IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. SHAWN EDWIN HAUGEN, Defendant-Respondent, Petitioner on Review.	Josephine County Circuit Court No. 10CR0636 CA A151535 SC S063754

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

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Josephine County
Honorable PAT WOLKE, Judge

Opinion Filed: September 30, 2015
Affirmed/Valid
Before: Ortega, Presiding Judge, and DeVorre, Judge, and Garrett, Judge.

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STATEMENT OF THE CASE

A jury convicted defendant of assaulting the victim in the parking lot of a bar. Prior to trial, defendant moved to exclude evidence of the victim's pretrial identification of defendant and sought to prevent the victim from identifying defendant in front of the jury. Relying on the standard that this court articulated in *State v. Classen*, 285 Or 221, 590 P2d 1198 (1979), defendant argued that the victim's identification of defendant was too unreliable to be admissible. The trial court held an evidentiary hearing and then denied defendant's motion. Defendant appealed that decision.

Following defendant's trial, this court decided *State v. Lawson/James*, 352 Or 724, 291 P3d 673 (2012). In that case, this court replaced the *Classen* standard with a new analytical framework based on several rules from the Oregon Evidence Code. In this case, the parties on appeal applied that new framework and the Court of Appeals affirmed defendant's conviction, holding that the record showed that the state had laid a foundation for the identification evidence that satisfied the new standard. *State v. Haugen*, 274 Or App 127, 150, 360 P3d 560 (2015).

Defendant petitioned for review. This court allowed review to answer the narrow question of whether, in cases in which trial courts ruled on motions

to exclude identification evidence before this court decided *Lawson/James*, the Court of Appeals must remand to allow the trial court to apply the new standard. As the state explains below, the Court of Appeals must affirm when it can determine from the record that an application of the new *Lawson/James* standard is not likely to lead to a different result.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

When the trial was conducted before this court's decision in *Lawson/James*, which set forth new standards for the admission of eyewitness testimony, was the Court of Appeals required to remand the case for a new hearing on the admissibility of the eyewitness testimony?

Proposed Rule of Law

Not when the Court of Appeals can determine from its review of the record that an application of the new *Lawson/James* standard would not likely lead to a different result. In such a case, the Oregon Constitution requires the Court of Appeals to affirm.

SUMMARY OF ARGUMENT

Article VII (Amended), section 3, of the Oregon Constitution requires a reviewing court to affirm the trial court's judgment when the record reveals that the trial court's error was unlikely to have affected the outcome of the case. Therefore, when the Court of Appeals can determine from its review of the

record that an application of the new *Lawson/James* standard for the admissibility of eyewitness testimony would likely lead to the same result that the trial court reached under the old *Classen* standard, the Oregon Constitution requires the Court of Appeals to affirm rather than remanding for the trial court to apply the new standard. That rule is consistent with this court's decisions in other cases that were in the same procedural posture as this one.

Because the *Classen* standard and the *Lawson/James* framework both concern the reliability of eyewitness-identification evidence, and because both involve similar inquiries, the Court of Appeals will often be able to determine from a record developed under the *Classen* standard whether eyewitness testimony would likely be admissible under the *Lawson/James* standard. Here, the record was sufficiently developed to allow the Court of Appeals to determine that the victim's identification of defendant would likely satisfy the state's relatively low foundational burden under the *Lawson/James* standard. Therefore, the Court of Appeals correctly affirmed rather than remanding this case for the trial court to apply the new standard.

Defendant argues that remand was required to allow him to "litigate" the admissibility of the eyewitness testimony under the new standard. Specifically, defendant wishes to present arguments and expert testimony to the trial court regarding "estimator variables" and "system variables." A remand for that purpose is improper for three reasons. First, "estimator variables" and "system

variables' do not determine the admissibility of eyewitness testimony under the *Lawson/James* standard. Second, a remand to allow defendant to present new arguments to the trial court is unnecessary because he already presented those same arguments to the Court of Appeals. And third, the record already includes expert testimony about "estimator variables" and "system variables" because defendant presented that testimony to the jury. Therefore, the Court of Appeals could, and did, consider that testimony when it determined that the state would likely be able to satisfy its foundational burden under the new standard. This court should affirm the judgments of the trial court and the Court of Appeals.

ARGUMENT

The parties mostly agree on the rule of law that this court should apply. But the state disagrees with defendant regarding the source and application of that rule. The Oregon Constitution requires the rule and an application of that rule required the Court of Appeals to reach the result that it did in this case. The Court of Appeals correctly affirmed because it could determine from the record that application of the *Lawson/James* framework was not likely to lead to a result that was different from the one that the trial court reached. The arguments and evidence that defendant wishes to present to the trial court under the *Lawson/James* standard do not justify a remand.

A. The Court of Appeals is constitutionally required to affirm when it can determine from the record that an application of *Lawson/James* is not likely to result in a ruling that is different than the one that the trial court reached under *Classen*.

If the Court of Appeals was able to determine from its review of the record in this case that an application of the new *Lawson/James* framework was not likely to result in the exclusion of the state's eyewitness testimony, the Court of Appeals was required to affirm the trial court's judgment. That is because the Oregon Constitution requires an appellate court to affirm, despite an error that the trial court maked, if the error is not likely to have affected the outcome of the case. The decisions that this court has reached in other cases that were in the same posture as this one are consistent with that constitutional principle.

Article VII (Amended), section 3, of the Oregon Constitution provides, in relevant part:

> If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial * * *.

That provision requires the reviewing court to "ask whether there was little likelihood that the error affected the jury's verdict." *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003).

In a case like this one, the "error" is in the methodology that the trial court used to determine whether the state's eyewitness testimony was

admissible. That is because the trial court applied the *Classen* standard for admissibility—a standard that this court later disavowed and replaced in *Lawson/James*. But that error in methodology did not affect the jury's verdict if the state's eyewitness testimony would be admissible under *either* standard. In a situation like that, application of the incorrect standard had no effect on the ultimate outcome because application of the correct standard would have led to the same result—the admission of the eyewitness testimony. When the Court of Appeals can tell from the record that the eyewitness testimony at issue is *likely* to be admissible under *Lawson/James*, the Oregon Constitution requires the Court of Appeals to affirm the trial court's decision to allow the testimony even though the trial court arrived at that decision using an erroneous standard.

In three cases, this court has applied the new standard for admissibility to rulings on eyewitness identifications that trial courts made prior to this court's decision in *Lawson/James*. The *Lawson/James* decision itself included two of those 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, the same witnesses later identified the defendants in front of the jury. *Id.* at 765, 768 n 11.

In defendant Lawson's case, this court applied the revised framework and concluded that the record revealed "serious questions concerning the reliability

of the identification evidence admitted at defendant's trial." *Id.* at 765. Accordingly, this court reversed and remanded the case to the trial court to allow the parties to litigate the admissibility of the evidence under the new standard. *Id.* Implicit in that decision is this court's conclusion that the record did not permit a determination of whether the eyewitness testimony at issue would be admissible under the new standard.

In defendant James's case, despite the presence of a suggestive police procedure, this court concluded that "application of the revised test that we have established here could not have resulted in the exclusion of the eyewitness identification evidence." *Id.* Consequently, this court affirmed. *Id.* In other words, this court was able to determine from the record that application of the new standard was not likely to lead to a result that was different than the result that the trial court reached under the *Classen* test.

The third case is *State v. Hickman*, 355 Or 715, 330 P3d 551 (2014). There, this court addressed two eyewitness identifications that occurred for the first time in front of the jury. The trial court made its rulings, allowing those identifications to take place, before this court's decision in *Lawson/James*. On review, this court applied the *Lawson/James* standard to the identifications. With regard to one of the identifications, this court concluded that an "application of the *Lawson/James* analysis would not have resulted in the exclusion of [the identification] testimony." *Hickman*, 355 Or at 743. Just as in

James, another way of characterizing that decision is to say that this court concluded that the record showed that it was unlikely that application of the new standard would lead to a different result. This court did not decide whether the same was true of the other identification, however, because it concluded that any error in allowing that identification was "harmless in light of [the other] identification testimony." *Id.* at 748. Accordingly, in that case, this court affirmed. *Id.*

This court's decision in each of those cases is consistent with a reviewing court's constitutional obligation to affirm when the court can determine from the record that the trial court's application of an incorrect standard did not likely lead the trial court to the incorrect result. And given the nature of the overlap between the *Classen* test and the *Lawson/James* framework, the record will often reflect that a trial court's decision under *Classen* to allow eyewitness testimony would have likely also been correct under *Lawson/James*.

B. Here, the Court of Appeals correctly affirmed because it determined from the record that an application of the *Lawson/James* framework was unlikely to lead to a result that is different than the result that the trial court reached under the *Classen* test.

When a trial court rules under *Classen* to allow eyewitness testimony, the evidentiary hearing that led to that ruling is often sufficiently developed to allow a reviewing court to determine that the testimony would have likely also

been admissible under *Lawson/James.* That is what the Court of Appeals determined in this case, concluding that no remand was necessary "because the record amply demonstrates that the victim's identification was sufficiently reliable to be admitted under *Lawson/James*." *Haugen*, 274 Or App at 146. Accordingly, consistent with its constitutional obligation described above, the Court of Appeals correctly affirmed the trial court's judgment.[1]

1. Because the two standards involve similar inquiries, a record developed under the *Classen* test will often reveal whether eyewitness testimony is likely to be admissible under the *Lawson/James* framework.

A record developed using the *Classen* test will be similar to a record developed using the *Lawson/James* framework because both standards concern the reliability of eyewitness-identification evidence. In *Classen*, this court noted that "the ultimate issue" to be decided under the test for admissibility is "whether an identification made in a suggestive procedure has nevertheless been demonstrated to be reliable despite that suggestiveness." *Classen*, 285 Or

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[1] Given the narrow scope of the question on which this court granted review, the state does not reiterate here its argument that the record was, in fact, sufficient for the Court of Appeals to determine that the state's eyewitness testimony likely satisfied the *Lawson/James* standard. Instead, the state focuses on answering whether a remand is necessary in a case that is in the same procedural posture as this one. In any event, to the extent that this court wishes to revisit the issue of whether the state would likely be able to establish a sufficient foundation for the identification evidence under *Lawson/James*, the state relies on its argument in the Court of Appeals, along with that court's reasoning in its written opinion.

at 233. This court decided to revise that test in *Lawson/James* because "the process outlined in *Classen* does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence." *Lawson/James*, 352 Or at 746.

The result of that revision is the creation of an admissibility framework that is based on rules from the Oregon Evidence Code. *Id.* at 727, 761-62. Like *Classen*, the purpose of the current framework is to address "the reliability of eyewitness identification evidence, particularly in those cases involving suggestive pretrial police procedures." *Id.* at 751. Even though each standard does so differently, and this court has decided that one does so more effectively, both standards address the reliability of eyewitness testimony. Therefore, an evidentiary hearing under either standard will necessarily elicit facts relevant to determining reliability.

Not only do both standards address reliability, an application of each standard turns on essentially the same question. Under the *Classen* test, if the record contains evidence of a suggestive identification procedure, "the prosecution must satisfy the court that the proffered identification has a source independent of the suggestive confrontation or photographic display." *Classen*, 285 Or at 232. The central inquiry of the *Lawson/James* framework is whether the eyewitness's identification is based on his own perceptions rather than any other source. *Lawson/James*, 352 Or at 754-55. Both standards assess the

likelihood that the identification is based on what the eyewitness observed rather than a contaminating source. And both account for the possibility that the source of contamination is a suggestive police procedure. Because both standards turn on similar inquiries, an evidentiary hearing under either standard will likely elicit similar facts.

As described below, the two standards have differences that can sometimes lead to different results. However, the standards are nevertheless similar enough that a reviewing court can often determine from a record developed under *Classen* whether eyewitness testimony admitted under that test is *likely* to also be admissible under *Lawson/James*.

2. The Court of Appeals could easily determine from the trial court's application of the *Classen* test that the eyewitness testimony likely satisfied the relatively low standards for admissibility that OEC 401 and OEC 602 provide.

Because of the above-described similarities between the *Classen* test and the *Lawson/James* framework, the Court of Appeals could easily determine from the record in this case—developed using the *Classen* test—that the victim's identification of defendant likely satisfied the low standards for admissibility that OEC 401 and OEC 602 provide. Therefore, a remand to allow the trial court to apply either of those two rules would be improper.

The first evidentiary principle that the *Lawson/James* framework employs is relevance under OEC 401. *Lawson/James*, 352 Or at 752. Here, the

Court of Appeals could determine from the record that the victim's identification of defendant was relevant. To be relevant under that rule, the eyewitness testimony at issue 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 [eyewitness testimony]." OEC 401. That rule "establishes a very low threshold for the relevance of proffered evidence." *State v. Clegg*, 332 Or 432, 441-42, 31 P3d 408 (2001). "Eyewitness identification evidence will nearly always meet that basic standard for relevance." *Lawson/James*, 352 Or at 752. Here, even from a record developed under the *Classen* test, the Court of Appeals could easily determine that the victim's identification of defendant as the assailant made the fact that defendant was, in fact, the assailant "more probable" than it would be without the identification.

The Court of Appeals was also able to easily determine from the record that the victim's identification likely satisfied the "personal knowledge" requirement that OEC 602 provides.[2] That requirement is foundational in

[2] OEC 602 provides that "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).

nature and does not require the proponent to present extensive or conclusive proof:

> [A]n identification satisfies OEC 602 if the eyewitness testifies to facts that, if believed, would permit a reasonable juror to find 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.

Hickman, 355 Or at 729-30. It will nearly always be apparent from a review of a record developed under *Classen* whether the eyewitness has testified to facts that are likely to satisfy that low foundational standard. Here, the Court of Appeals concluded that the record provided "more than enough to demonstrate, for purposes of OEC 602, that the victim's identification was based on his personal knowledge." *Haugen*, 274 Or App at 146.

Whether testimony is logically relevant under OEC 401 and supported by facts "sufficient to support a finding" that the testimony is based on the witness's personal knowledge under OEC 602 are purely questions of law with only one correct answer in any given case. Moreover, both rules provide relatively low standards for admissibility. Given the black-and-white nature of those standards, and how easy it is for a proponent to meet them, a reviewing court will almost always be able to determine from its review of a record developed under *Classen* whether it is likely that eyewitness testimony would be admissible under those first two rules in the *Lawson/James* framework. Because the Court of Appeals concluded in this case that the victim's

identification of defendant likely satisfied those two rules, it correctly declined to remand for the purpose of allowing the trial court to apply the two rules.

3. The Court of Appeals could determine from the record that the state would most likely be able to satisfy its relatively low foundational burden of proof under OEC 701.

OEC 701 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." Whether an identification satisfies the first of those two criteria is a question of law, but the answer often depends on the trial court's factual findings:

> When a witness's perceptions are capable of supporting an inference of identification, but are nevertheless met with competing evidence of an impermissible basis for that inference—*i.e.*, suggestive police procedures—an issue of fact arises as to whether the witness's subsequent identification was derived from a permissible or impermissible basis. When there are facts demonstrating that a witness could have relied on something other than his or her own perceptions to identify the defendant, the state—as the proponent of the identification—must establish by a preponderance of the evidence that the identification was based on a permissible basis rather than an impermissible one, such as suggestive police procedures.

Lawson/James, 352 Or at 755. In that regard, OEC 701 provides a potentially important distinction between the *Classen* test and the *Lawson/James* framework.

Under OEC 701, the proponent—usually the state—has the foundational burden to demonstrate that it is more likely than not that an identification is

based on the eyewitness's perceptions rather than a suggestive police procedure. But under the *Classen* test, a defendant who seeks to exclude an eyewitness identification has the initial burden to establish that the police used a potentially suggestive police procedure. *Lawson/James*, 352 Or at 747-48. That difference in the allocation of the initial burden could potentially lead to the development of a record under *Classen* that would not allow a reviewing court to determine that the eyewitness testimony at issue would likely satisfy OEC 701.

But that potential is slight. Even though the state, as the proponent of the eyewitness testimony, has the burden under OEC 701, that burden is relatively low. OEC 701 does not require a court to "conclusively determine whether the witness's identification was based on the witness's actual perceptions." *Lawson/James*, 352 Or at 755-56. Instead, the 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." Because that standard is so low, even a record developed using the *Classen* test will often contain evidence that could likely satisfy the state's foundational burden under OEC 701.

Here, the Court of Appeals was able to determine from the record that the state would likely be able to satisfy its low foundational burden under OEC 701. The Court of Appeals concluded that, "applying a preponderance-of-the-evidence standard under *Lawson/James*," the OEC 701 inquiry "can be reasonably resolved only in the state's favor." *Haugen*, 274 Or App at 147.

The Court of Appeals explained that "any reasonable factfinder would conclude that the victim's identifications of defendant were 'more likely based' on his 'own perceptions' than on any other factors." *Id.* at 150.

Not only could the Court of Appeals reach that conclusion based on its own review of the evidence in the record, the trial court's factual findings support the conclusion that the Court of Appeals reached. The OEC 701 inquiry requires a trial court to make a factual determination of whether it is more likely than not that the identification is based on the eyewitness's perceptions rather than some other source. Here, the trial court resolved that factual determination in the state's favor. Just as OEC 701 requires, the trial court considered the likelihood that the victim's identification of defendant was based on the allegedly suggestive aspects of the photographic lineup rather than the victim's perceptions. (ER 8). The trial court concluded "that it is overwhelmingly likely that the defendant in this case would have been identified by the alleged victim, independent of the photographic lineup." (ER 8). That factual finding was binding on the Court of Appeals because evidence in the record supports it. *See Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968).

The final portion of the OEC 701 inquiry is whether the eyewitness testimony will be helpful to the trier of fact. As this court observed, "that burden will be easily satisfied in nearly all cases." *Lawson/James*, 352 Or at

756. Accordingly, the Court of Appeals was able to "easily conclude" from its review of the record "that evidence of the victim's identification of defendant as one of his assailants would be helpful to a trier of fact in an assault case." *Id.* at 150. Given the state's low foundational burden, along with the trial court's factual findings, the Court of Appeals was able to determine from the record that the victim's identification of defendant would likely satisfy OEC 701. Therefore, a remand to allow the trial court to apply that rule would have been improper.

OEC 701, together with OEC 401 and OEC 602, establishes nothing more than a "minimum baseline of reliability." *Lawson/James*, 352 Or at 758. Accordingly, this court noted that even "identifications possessing relatively low probative value may still pass that initial test." *Id.* In other words, it takes very little for the proponent to satisfy its foundational burden under the *Lawson/James* standard. Consequently, whether the proponent will likely be able to do so is a question that the Court of Appeals can often answer from a review of the record even when that record was developed using the *Classen* test. That is what the Court of Appeals did in this case and it concluded that application of the *Lawson/James* framework was not likely to lead to a result that was different than the result that the trial court reached. Remanding under those circumstances would have been a waste of judicial resources and

inconsistent with the reviewing court's obligation to affirm when there is little likelihood that the error affected the verdict.

4. OEC 403 provided no basis for the Court of Appeals to reverse.

The final step of the *Lawson/James* framework serves a purpose beyond evidentiary foundation and involves the trial court's assessment of the identification under OEC 403.[3] 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. *Lawson/James*, 352 Or at 762. If the defendant satisfies that burden, the trial court then exercises its discretion under OEC 403 to admit the evidence, exclude it, or fashion an intermediate remedy. *Id.* at 757, 762.

That aspect is another way in which the *Lawson/James* framework differs from the *Classen* test.[4] But that difference provided no basis for a remand in

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[3] 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."

[4] The *Classen* test and the *Lawson/James* framework differ in two other potentially important ways that this case does not implicate. First, unlike the *Classen* test, the *Lawson/James* framework does not require the source of suggestiveness to be a police procedure in order to provide a possible basis for the exclusion of eyewitness testimony. *Lawson/James*, 352 Or at 747. But here, the only sources of suggestiveness that defendant alleges on appeal involve the photographic-lineup procedure that the police used. (Pet Br 39-48). Second, unlike an application of the *Lawson/James* framework, an application

Footnote continued…

this case because defendant did not raise an argument based on OEC 403 on appeal. *Haugen*, 274 Or App at 150. Regardless, the Court of Appeals would have been able to determine from the record in this case that OEC 403 would not likely provide a basis for the exclusion of the victim's identification of defendant. This court implicitly reached the same conclusion in *Hickman* and *James* because this court's decisions in those cases necessarily included a conclusion that OEC 403 was not likely to provide a basis for exclusion.

C. Defendant's desire to present arguments and evidence to the trial court regarding "estimator variables" and "system variables" does not warrant a remand to the trial court.

Because the Court of Appeals was able to determine from the record that the state would likely be able to satisfy its low foundational burden under the *Lawson/James* standard, the Oregon Constitution required the Court of Appeals to affirm. Defendant's argument to the contrary is that "had the parties litigated the issue under *Lawson/James*, they would have presented evidence and argument on several estimator and system variable concerns that could have

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(…continued)
of the *Classen* test ends if the trial court does not first conclude that the identification procedure that the police used "was suggestive or needlessly departed from procedures prescribed to avoid suggestiveness." *Classen*, 285 Or at 232. Here, the trial court did not end its analysis at that point. Instead, it went on to consider the facts that suggested that the victim's identification was based on his perceptions of defendant. (ER 7-10).

affected the trial court's decision." (Pet Br 33-34). That argument fails for three reasons.

1. "Estimator variables" and "system variables" do not warrant a remand because those social-science concepts do not provide the legal standard for the admissibility of eyewitness testimony.

Defendant identifies "six estimator and system variable concerns" that he argues required the Court of Appeals to remand. (Pet Br 33-48). According to defendant, he would be able to present argument and evidence regarding those variables to the trial court. (Pet Br 33-34, 48-49). In fact, defendant's entire argument in support of a remand is based on those variables.[5]

Although *Lawson/James* discussed social-science concepts such as "estimator variables" and "system variables," it did so to explain why it was overruling *Classen*—not to suggest that those concepts should be litigated in all future cases. *Hickman*, 355 Or at 737-39. As this court later explained in

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[5] The phrase "estimator variables" refers to "characteristics of the witness, the alleged perpetrator, and the environmental conditions of the event that cannot be manipulated or adjusted by state actors." *Lawson/James*, 352 Or at 740. Examples include the witness's level of stress, the witness's attention, the duration of the exposure, viewing conditions, the witness's physical and mental characteristics, and the witness's description of the perpetrator. *Id.* at 744-46.

The phrase "system variables" refers to "circumstances surrounding the identification procedure itself that are generally within the control of those administering the procedure." *Id.* at 740. Examples include blind administration, pre-identification instructions, suggestive questioning, and the particular identification procedure used. *Id.* at 741-44.

Hickman, its use of social science in *Lawson/James* was governed by the context of the *Lawson* and *James* cases. *Id.* at 722-23, 736-38. This court cautioned practitioners that "estimator variables" and "system variables" do not provide a "general interpretive overlay for the application of" the evidentiary rules that *Lawson/James* discussed. *Id.* at 737-38. In sum, this court made clear in *Hickman* that the Oregon Evidence Code, not "estimator variables" and "system variables," determines the admissibility of eyewitness testimony.

Defendant's desire to litigate the application of "estimator variables" and "system variables" in the trial court does not warrant a reversal because those variables do not determine whether or not eyewitness evidence is admissible. Said another way, application of those variables is not *necessary* to a court's admissibility determination. Instead, the rules from the Oregon Evidence Code that *Lawson/James* discussed provide the framework for determining admissibility. As already discussed, the Court of Appeals was able to apply those rules to the record to determine whether it was likely that the state's eyewitness testimony would satisfy the admissibility requirements that those rules provide.

2. Defendant's desire to make additional arguments in the trial court does not warrant a remand.

One way that defendant wants to "litigate" the application of those six "estimator variables" and "system variables" in the trial court is to present

"argument" about those variables. (Pet Br 33-34). Defendant's desire to present additional argument to the trial court does not provide a basis for a remand because nothing prevented him from making those same arguments in the Court of Appeals.

When the standard for the admissibility of evidence changes after trial and before appeal, nothing prevents the parties from arguing about the applicability of that standard on appeal. By the time of the appeal, both parties are on notice about the new standard and the Court of Appeals is just as capable as the trial court of considering legal arguments. The Court of Appeals can determine from those arguments, and from its review of the record, how likely it is that the proponent would be able to satisfy the new standard. Defendant points to no reason why the parties should have to make those arguments to the trial court before the Court of Appeals can consider them.

In fact, in this case, defendant made the very arguments about "estimator variables" and "system variables" in the Court of Appeals that he now says that he wants to make in the trial court:

> Defendant cites both system variables (*i.e.*, Brown's 'suggestive feedback' and 'improper' identification procedures) and estimator variables (*i.e.*, the victim's 'high level of stress;' his inattention to his attacker during a brief, dark encounter; and his initial inability to remember details about the attack) to argue that the identifications were so unreliable as to require remand for a new hearing and new trial.

Haugen, 274 Or App at 146. The Court of Appeals addressed those arguments and rejected them. *Id.* at 146-50.

Other than possibly giving defendant a second bite at the apple with a different judge, there is no apparent reason why presenting those arguments to the trial court should lead to an outcome that is any different than the outcome that the Court of Appeals reached. And to the degree that defendant now argues that he would make different arguments in the trial court on remand, he does not explain why he could not have made those arguments in the Court of Appeals. The likelihood of different arguments based on the new standard was just as great in *James* and *Hickman*, but that likelihood did not justify a remand in those cases. Accordingly, it does not in this case.

Defendant's reliance on *Outdoor Media Dimensions, Inc. v. State*, 331 Or 634, 20 P3d 180 (2001), does not support a remand simply to allow him to present additional arguments. The "right for the wrong reason" doctrine "permits a reviewing court—as a matter of discretion—to affirm the ruling of a lower court on an alternative basis when certain conditions are met." *Outdoor Media Dimensions, Inc.*, 331 Or at 659. One of those conditions is that the record would not have developed differently in the trial court, in a way that would have affected the trial court's resolution of the legal issue, had the party relying on the alternative basis for affirmance raised that basis below. *Id.* at 660. But the condition that the record would not have developed differently

does not refer to different arguments. Instead, this court repeatedly discussed that condition in terms of differences in the "evidentiary record" and the "factual record." *Id.* at 659-60, 661. Therefore, the possibility of defendant raising different *arguments* in the trial court did not require a remand.

3. Defendant's desire to present additional evidence in the trial court does not warrant a remand.

The other way that defendant wishes to "litigate" the application of the six "estimator variables" and "system variables" in the trial court is to present expert testimony about those variables. (Pet Br 33-34). He contends that presenting that evidence at the pretrial hearing on the admissibility of the eyewitness evidence might have affected the trial court's determination that the state had established a sufficient foundation. (Pet Br 33-49). That argument fails because the Court of Appeals was able to determine from its review of the record that the expert testimony that defendant now cites was not likely to affect the admissibility of the eyewitness testimony under the *Lawson/James* standard.

Expert testimony about "estimator variables" and "system variables" is not likely to affect the admissibility determination under the *Lawson/James* framework because, as already explained, those variables do not provide the test for the admissibility of eyewitness evidence. Moreover, in *Hickman*, this court cautioned practitioners against overreliance on social science and experts to decide whether a witness is reliable enough to testify, whether the jury will be

able to fairly assess the reliability of a witness, and whether the jury should believe a witness. *Hickman*, 355 Or at 739-40. Such an overreliance, the court warned, would interfere with the role of the jury, thereby conflicting with "the fundamental assumptions on which our system of justice is delicately balanced." *Id.* at 740.

Relatedly, to the degree that an application of "estimator variables" and "system variables" was helpful to the foundational determination in this case, the Court of Appeals did not need expert testimony about those variables in order to apply them. This court provided a detailed explanation and application of those variables in *Lawson/James*. The Court of Appeals was capable of applying those factors on its own, and without the assistance of an expert, based on a reading of *Lawson/James*. And that is precisely what the Court of Appeals did in this case. *Haugen*, 274 Or App at 147-50.

This court used a similar approach in the *Lawson/James* decision itself. It took judicial notice of the social-science research on "estimator variables" and "system variables" and accepted them as "legislative facts." *Lawson/James*, 352 Or at 740. It then applied those variables to the facts in the record for each case. *Id.* at 763-68. This court did not need a record that included expert testimony about those variables in order to apply them and neither did the Court of Appeals in this case.

And even if an application of "estimator variables" and "system variables" was necessary to the determination that the Court of Appeals had to make, and even if expert testimony about those variables would have been helpful in that regard, remand would nevertheless have been inappropriate in this case. That is because the Court of Appeals *did* have the benefit of that expert testimony and it, in fact, considered that testimony when it decided to affirm the trial court's ruling. Even though defendant did not present expert testimony to the trial court during the pretrial hearing on the admissibility of the state's identification evidence, defendant did present expert testimony to the jury during the trial. As a result, that expert testimony was in the record and the Court of Appeals could, and did, consider it when it addressed whether the state would likely be able to satisfy its foundational burden under the new standard. *Haugen*, 274 Or App at 137, 148 n 7. Therefore, there is no reason to remand to allow defendant to present the same expert testimony a second time.

To the extent that it could somehow be necessary to allow the trial court to consider the expert testimony rather than simply allowing the Court of Appeals to consider it, defendant does not explain why he could not have presented that testimony to the trial court during the original pretrial hearing on the admissibility of the state's eyewitness testimony. Both the *Classen* test and the *Lawson/James* framework hinge on the reliability of the identification at issue. Therefore, if it was pertinent at all, the expert testimony would have been

just as pertinent to the old test as it is to the new test.[6] Remand is not appropriate to allow defendant to present evidence at a second pretrial hearing that he could have just as easily presented at the first hearing.

The Court of Appeals did not need a record that contains arguments and evidence about "estimator variables" and "system variables" in order to determine whether the state would likely be able to satisfy its foundational burden under the *Lawson/James* framework. But even if that information was necessary, the Court of Appeals had it. For either of those two alternative reasons, the Court of Appeals correctly determined that remand would be improper and affirmed the trial court's judgment. This court should do the same.

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[6] This court did not invent "estimator variables" and "system variables" when it articulated the *Lawson/James* framework. Those concepts existed before the *Lawson/James* decision and at the time of defendant's trial in this case. To the degree that "estimator variables" and "system variables" are helpful to determining the admissibility of eyewitness testimony under the *Lawson/James* framework, the same variables would also be helpful under the *Classen* test. *See Classen* 285 Or at 232-33 (providing a nonexclusive list of factors to consider when determining the reliability of an eyewitness identification).

CONCLUSION

Even when the admissibility standard for evidence changes, the Court of Appeals must affirm rather than remanding to allow the trial court to apply the new standard when the Court of Appeals can determine from the record that an application of the new standard would not likely affect the outcome of the case. That is what this court has done in other similar cases and that is what the Court of Appeals did in this case. This court should affirm the judgments of the trial court and the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 17, 2016, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Neil F. Byl, attorneys for petitioner on review, 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 6,716 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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