction.

FACTUAL BACKGROUND

The state sets forth the facts that are pertinent to the admissibility of the two courtroom identifications at issue and to the determination of whether those identifications, if erroneously admitted, prejudiced defendant.

A. Defendant shot and killed the victim in front of multiple eyewitnesses at a New Year's Eve party.

On New Year's Eve 2007, defendant attended a house party in Northeast Portland. (Tr 2503-05). During that party, defendant got into an argument with the victim while both men were in the front yard of the house. (Tr 1272, 1400-01, 1423-24, 1526, 1673, 1771). The argument escalated until defendant walked away. (Tr 1272, 1526, 1773-77). Moments later, defendant approached the victim, put on a ski mask, and shot the victim four times with a handgun in front of multiple eyewitnesses. (Tr 1275, 1402-03, 1426-27, 1529, 1627, 1677-80, 1778, 1783). The victim died soon after. (Tr 1627, 2100). Defendant walked into the street and fired several shots into the air. (Tr 1529-30, 1575, 1793). People from the party fled on foot and in cars. (Tr 2093, 2101, 2103).

Shortly before the shooting, two women, D (19 years old) and N (18 years old), arrived by car at the house party. *State v. Hickman*, 255 Or App 688, 690, 298 P3d 619, *rev allowed*, 354 Or 61 (2013). D and N were in the backseat of the car. *Id.* Both women noticed that a large group of African-American men had gathered outside of the house. *Id.* Some of the men were fighting. *Id.* D and N then heard a noise that sounded like fireworks. *Id.* Moments later, D and N saw one of the men who had been fighting fire several gunshots into the air. *Id.* As D's and N's car started to drive away, the two women saw the man with the gun run toward the car and try to get in. *Id.* One

of the other passengers repelled the man. *Id.* The car made it a few blocks from the house before the police stopped it. *Id.*

D told the police that she did not see the murder, but that she saw the argument that preceded it. (Tr 53). At the time, D was unable to provide the police with many details about whom and what she had seen. (Tr 53).[1] N described the shooter as a black male with a "stocky build" in mid to late 20's. (Tr 1790-91). N was unable to provide additional details to the police at the time because she was "very upset." (Tr 1795). Between the night of the murder and defendant's trial, 23 months passed. *Id.*, 255 Or App at 691. During that time, the state made no attempt to have D and N identify the man with the gun. *Id.*

On the night of the murder, the police arrived on the scene within minutes of the shooting. (Tr 1277). Defendant ran. (Tr 1279, 1683, 1779). During his flight from the scene, both of his shoes came off, and he lost his watch when he jumped over a fence. (Tr 1356, 1373, 1376, 1439-40, 2514, 2529-30). As he approached a nearby golf course, he jumped another fence and fell a distance on the other side, breaking his leg. (Tr 1714-15, 1718, 2517-18). Two golfers found a shoeless and hypothermic defendant in the golf course the

[1] At defendant's bail hearing, the lead investigator, Detective Beniga, provided that description of D's statements to police.

next morning. (Tr 1715, 1830-32, 1843, 1849, 1854). At the crime scene, the police found the handgun and the ski mask. (Tr 1355-56, 1730-31, 1737). They submitted the ski mask to the crime lab for DNA testing. (Tr 2062). The lab found DNA from three people on the ski mask. (Tr 2062-63). The lab further determined that defendant was the primary source of the DNA. (Tr 2070).

B. At trial, eyewitnesses D and N identified defendant in front of the jury as the person who fired the gunshots.

D took the stand on the third day of defendant's trial. (Tr 1516). At that time, defendant was present in the courtroom and seated with defense counsel. (Tr 1474, 1556-57). Shortly after the state began its direct examination, and before D identified defendant, the courtroom experienced an equipment malfunction and the court recessed. (Tr 1523, 1556). As the jurors left the courtroom, everyone, including defendant, stood up. (Tr 1556-57). The court staff cleared the public from the courtroom. (Tr 1560). Defendant remained in the courtroom with defense counsel. (Tr 1560). D left the stand and walked into the hallway. (Tr 1557). One of the prosecutors followed D into the hallway and noticed that D was hyperventilating. (Tr 1557). D said to the prosecutor: "Oh, my God, that's him, that's him, that's him." (Tr 1557). Without saying anything to her, the prosecutor sat D down next to D's mother.

(Tr 1557). During the recess, D had no contact with any of the other witnesses. (Tr 1525).[2]

After the court resolved the equipment malfunction, D retook the stand. (Tr 1524). D described the man who she had seen firing the gunshots in the air. (Tr 1531). The prosecutor asked D if she saw that person in the courtroom and D said that she did. (Tr 1532). Before D identified anyone, defendant objected, citing the Due Process Clause of the United States Constitution and OEC 403. *Hickman*, 255 Or App at 692. Outside the jury's presence, the trial court had a lengthy discussion with the parties and, ultimately, decided to allow the identification. *Id.* The state resumed its direct examination and D identified defendant as the man who she had seen firing the gunshots into the air. (Tr 1573). She explained to the jury that she did not know whether she would recognize defendant before entering the courtroom. (Tr 1601). She further explained to the jury that after the equipment malfunction and when she walked

---

[2] The Court of Appeals opinion states that D started to hyperventilate when she "happened to see defendant in the hallway outside the court room." *Hickman*, 255 Or App at 692. As described above, the record reflects a slightly different sequence of events. It shows that D saw defendant in the courtroom when her direct examination began, that she left the courtroom when the equipment malfunction occurred, that defendant remained in the courtroom, and that D started to hyperventilate as soon as she got in the hallway. (Tr 1557-60, 1601-02).

into the hallway, she became emotional and told the prosecutor "that that was the shooter, that [was] him." (Tr 1601).

N testified on the fourth day of trial. (Tr 1758). She explained to the jury that she witnessed the murder. (Tr 1778-79). She described the man who she saw shoot the victim. (Tr 1777-78). The state asked N if she saw the shooter in the courtroom and N said that she did. (Tr 1782). Defendant objected on the basis of the Due Process Clause and OEC 403. (Tr 1782). The trial court overruled the objection and N identified defendant as the shooter. (Tr 1783).

ARGUMENT

This case presents two issues related to eyewitness identifications that occur in front of the jury. The first issue requires a determination of how the *Lawson/James* test applies to such identifications when they occur without any pretrial attempts at identification. This court reaches the second issue only if it concludes that the two courtroom identifications at issue in this case were problematic under the *Lawson/James* test. If they were, this court must decide whether the admission of the identifications requires reversal.

A. The trial court correctly allowed eyewitnesses D and N to identify defendant in front of the jury.

Before D and N identified defendant in front of the jury, neither witness had tried to identify the murderer. Unlike this case, *Lawson/James* involved

eyewitness identifications that occurred before trial and outside of the courtroom. Because of that difference, the identifications in *Lawson/James* presented a potential for unfair prejudice that the identifications in this case do not present. For that reason, and as explained in greater detail below, the *Lawson/James* test for the admissibility of eyewitness identifications applies differently to identifications like the ones in this case. The trial court's role as evidentiary gatekeeper is more modest and, as the trial court correctly concluded, D's and N's identification testimony was admissible and its credibility was for the jury to determine.

1. The *Lawson/James* test applies differently to eyewitness identifications that happen for the first time in the courtroom than it does to identifications that involve potentially suggestive pretrial procedures.

In general, our justice system depends on the premise that juries are capable of determining what weight to give evidence and whether testimony is credible. We trust juries nearly exclusively with that role and, typically, the trial court does not interfere by excluding evidence that it considers to be unreliable.[3] Consequently, "[i]t is part of our adversary system that we accept

---

[3] *See Perry v. New Hampshire*, 565 US ___, 132 S Ct 716, 720, 181 L Ed 2d 694 (2012) (generally, it is the province of the jury to determine the reliability of relevant evidence); *Duncan v. Louisiana*, 391 US 145, 157, 88 S Ct 1444, 20 L Ed 2d 491 (1968) (juries are well-equipped to "understand the evidence and come to sound conclusions"); *State v. Stone*, 111 Or 227, 236, 226 P 430 (1924) ("Even extreme cases do not justify judicial interference with the

Footnote continued…

at trial much evidence that has strong elements of untrustworthiness." *Manson v. Brathwaite*, 432 US 98, 113 n 14, 97 S Ct 2243, 53 L Ed 2d 140 (1977). However, the law recognizes that juries are less able to properly assess certain kinds of evidence. Trial courts exclude that evidence not merely because of its unreliability, but because of its potential to have an unfair effect on the jury. "As a discrete evidentiary class, eyewitness identifications subjected to suggestive police procedures are particularly susceptible to concerns of unfair prejudice." *Lawson/James*, 352 Or at 758. Accordingly, this court developed an admissibility test for that kind of evidence that strikes a careful balance between the roles of the trial court and the jury.

a. This court's focus in *Lawson/James* was eyewitness identifications that involve pretrial identification procedures, not identifications that occur for the first time in the courtroom.

This court's decision in *Lawson/James* involved two cases. Both cases involved eyewitness identifications that occurred after the police subjected the witnesses to suggestive pretrial identification procedures. *See generally Lawson/James*, 352 Or at 763-67 (describing those procedures). In both cases,

---

(…continued)
legitimate functions of the twelve jurors to whom as the tribunal peculiarly of the people our system of government has committed the decision of questions of fact."); ORS 44.370 ("Where the trial is by the jury, they are the exclusive judges of the credibility of the witness."); ORS 136.320 ("questions of fact" are generally for the jury to decide).

the same witnesses later identified the defendants at trial and in front of the jury. *Id.* at 765, 768 n 11. Consequently, this court formulated the resulting admissibility test within that context. As a result, *Lawson/James* presented this court with neither the need nor the opportunity to consider how an application of the new test would work in the context of courtroom identifications that are free from the taint of suggestive pretrial procedures.

In addition to the case's context, the language that this court used throughout the *Lawson/James* opinion makes it clear that this court's focus was eyewitness identifications that involve suggestive police procedures. For instance, this court decided to revise the old admissibility test because "it is not adequate to the task of ensuring the reliability of eyewitness identification evidence that has been subjected to suggestive police procedures." *Id.* at 750. The new "OEC-based" test was designed to better address issues of "reliability of eyewitness identification evidence, particularly in those cases involving suggestive pretrial police procedures." *Id.* at 751. With regard to the second step of the test, this court advised that "trial courts have a heightened role as an evidentiary gatekeeper" when "an eyewitness has been exposed to suggestive police procedures. *Id.* at 758.

Moreover, the "system variables" that this court identified as influencing the reliability of eyewitness identifications are described exclusively in terms of pretrial identifications and scientific studies meant to approximate pretrial

identification procedures. *Lawson/James*, 352 Or at 741-44, 779-89. Several of those variables clearly have no relevance to in-court identifications that involve no pretrial procedures. For instance, the system variables "lineup construction," "blind administration," and "simultaneous versus sequential lineups" have no application to a courtroom identification. *See Id.* at 741-42, 781-82 (describing those variables).

The context, focus, and underlying purpose of the *Lawson/James* test is to provide trial courts with a process for exercising their role as "evidentiary gatekeeper" as that role relates to eyewitness identifications. *Lawson/James*, 352 Or at 758. "[I]n cases in which an eyewitness has been exposed to suggestive police procedures," that role is "heightened." *Id.* That is because identifications that result from such procedures tend to be both unreliable and misleading to juries. *Id.* at 749-50. But, in cases in which no "suggestive pretrial police procedures" preceded the in-court identification, the trial court's "evidentiary gatekeeper" function is not "heightened."

As explained below, the *Lawson/James* test applies to in-court identifications. Regardless of whether potentially suggestive out-of-court procedures preceded the courtroom identification, the foundational first step operates the same. But if no pretrial procedures are involved, the second step provides no basis for the courtroom identification's exclusion.

b. The first step of the test applies the same to eyewitness identifications that occur for the first time in the courtroom, but this court should clarify how that step operates.

The *Lawson/James* test is based on specific rules from the Oregon Evidence Code and includes two steps. *Id.* at 727, 761-62. The first step is foundational and it provides the "minimum baseline for reliability" for eyewitness identifications. *Id.* at 758. That step implicates three interrelated evidentiary concepts: relevance under OEC 401, personal knowledge under OEC 602, and lay opinion under OEC 701. *Id.* at 741. Those rules of evidence apply to first-time courtroom identifications like the ones in this case just as they do to all other eyewitness identifications.[4] However, this court should

---

[4] To be relevant, the identification must merely have some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." OEC 401. But to satisfy the first step, the eyewitness must also have the personal knowledge necessary to make the identification, the identification must be rationally based on that knowledge, and the identification must be helpful to the jury. The state discusses the "personal knowledge" criterion in greater detail in this section. OEC 701 provides the basis for the other two criteria. That rule limits a witness's testimony regarding inferences and lay opinions to those that are "[r]ationally based on the perception of the witness" and "[h]elpful to a clear understanding of testimony of the witness or the determination of a fact in issue." Therefore, OEC 701 requires the trial court to determine whether the identification is "rationally based" on the witness's personal knowledge. *Lawson/James*, 352 Or at 754-55. To satisfy that criterion, the state need not provide conclusive proof. *Id.* at 755-56. "Instead, the trial court need only ascertain whether it was more likely that the witness's identification was based on his or her own perceptions than on any other source." *Id.* Estimator variables and system variables both potentially

Footnote continued…

clarify how OEC 602 applies because the *Lawson/James* decision does not fully account for its foundational nature.

OEC 602 provides the basis for the first step's "personal knowledge" criterion:

> [A] witness may not testify to a matter unless evidence is introduced *sufficient to support a finding* that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.

(emphasis added). "[W]hether the witness has personal knowledge is a matter of conditional relevancy that is ultimately decided by the jury * * *." Kirkpatrick, *Oregon Evidence*, § 601.03[3] (5th ed 2007); *see also Farmers' Bank v. Saling*, 33 Or 394, 401-02, 54 P 190 (1898) (applying that principle). OEC 104(2) provides: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Under that rule, the proponent need not conclusively prove the foundational fact. Instead, the proponent need only present evidence from

---

(…continued)
apply to that determination. *Id.* at 755. The last criterion—that the identification is helpful—merely requires that the identification "communicates more to the jury than the sum of the witness's describable perceptions." *Id*

which a juror *could* find the fact. *See* OEC 104 Legislative Commentary (1981); Kirkpatrick, *Oregon Evidence*, § 104.04 (5th ed 2007).[5]

Moreover, as this court noted, OEC 602 expressly allows for proof of personal knowledge to consist of the witness's own testimony. *Lawson/James*, 352 Or at 753. This court also noted that pursuant to ORS 44.370, a "witness is presumed to speak the truth." *Id.* at 752 n 8. Given those principles, an identification satisfies OEC 602 if the eyewitness testifies to facts that, if true, *could* allow a reasonable juror to conclude that the eyewitness observed the facts necessary to make the identification. Whether the eyewitness actually did observe those facts is a credibility determination for the jury.[6] Without a clarification that personal knowledge is a matter of conditional relevance, trial

---

[5] The legislative commentary for OEC 104(2) warns:

> If preliminary questions of conditional relevancy were determined solely by the judge, * * *, the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries.

[6] Consistent with that, some estimator variables might be helpful to the trial court's OEC 602 determination to the extent that they influence what the witness actually observed rather than what the witness recalls of those observations. *See Lawson/James*, 352 Or at 744-46 (describing estimator variables). Whether something has interfered with the accuracy of the witness's recollection is a credibility determination that OEC 104(2) and 602 reserve for the jury. Given that, system variables are not applicable to the trial court's OEC 602 determination because they affect the witness's recollection of her observations rather than the observations themselves. *See Lawson/James*, 352 Or at 741-44 (describing system variables).

courts, in the context of eyewitness identifications, will be more likely to improperly interfere with credibility determinations that are reserved for the jury.

Because OEC 401, 602 and 701 are foundational rules, a vast majority of eyewitness identifications should satisfy their low threshold and, therefore, the first step of the *Lawson/James* test. That first step, with the clarification added above, applies with equal force to identifications involving pretrial procedures *and* identifications like the ones in this case that occurred for the first time in front of the jury. It is in the second step that the differences in the application of the test emerge.

c. The second step of the test applies differently to eyewitness identifications that occur for the first time in the courtroom because the danger of unfair prejudice is low.

The second step of the *Lawson/James* test serves a purpose beyond evidentiary foundation and involves the trial court's assessment of the identification under OEC 403.[7] If the state establishes a foundation under the first step, "the burden shifts to defendant" to demonstrate that the danger of unfair prejudice substantially outweighs the identification's probative value.

---

[7] OEC 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

Lawson/James, 352 Or at 762. System variables are important under the second step when "an eyewitness has been exposed to suggestive police procedures." *Id.* at 758. In such cases, trial courts have a heightened role as an evidentiary gatekeeper" because the danger of unfair prejudice increases. But if the identification occurs for the first time in front of the jury and is free from the taint of suggestive pretrial procedures, the particular danger that the second step seeks to address is nearly nonexistent.

The particular danger of unfair prejudice that the second step seeks to address is not merely that eyewitness identifications might be unreliable. Rather, it is the danger that the jury will be unable to properly assess that unreliability. *See, e.g.,United States v. Recendiz*, 557 F3d 511, 526 (7th Cir 2009) (identification evidence is unfair when it creates the likelihood of a misidentification that is "irreparable," that is, "when the source of the error is so elusive that it cannot be demonstrated to a jury, which therefore will give excessive weight to the eyewitness testimony."). For the most part, it is certain system variables that create that danger.

System variables affect the reliability of an identification by affecting "the circumstances surrounding the identification procedure itself." *Lawson/James*, 352 Or at 740. They adversely affect reliability if they contaminate an eyewitness's memory of events or if they lead to a suggestive identification procedure that allows the witness to base her identification on

some aspect of the procedure rather than her own observations. *Id.* at 741-44, 753. Typically, but not always, it is suggestive police procedures that create that kind of problem. *Id.* Implicit in this court's decision in *Lawson/James* is that juries are generally able to assess the reliability of an identification when only estimator variables are involved, but are less able to do so when system variables are involved. *See id.* at 763 (presence of corrupting system variables prerequisite to exclusion under second step). That diminished ability creates the danger of unfair prejudice that the second step of the *Lawson/James* test is meant to address.

In *Lawson/James*, this court identified one reason that juries are less able to properly assess the effects of system variables. They "are either unknown to the average juror or contrary to common assumptions." *Id.* at 761. However, this court observed that, as with estimator variables, expert testimony can assist the jury in understanding the effects of system variables. *Id.* Implicit in that observation is that system variables interfere with the jury's proper assessment in another way, as well. This court did not expressly identify that additional problem, but another court has.

In *United States v. Domina*, 784 F2d 1361, 1368 (9th Cir 1986), the Ninth Circuit identified and described the additional problem:

> Because the jurors are not present to observe the pretrial identification, they are not able to observe the witness making that initial identification. The certainty or hesitation of the witness when making the identification,

> the witness's facial expressions, voice inflection, body language, and the other normal observations one makes in everyday life when judging the reliability of a person's statements, are not available to the jury during this pretrial proceeding.

Also, the pretrial procedures that lead to the identification present a "grave potential for prejudice" which "may not be capable of reconstruction at trial." *Id.* at 1367. Therefore, the problem is not only that juries do not understand that pretrial procedures can adversely affect the reliability of an identification. It is also that juries are unable to directly observe those procedures and the resulting identification when they occur outside of the courtroom. That concern is consistent with the jury's role in our adversary system—to evaluate the credibility of witnesses. Our system assumes that juries are best at that when they can observe the witness testify. That is why the law generally forbids hearsay testimony and, in criminal cases, provides the defendant with the right to confront the state's witnesses in the jury's presence. *See generally* OEC 801 and 802; Or Const Art I, § 11; US Const Amend VI.

Out-of-court system variables create another problem that is distinct from, but closely related to the above-described problem. Not only do they occur outside the presence of the jury, but they occur without defense counsel's presence, as well. When that occurs, defense counsel cannot observe the procedure, which impairs his ability to attack the procedure through cross-examination. *See United States v. Wade*, 388 US 218, 235-36, 87 S Ct 1926, 18

L Ed 29 1149 (1967) (explaining that defense counsel is better able to challenge the deficits in a police lineup when defense counsel is present to observe it firsthand). Ineffective cross-examination, in turn, adversely affects the jury's ability to properly evaluate the identification's reliability.

For first-time courtroom identifications, all of the system variables generally occur within full view of the jury and defense counsel. The jury and defense counsel are able to observe firsthand all of the suggestive aspects of the courtroom identification. For instance, the fact that the courtroom identification involves a single-subject procedure is a system variable that everyone in the courtroom can readily observe. The same is true if the identification involves suggestive questioning. As a result, and in contrast to pretrial identification procedures, the system variables are obvious to the jury and easy to understand because the jury can see those variables firsthand. Therefore, the danger that the variables will interfere with the jury's traditional role of assessing the credibility of witness testimony is especially low.

Moreover, in addition to the jury's ability to observe all of the system variables for itself, the jury can assess the eyewitness's demeanor as the eyewitness makes the identification for the first time in the courtroom. In that context, the jury's ability to perform its traditional role—to weigh the reliability of evidence—is especially strong. And that ability is further enhanced in courtrooms in which the judge allows jurors to ask questions of the witnesses.

In those courtrooms, a juror can question the eyewitness regarding any concerns that the juror might have about the identification.

Just like the jury, defense counsel can see for himself or herself the aspects of the in-court procedure that potentially impact the reliability of the identification and he can observe the witness's demeanor as the witness makes the identification for the first time. Consequently, and in contrast to an out-of-court identification, defense counsel's ability to challenge the in-court identification is enhanced. He or she can immediately do so through cross-examination, argument, expert testimony, impeachment, and other defense evidence. Using those tools, defense counsel can immediately draw the jury's attention to the untrustworthy aspects of the in-court identification, thereby assisting the jury in its role as trier of fact.

To the degree that the jury's observation and defense counsel's cross-examination does not adequately reveal the suggestive aspects of a courtroom identification, a criminal trial offers other safeguards against what little danger of unfair prejudice remains. This court approved of expert testimony as a way of educating the jury regarding the effects on reliability that estimator variables and system variables can have. *Lawson/James*, 352 Or at 761. As long as that testimony meets the requirements of OEC 702 and does not amount to a direct comment on the eyewitness's credibility, an expert could explain to the jury the

suggestive aspects of a courtroom identification.[8] Moreover, the defense could choose to have that expert observe the in-court identification to make the expert testimony even more effective. *See* OEC 615(3) (allowing witness to be present during the testimony of another witness if the witness is "essential to the presentation of the party's cause").

In addition to taking place in front of the jury and defense counsel, a courtroom identification takes place in front of the judge. Therefore, the trial court is in a position to further reduce the danger of unfair prejudice by controlling how the identification happens. *See* OEC 611(1).[9] For instance, the court can control what questions that the state asks to elicit the identification in order to avoid unnecessary suggestiveness. In addition, at the end of the case and if a party requests it, the trial court can provide the jury with case-specific

---

[8] OEC 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

[9] OEC 611(1) provides:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time and protect witnesses from harassment or undue embarrassment.

instructions that educate the jury regarding the suggestive effects of the courtroom. The availability of those additional safeguards further reduces the propriety of excluding a first-time courtroom identification under OEC 403.[10]

It is important to recognize that some courtroom identifications involve system variables that occur outside of the courtroom. One example of that sort of "hybrid" identification is one that occurs in court, but is preceded by potentially suggestive police procedures. Another example involves the "pre-identification instructions" system variable. *See Lawson/James*, 352 Or at 742, 780 (describing that variable). Prosecutors often talk to eyewitnesses about the courtroom identification before the trial begins. In those situations, the courtroom identification involves system variables that the jury and defense counsel did not see firsthand. If an argument can be made that the variables somehow tainted the courtroom identification, exclusion under OEC 403 might be appropriate. But when all of the system variables occur in the courtroom (or when no pretrial system variable has adversely affected the reliability of the

---

[10] The Ninth Circuit has recognized the distinction between first-time courtroom identifications and those involving pretrial procedures: "When the initial identification is in court, there are different considerations. The jury can observe the witness during the identification process and is able to evaluate the reliability of the initial identification." *Domina*, 784 F2d at 1368 (internal citations omitted).

courtroom identification), exclusion of the identification under OEC 403 would be improper.

The trial court's gatekeeper role under the *Lawson/James* test should be much more modest in the context of an in-court identification that is free from the taint of any pretrial identification procedures. In that situation, the eyewitness's identification is nothing more than trial testimony regarding the witness's personal observations. With regard to testimony of that nature, the abilities of the jury and defense counsel to perform their traditional roles are at their strongest. Therefore, the danger of misidentification is not "irreparable" and the danger of unfair prejudice that identification evidence potentially presents—that the jury will improperly assess its reliability—is necessarily low. OEC 403 provides no basis for the exclusion of an exclusively in-court identification. To conclude otherwise would be to needlessly invade the domain of the jury as trier of fact.[11]

---

[11] Just like the Ninth Circuit in *Domina*, many jurisdictions have recognized the distinction between first-time courtroom identifications and identifications that involve pretrial procedures. Those jurisdictions consider initial courtroom identifications to be trial testimony subject to cross-examination and the jury's credibility assessment. *See Pitts v. Georgia*, ___ Ga App ___, 747 SE 2d 699, 702 (2013) ("the problematic aspects of an in-court identification go to the identifying witness's credibility, which is solely a question for jury determination."); *Galloway v. Mississippi*, ___ So 3d ___ (Miss, June 6, 2013; slip op at 40) (first-time courtroom identifications are different because "the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers

Footnote continued…

To summarize so far, the two-part *Lawson/James* test applies to the kinds of courtroom identifications at issue in this case, but it applies differently than it does to identifications that involve potentially suggestive pretrial procedures. The first step, determining whether the state has laid a sufficient foundation for the identification, operates the same. In-court identifications that satisfy the

---

(…continued)
defendants an adequate safeguard or remedy against suggestive examinations."); *Massachusetts v. Carr*, 464 Mass 855, 986 NE 2d 380, 400 (2013) (in-court identifications admissible unless tainted by suggestive pretrial procedure); *Byrd v. State of Delaware*, 25 A3d 761, 764 (2011) ("The general rule is that, absent an unduly suggestive pretrial identification procedure, questions as to the reliability of a proposed in-court identification affect only the in-court identification's weight and not its admissibility."); *New Hampshire v. Addison*, 160 NH 792, 8 A3d 118, 126 (2010) ("[T]he proper remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument."); *Louisiana v. Castro*, 40 So 3d 1036, 1048 (2010) (that defendant is "conspicuously seated at the defense table" does not render in-court identification inadmissible because cross-examination is "sufficient to remedy any suggestiveness inherent in the in-court identification process"); *United States v. Recendiz*, 557 F3d 511, 526 (7th Cir 2009) ("In circumstances such as these, where the in-court identification was not tainted by a previous out-of-court identification, the jury is in the unique position of observing the entire identification procedure, and it may weigh the accuracy of the identification accordingly."); *South Carolina v. Lewis*, 363 SC 37, 609 SE 2d 515, 518 (2005) (unfairness concerns do not apply to "a first-time in-court identification because the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendant's an adequate safeguard or remedy against suggestive examinations."); *New York v. Medina*, 208 AD 2d 771, 772, 617 NY S 2d 491 (1994) (first-time courtroom identifications are admissible because "defense counsel is able to explore weaknesses and suggestiveness of the identification in front of the jury"). *But see also Bennett v. Miller*, 419 Fed Appx 18, 20-21 (2nd Cir 2011) (first-time courtroom identification inadmissible under due-process test).

first step are admissible witness testimony subject to cross-examination and the jury's credibility determination. The suggestive aspects of the courtroom identification are not a basis for exclusion under the second step because the jury is able to assess those aspects for itself without the trial court's interference. An in-court identification is subject to exclusion under the second step only if it has been tainted by some kind of system variable that has occurred outside of the jury's presence. Under that slightly modified version of the *Lawson/James* test, the two eyewitness identifications at issue in this case were admissible.

2. D's and N's in-court identifications were admissible.

In *Lawson/James*, this court reversed one defendant's conviction and affirmed the other. 352 Or at 763-65. This court affirmed in *James* because "application of the revised test that we have established here could not have resulted in the exclusion of the eyewitness identification evidence." *Id.* at 765. Under the slightly revised version of that test discussed above, the same is true of the identification evidence in this case. The state established a sufficient foundation for the identifications, the identifications occurred for the first time at trial, and the suggestive aspects of the courtroom environment provided no basis for exclusion under OEC 403. The identifications were sworn trial testimony the credibility of which was for the jury to determine. The trial court correctly allowed the identifications.

a. The state established a sufficient foundation for both identifications.

As explained above, the first step of the *Lawson/James* test is merely foundational and it provides a "minimum baseline for reliability." The threshold is low because, as long as there is a sufficient foundation for the evidence, the weight and credibility of that evidence is generally for the jury to determine. Here, the trial court correctly allowed the two identifications because the state presented sufficient facts to establish foundations for both.

There can be little doubt that D's and N's identifications of defendant were *logically* relevant under OEC 401 and therefore generally admissible under OEC 402. But whether a witness has sufficient personal knowledge under OEC 602 is a matter of *conditional* relevance under OEC 104(2). As such, the state had only to present facts from which a rational juror *could* find that D and N made observations sufficient to support their identifications of defendant. If the state presented those facts, whether D and N actually had sufficient personal knowledge was a credibility issue that was ultimately for the jury to resolve. The in-court identifications in this case easily satisfy that foundational standard for admissibility.

D testified that she had an excellent opportunity to view defendant immediately after the murder and that she observed his facial features at that time. Immediately before the murder, she focused her attention on defendant

and the victim because the two men were in an argument. (Tr 1526). She "got a good view of both of the gentlemen." (Tr 1527). Moments after the murder, D saw defendant standing in the street firing shots into the air. (Tr 1529-30, 1575). At that time, defendant was illuminated by overhead fluorescent lighting. (Tr 1601). D was only 12 feet away from defendant when she saw him. (Tr 1576). She indicated that, at the time of the shooting, she noticed that defendant was African-American, in his 20s to early 30s, he had a "stocky" build, his hair was in braids, and he had a broad nose and large lips. (Tr 1531). D was relatively young, testified to no sensory deficits, and had not been drinking on the night of the murder. (Tr 1516-17, 19).[12]

N also testified that she had an excellent opportunity to observe defendant at the time of the murder. Immediately before the shooting, her attention was focused on defendant because he was arguing with the victim in the front yard of the house. (Tr 1771, 1773-77). At the time of the murder itself, defendant was 20 to 25 feet away from N. (Tr 1780). But defendant got closer as her car started to drive away after the shooting. (Tr 1781). She indicated that defendant came up to her car window, tried to get in the car, and

---

[12] In the Court of Appeals, defendant pointed to several representations of defense counsel at the trial regarding "racially crass" statements that D allegedly made about African Americans. (Supp App Br 11). It should be noted that D denied making those statements. (Tr 1595-96).

that she got a good look at him at that time. (Tr 1781, 1799-1800). She noticed that defendant was African-American, "stocky," about 5'7" tall, and wearing jeans and a t-shirt. (Tr 1777, 1799). N was also relatively young, had no reported sensory deficits, and had not been drinking on the night of the murder. (Tr 1758-59, 63). From those facts, a reasonable juror could find that D and N had sufficient personal knowledge to make the courtroom identifications.

To satisfy its burden under OEC 701, the state had to demonstrate that the witnesses perceived sufficient facts to support an inference of identification (the OEC 602 inquiry described above) and that their identifications were, in fact, based on those perceptions. The state also had to show that the identifications would be helpful to the jury. Here, for mostly the same reasons that the identifications satisfy the OEC 602 inquiry above, they satisfy the OEC 701 inquiry.

"Human facial features will ordinarily be sufficiently distinctive to serve as a rational basis for an inference of identification. Thus, a witness who got a clear look at the perpetrator's face could rationally base a subsequent identification on a comparison of facial features, even if the witness was unable to verbally communicate every specific similarity between the two faces." *Lawson/James*, 352 Or at 755. Here, both witnesses had a clear view of defendant's face immediately after the murder. D testified that she observed defendant's facial features while he was standing 12 feet away from her and

under street lighting. N testified that she got a good look at defendant at close range when he ran up to her car window immediately after the shooting.

Given the detail of D's and N's descriptions of what they witnessed, the record shows that it was more likely than not that the identifications were based on the eyewitnesses' observations rather than the suggestive aspects of the in-court procedure. The identifications also satisfy the second part of the OEC 701 analysis—they were helpful to the trier of fact because they conveyed more "than the sum of the witness's describable perceptions." *See Lawson/James*, 352 Or at 756. Because the state presented an adequate foundation for both courtroom identifications, they were admissible testimony subject to the jury's credibility determination.

b. Because both identifications occurred for the first time in the courtroom and were free from the taint of prior identification attempts, the second step of the *Lawson/James* test provided no basis for their exclusion.

Prior to D's and N's in-court identifications, the police had engaged in no formal attempts with D and N to identify the murderer. The police obtained only D's and N's verbal descriptions of the shooter on the night of the murder. (Tr 53, 1790-91). All of the system variables that could have adversely affected the reliability of D's and N's identifications occurred in the jury's presence. As a result, the particular danger of unfair prejudice that the second step of the *Lawson/James* test seeks to prevent was especially low.

This case provides an excellent example of how the courtroom environment had suggestive aspects, but at the same time, how the trial process itself served to eliminate the danger that the jury would misevaluate the courtroom identifications. When D and N identified defendant for the first time, they did so in full view of the jury and defense counsel.[13] As a result, the jury and defense counsel were able to see for themselves the suggestive aspects of the courtroom, how the prosecutor elicited the identifications, and the witnesses' demeanors as they identified defendant. Moreover, both in-court identifications were immediately followed by extensive cross-examination directed at testing the reliability of the identifications. (Tr 1580-98, 1789-94, 1798-1802). After the prosecution and the defense finished questioning both eyewitnesses, the trial court allowed the jury the opportunity to ask D and N questions about their testimony. (Tr 1603, 1799-1800). And during his closing argument, defense counsel spent a great deal of time attacking the accuracy of both in-court identifications. (Tr 2761-69, 2784-85, 2827-29).

---

[13] As described in the Factual Background section above, when D first indicated that she recognized defendant, she was in the hallway with the prosecutor. However, that fact does not detract from the in-court nature of D's identification. That is because the moment that she first recognized defendant occurred in the courtroom and in full view of the jury and defense counsel. Therefore, everyone was in a position to observe the circumstances in the courtroom when that recognition occurred. It was merely her verbalization of that recognition that occurred in the hallway and the jury was informed of that verbalization during D's testimony. (Tr 1601-02).

To the degree that the jury's own observations and defense counsel's cross-examination did not prepare the jury to properly assess the credibility of D's and N's in-court identifications, the defense presented expert testimony to further assist the jury in that regard. Here, defense counsel presented the testimony of a psychologist with expertise in human memory to cast doubt on D's and N's identifications. (Tr 2352-2433). Much of that testimony focused specifically on the alleged inaccuracy of in-court identifications. (Tr 2359-63). The trial court allowed the jury to ask the expert numerous questions. (Tr 2408-23, 2426-27, 2431-32). That testimony served to further offset the risk that the jurors would have assigned undue weight to the identifications in this case.

Before trial, the prosecutors provided D and N with pre-identification instructions. Therefore, those instructions were system variables that occurred outside of the jury's presence and subject to the trial court's evaluation under OEC 403. But the record shows that the pre-identification instructions in this case did not increase the suggestiveness of the courtroom identifications. In fact, the instructions most likely *decreased* the potential for suggestiveness.

In *Lawson/James*, this court described the potential effects of the "pre-identification instructions" system variable. "Studies show that the likelihood of misidentification is significantly decreased when witnesses are instructed prior to an identification procedure that a suspect may or may not be in the lineup or photo array, and that it is permissible not to identify anyone."

Lawson/James, 352 Or at 780. Here, before trial, the prosecutors told both D and N that it was permissible for them to not identify anyone if they did not see the shooter in the courtroom. (Tr 1558-59, 1796-97). Moreover, the prosecutors told N that she should tell the court and the jury if she *did not* recognize anyone in the courtroom as the murderer. (Tr 1796-97). While that system variable occurred outside of the courtroom, it was no basis for exclusion under OEC 403 because it did not detract from the reliability of the identifications. Instead, it "significantly decreased" the "likelihood of misidentification."[14]

The Court of Appeals took issue with one aspect of the prosecutor's pretrial discussion with D. *Hickman*, 255 Or App at 691-92, 692 n 1. During that discussion, the prosecutor told D that she should give him "a look in the eye" if she was able to identify defendant in the courtroom. (Tr 1559). While that instruction could have potentially resulted in exculpatory evidence if D was unable to identify defendant, it is unclear how—and the Court of Appeals does not explain how—that instruction added to the suggestiveness of the courtroom-

[14] With regard to that variable, the Court of Appeals made a factual error. The court indicated that "neither witness was advised of the possibility that she could positively conclude that defendant was *not* the shooter, or what she should do if that were the case." *Id.* (emphasis in original). But, as explained above, that is not accurate with regard to N.

identification procedure. The issue of exculpatory evidence is different than the issue of suggestiveness. [15]

It is also worth noting that, unlike in both cases in *Lawson/James*, the trial court in this case specifically considered defendant's argument under OEC 403 and exercised its discretion to allow the in-court identifications. (Tr 1570, 1782). The trial court considered the suggestive aspects of the courtroom, but concluded: "Cross-examination is the appropriate device by which to test her reliability as a witness." (Tr 1569). The trial court also allowed the defense to call an expert witness to educate the jury about the suggestive aspects of the courtroom identifications. (Tr 1569). That exercise of discretion was appropriate and the record supports it.

Other than the pre-identification instructions—that only increased the reliability of the identifications—all of the system variables in this case

---

[15] Regardless, and despite the court's suggestion to the contrary, the record does not reflect that the prosecutor intended to deprive defendant of exculpatory evidence. The Court of Appeals described the prosecutor's discussion with D as a "secret signal process." *Id.* at 692 n 1. But the prosecutor did not keep the process a secret. Instead, he voluntarily disclosed to the trial court and defense counsel that he had that conversation with D. (Tr 1559). It is far more likely that the prosecutor simply wanted to know *when*, not *whether*, to ask D if she could identify defendant. Even if D had not been able to identify defendant and the state did not ask her if she could, it defies common sense to conclude that her inability would not have nevertheless been exposed during cross-examination or the jury's questioning. In any event, the "look in the eye" never occurred and D *was* able to identify defendant. (Tr 1559, 1573).

occurred in front of the jury and were therefore no basis for exclusion under OEC 403. As a result, all that was left was estimator variables. Those estimator variables also provided no basis for exclusion under the second step of the *Lawson/James* test. As this court explained, "the state's administration of one or more of the system variables (either alone or combined with estimator variables)" that "results in suggestive police procedures" is a prerequisite to potential exclusion under OEC 403. *Lawson/James*, 352 Or at 763. Estimator variables alone do not provide a basis for exclusion under the second step.[16] Instead, cross-examination, expert testimony, and case-specific jury instructions are the preferred methods for addressing those variables. *Id.* at 762-63.

In sum, the trial court correctly allowed D and N to identify defendant during trial. The state established a sufficient foundation for D's and N's

---

[16] It appears that the Court of Appeals misapplied one of the estimator variables. The court observed that neither witness could provide the police with a detailed description of the shooter. *Hickman*, 255 Or App at 699, 700 n 5. In the court's view, that fact seriously undermined the reliability of the witnesses' subsequent in-court identifications. *Id.* However, "[c]ontrary to a common misconception, there is little correlation between a witness's ability to describe a person and the witness's ability to later identify that person." *Lawson/James*, 352 Or at 745, 774. It also appears that this court possibly relied on witness D's statement to the police after the shooting that she did not see the shooting. *Hickman*, 255 Or App at 699. But that statement should not have suggested that D's later in-court identification was unreliable. D never claimed to have seen the shooting itself. Instead, when she identified defendant in court, she identified him as the man that she saw immediately *after* the shooting firing a gun into the air. (Tr 1529-32).

identifications and their in-court nature all but eliminated the danger of unfair prejudice. Therefore, the identifications were nothing more than sworn testimony subject to cross-examination and the jury's credibility assessment. Consequently, the trial court correctly allowed D and N to identify defendant at trial and this court should affirm defendant's conviction.[17]

B. If the trial court erred when it allowed D and N to identify defendant, the errors were harmless.

Even if this court concludes that D's and N's identifications were problematic under the *Lawson/James* test, it should nevertheless affirm the trial court's judgment because the identifications did not prejudice defendant. The single issue at trial for the jury's determination was whether it was defendant who shot and killed the victim. Certainly, D's and N's identifications were probative of that issue. However, the likely impact of those identifications should be assessed based on the quality of the other evidence on the same issue and how the identifications likely affected the jury's assessment of the defense theory of the case.

Evidentiary error is not presumed to be prejudicial. OEC 103(1). This court may affirm the judgment of the trial court, notwithstanding evidentiary

---

[17] For the same reasons that D's and N's identifications were not unfairly prejudicial under OEC 403, they satisfied the federal Due Process Clause. For a more extensive due-process analysis of the identifications in this case, see Resp Br 6-27.

error, if there is little likelihood that the error affected the verdict. *State v. Titus*, 328 Or 475, 482, 982 P2d 1133 (1999). A criminal defendant who assigns error to the exclusion or admission of evidence "must establish that the error was not harmless." *State v. Lotches*, 331 Or 455, 487, 17 P3d 1045 (2000), *cert den*, 534 US 833 (2001). Factors in evaluating the degree of harm from improperly admitted evidence include whether evidence of guilt is substantial, whether the challenged evidence is merely cumulative of other properly admitted evidence, and the nature and significance of any error in the context of the case as a whole. *State v. Gibson*, 338 Or 560, 576, 113 P3d 423, *cert den*, 546 US 1044 (2005); *State v. Davis*, 336 Or 19, 33-34, 77 P3d 1111 (2003).

As defendant acknowledged in the Court of Appeals, the "obvious, alternative suspect" in this case was Dontae Porter. (App Br 29). Porter, for a time, was a police suspect in the victim's murder. *Hickman*, 255 Or App at 691. Porter's DNA, along with defendant's DNA, was on the ski mask that the murderer wore. (Tr 2063, 2070). And several times during his trial testimony, defendant implied that Porter was the murderer. (Tr 2528, 2533). This court should evaluate the potential for prejudice in the context of the defense theory of the case—that Porter was actually the murderer—and the other evidence on that issue.

The state's case included two in-court identifications from eyewitnesses other than D and N. Porter identified defendant in court as the murderer. (Tr 1239, 1245, 1275-76). Porter testified that he was present for the murder and that he witnessed it after defendant put on Porter's ski mask. (Tr 1239, 1245, 1275-76). Porter is a convicted felon and he testified in the hopes of obtaining a more favorable sentence on his own pending case. (Tr 1236-38). Defendant's uncle, Brandon Miller, also identified defendant in court as the murderer. (Tr 1654, 1677-79). Miller testified that he was with defendant during the murder and that he saw defendant shoot the victim. (Tr 1679-80). Miller is also a convicted felon and he testified with the hope of positively affecting the sentence on his pending case in Nevada. (Tr 1655-57).

In addition, three other eyewitnesses to the murder—Marco Anderson, Raymond Grant, and Shawana Pskar—testified and provided descriptions of the shooter that corroborated Porter's and Miller's identifications of defendant. Only one of those eyewitnesses had the same kind of legal problems as Porter and Miller. (Tr 1418). Each of those eyewitnesses said that the shooter was approximately 5'7" tall, had a "stocky" build, and was an African-American male. (Tr 1401-02, 1426, 2144). Defendant is African-American, male, 5'6" tall, and has a "stocky" build. (Tr 2274, 2529). The record does not reflect

anyone else who was present at the time of the murder who met that description.[18]

The police found the murderer's ski mask at the crime scene. (Tr 1355-56, 1730-31, 1737). The crime lab found three people's DNA on the mask. (Tr 2062-63). The lab further determined that defendant was the "major contributor" of the DNA on the mask. (Tr 2070). One person's DNA was unidentifiable because there was too little DNA to analyze and the third person's DNA was that of Dontae Porter. (Tr 2063).

The desperate manner of defendant's flight from the scene after the murder was also powerful evidence of his guilt. Immediately after the shooting, defendant ran. (Tr 1279, 1683, 1779). As he ran, both of his shoes came off, he left them behind, and he lost his watch when he jumped over a fence. (Tr 1356, 1373, 1376, 1439-40, 2514, 2529-30). As he approached a nearby golf course, he jumped another fence and fell a distance on the other side, breaking his leg. (Tr 1714-15, 1718, 2517-18). Two golfers found defendant the next morning in the golf course with no shoes and signs of hypothermia. (Tr 1715, 1830-32,

---

[18] In addition, D and N both provided physical descriptions of the shooter that were consistent with the above-described descriptions. (Tr 1531, 1777). In the Court of Appeals, defendant did not challenge the admissibility of those descriptions and they would have been admissible even if the trial court had excluded D's and N's in-court identifications. Those descriptions further corroborated Porter's and Miller's in-court identifications.

1843, 1849, 1854). Defendant testified that he was avoiding the police when he ran from the scene. (Tr 2520).

As noted above, defendant claimed that D's and N's in-court identifications were prejudicial because they resulted in the jury being less inclined to consider the "obvious alternative suspect, Dontae Porter." (App Br 29). But other evidence conclusively excluded Porter as the murderer. As detailed above, five different eyewitnesses described the murderer as approximately 5'7" tall. Porter is substantially taller than that, standing at 6'1". (Tr 1240). During defendant's testimony, defendant implied that Porter was the murderer, but refused to identify Porter even when the prosecutor specifically asked defendant, several times, whether Porter had killed the victim. (Tr 2542-44, 2554).

Defendant's own testimony provided powerful evidence of his guilt. He admitted to being present for the shooting, but denied being the murderer. (Tr 2503-06, 2528). Several times, he implied that he knew who the murderer was. (Tr 2506, 2528). But when the prosecutor and the jury asked him to identify the murderer, defendant explicitly refused. (Tr 2534, 2540-44, 2554, 2559). Instead, he provided answers like, "I'm not here to testify against anybody." (Tr 2534). Eventually, he claimed not to "recall" who the murderer was. (Tr 2567). Multiple times during his testimony, defendant became openly hostile toward the prosecutor. (Tr 2537, 2544). And when the jury asked defendant

why his DNA was on the murderer's ski mask, defendant provided a lengthy but indirect answer. (Tr 2560-61, 2565-66). Several times, the state focused on those damaging aspects of defendant's testimony during its closing arguments. (Tr 2646, 2718-19, 2727, 2836-42).

Lastly, for many of the same reasons discussed above that the in-court aspects of D's and N's identifications satisfied OEC 403, the identifications were unlikely to have prejudiced defendant. Defense counsel's cross-examination and the expert's testimony likely reduced the persuasive force of D's and N's identifications. Moreover, in the context of harmlessness, this court should evaluate D's and N's identifications separately. Even though both identifications occurred for the first time in the courtroom, each one possessed slightly different features.[19] Therefore, for instance, even if this court were to conclude that D's identification was problematic under *Lawson/James*, it should nevertheless affirm the trial court's judgment if N's identification was admissible. The admissibility of one identification should render harmless the inadmissibility of the other.

---

[19] For example, the content of the identifications was different. As already noted, D did not see the murder itself. Instead, she identified defendant as the person who she saw firing gunshots into the air immediately after the murder, whereas N saw the murder itself and identified defendant as the murderer.

Given the other evidence in the record of defendant's guilt, it is unlikely that the two challenged in-court identifications affected the jury's verdict. Two other eyewitnesses identified defendant in court as the murderer. Three eyewitnesses provided physical descriptions of the murderer that corroborated the two unchallenged in-court identifications. The record reveals no other suspects who were present during the shooting who fit those descriptions. Defendant's DNA was on the murderer's ski mask. Defendant's flight from the crime scene demonstrated his desperate attempt to avoid apprehension. And defendant's evasive and hostile testimony caused irreparable damage to his own case. Consequently, even if the trial court erroneously allowed D and N to identify defendant in court as the murderer, the errors did not prejudice defendant.

CONCLUSION

This court should affirm the trial court's judgment and reverse the decision of the Court of Appeals. The trial court correctly allowed D and N to identify defendant during his trial. An application of the *Lawson/James* test could not have resulted in their exclusion. And if this court disagrees, it should nevertheless affirm because the identifications did not prejudice defendant.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Andrew M. Lavin
ANDREW M. LAVIN #033696
Senior Assistant Attorney General
andrew.m.lavin@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon

AML:bmg/4763780

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 7, 2013, I directed the original Brief on the Merits of Petitioner on Review, State Of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system. I further certify that on November 7, 2013, I directed the Brief on the Merits of Petitioner on Review, State Of Oregon to be served upon Ryan Scott, attorney for appellant, by mailing two copies, with postage prepaid, in an envelope addressed to:

Ryan Scott # 955267
Scott and Huggins Law Offices
1549 SE Ladd Avenue
Portland, OR 97204
Email: ryan@scotthugginslaw.com

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 10,851 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).

/s/ Andrew M. Lavin

ANDREW M. LAVIN #033696
Senior Assistant Attorney General
andrew.m.lavin@doj.state.or.us

Attorney for Petitioner on Review

AML:bmg/4763780