

I. The Oregon Evidence Code provides the first barrier to the admission of eyewitness identification evidence, and the proponent bears the burden to establish the admissibility of the evidence.

In *State v. Lawson/James*, 352 Or __, __ P3d __ (Nov 29, 2012), the Oregon Supreme Court significantly revised the framework for determining the admissibility of eyewitness identification evidence from *State v. Classen*, 285 Or 221, 590 P2d 1198 (1979), in light of current scientific research and “adopt[ed] several additional procedures, based generally on applicable provisions of the Oregon Evidence Code (OEC) for determining the admissibility of eyewitness identification evidence.” *Id.* at __ (slip op at 1).

A. The *Lawson* test requires trial courts to exclude more eyewitness identification evidence than the *Classen* test

First, the court explained that the *Classen* test allowed trial courts to admit into evidence too many unreliable eyewitness identifications of criminal defendants:

“In light of the variables identified in the scientific research * * *, we conclude that the process outlined in *Classen* does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence. Not only are the reliability factors listed in *Classen* * * * both incomplete and, at times, inconsistent with modern scientific findings, but the *Classen* inquiry itself is somewhat at odds with its own goals and with current Oregon evidence law.”

Id. at __ (slip op at 25). The court identified two overarching deficiencies with the *Classen* test. Its “threshold requirement of suggestiveness inhibits courts from

considering evidentiary concerns[.]” *Id.* And “*Classen’s* second-part inquiry fails to account for the influence of suggestion on evidence of reliability.” *Id.* at 27.

The court explained that scientific research established that “estimator” and “system” variables affect the reliability of an eyewitness identification. Estimator variables relate to environmental factors and characteristics of the people involved in the incident—like the time of day, the age of the witness, the race of the suspect, *etc.* System variables refer to things within the control of law enforcement or the justice system, like the procedures used to obtain an identification and the way police officers question a witness. *Id.* at ___ (slip op at 17-18). The new test, explained below, incorporated that research and allows a trial court flexibility to exclude evidence or craft remedies consistent with the evolving science. *Id.* at ___ (slip op at ___).

Under the *Lawson* test, if a defendant files a motion to exclude eyewitness identification evidence, “the state as the proponent of the eyewitness identification must establish all preliminary facts necessary to establish the admissibility of the eyewitness evidence. *See* OEC 104; OEC 307.” *Id.* at ___ (slip op at 44). That includes establishing relevance under OEC 401.

- A. The state must establish that the witness had an adequate opportunity to perceive the facts to which the witness will testify and did, in fact, perceive them.**

Under OEC 602, if a criminal defendant argues that an eyewitness lacks personal knowledge of the identity of the person who committed the offense, the state “must offer evidence showing both that the witness had an adequate opportunity to observe or otherwise personally perceive the facts to which the witness will testify and, did, in fact observe or perceive them, thereby gaining personal knowledge of the facts.” *Id.* at __ (slip op at 33). As the court explained, OEC 602 may require the exclusion of an eyewitness identification because

“many of the reliability concerns surrounding eyewitness identification evidence stem from the basic premise that eyewitness testimony can be led or prompted by suggestive identification procedures, suggestive questioning and/or memory contamination from other sources.”

Id.

B. The state must also establish that the witness identification of the perpetrator is based on the witness’s perception, and not some other source, and that the witness’s testimony will be helpful to the factfinder.

Also, the state, as the proponent of the evidence must establish by a preponderance of the evidence under OEC 701 that an eyewitness’s “proposed testimony is both rationally based on the witness’s perceptions and helpful to the trier of fact.” *Id.* at __ (slip op at 34). To establish that the identification is rationally based on the witness’s perception, the state must demonstrate “that the witness perceived sufficient facts to support an inference of identification and that the identification was, in fact, based on those perceptions.” *Id.* at __ (slip op at

35). Although evidence that a witness “got a clear look at the perpetrator’s face” would “ordinarily” establish that requirement, “nonfacial features like race, height, weight, clothing, or hair color, generally lack the level of distinction necessary to permit the witness to identify a specific person as the person whom the witness saw.” *Id.* at __ (slip op at 35-36). Further, if there is evidence of an

“‘impermissible basis’ for the inference that a witness could identify a suspect, like suggestive police procedures or another source other than the witness’s own perceptions, then the state must establish by a preponderance of the evidence that the witness’s identification was based on his or her own perceptions [instead of] on any other source.”

Id. at __ (slip op at 36). Importantly, a defendant need not present *any* evidence of suggestive influences because the state bears the burden as the proponent of the evidence. *Id.* at __ (slip op at 37).

Under OEC 701(2), lay opinion testimony may be admissible only if it is helpful to the trier of fact. That means that a court may admit it “only when the opinion communicates more to the jury than the sum of the witness’s describable perceptions.” *Id.* at __ (slip op at 37). For example, in *James*, the court explained that because the eyewitnesses had provided descriptions of the perpetrators prior the suggestive showup, one could argue that “the witness’s identification of the men did not provide the jury with information that was any more helpful than their complete descriptions of the perpetrators[.]” *Id.* at __ (slip op at 52).

C. A court should exclude eyewitness evidence or utilize an intermediate remedy under OEC 403 when an eyewitness has been exposed to suggestive influences.

Even if the state establishes that the evidence is admissible under OEC 401, 602, and 701, the evidence may nonetheless be inadmissible under OEC 403. The probative value of the evidence turns on its reliability and “[t]he more factors—the presence of system variables alone or in combination with estimator variables—that weigh against reliability of the identification, the less persuasive the identification evidence will be to prove the fact of identification, and correspondingly, the less probative value that identification will have.” *Id.* at ___ (slip op at 39). The danger of unfair prejudice may outweigh the probative value of the evidence, and thus requires exclusion or some other remedy, particularly when the police employ suggestive procedures:

“As a discrete evidentiary class, eyewitness identifications subjected to suggestive police procedures are particularly susceptible to concerns of unfair prejudice. *Consequently, in cases in which an eyewitness has been exposed to suggestive police procedures, trial courts have a heightened role as an evidentiary gatekeeper because ‘traditional’ methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence.*”

Id. at ___ (slip op at 40) (footnote omitted) (emphasis added).

The court believed that trial courts will admit “most eyewitness identifications” under the new test because most likely involve only “estimator

variables” that would not “support an inference of unreliability sufficient to justify the exclusion of the eyewitness identification.” *Id.* at __ (slip op at 45). However, a trial court’s “heighted role as an evidentiary gatekeeper” will result in the exclusion of identification evidence under OEC 403 if a case involved a system variable that “results in suggestive police procedures that * * * give rise to an inference of unreliability that is sufficient to undermine the perceived accuracy and truthfulness of an eyewitness identification.” *Id.* at __ (slip op at 46).

The court applied the new test to the facts of *Lawson* and *James*. It reversed *Lawson* because it concluded that the combination of estimator and system variables called into question the reliability of the eyewitness identification. The court remanded to the trial court for a new trial and to allow the parties and the court an opportunity resolve the admissibility of the eyewitness identification evidence under the new evidence-code framework. *Id.* at __ (slip op at 47-49).

In *James*, the court affirmed the decisions of the trial court and the Court of Appeals because “application of the revised test * * * could not have resulted in the exclusion of the eyewitness identification evidence.” *Id.* at __ (slip op at 49).

II. This court should apply the rule from *Lawson* to this case.

When controlling law significantly changes during the pendency of an appeal, this court applies the new law to cases before it. *State v. Jury*, 185 Or App 132, 136-37, 57 P3d 970 (2002), *rev den*, 335 Or 504 (2003). Here, defendant has

consistently argued that evidence of The witness's identification of him should have been excluded from trial. App Br at 28-33. He relied on controlling United States Supreme Court and Oregon Supreme Court case law, just like Mr. Lawson and Mr. James did at trial and before this court, as the briefs filed in this court by those defendants will confirm. Before the Oregon Supreme Court, Mr. James argued, for the first time, that the common-law rule in *Classen* should be replaced by an evidence-code based approach. Mr. Lawson did not advance that argument. The Supreme Court did not raise preservation concerns in its opinion in *Lawson* or *James*. Instead, in *Lawson*, it remanded to the trial court for further proceedings under the newly announced rule. *Lawson*, 352 Or at ___ (slip op at 49).

Similarly, here, there are no preservation concerns. Defendant has raised this issue under Oregon law (*Classen*) and the Fourteenth Amendment just like the defendants in *Lawson* and *James*. Now that the law has changed, this court should apply the current law to decide this case. *Jury*, 185 Or App at 136-37. As explained below, the trial court should have excluded evidence of The witness's identification of defendant under *Lawson*. Alternatively, this court, like the Supreme Court in *Lawson*, should reverse and remand for further proceedings under the newly announced rule.

III. The trial court should have excluded the witness's identification of defendant under the evidence-code rules announced in *Lawson*

Here, defendant's Fourth Assignment of Error argues that the trial court erred in denying his motion to suppress the witness's identification of him as a person in the car from which the shots were fired at him, one of which killed Victim. As a preliminary matter, *Lawson* supports defendant's argument. *Lawson* modified the *Classen* test because it permitted trial courts to admit unreliable eyewitness identification evidence. The witness's identification of defendant should have been excluded under *Classen*, and it thus should be excluded under *Lawson*. Further, *Lawson* makes clear that an unreliable eyewitness identification should be excluded under the Oregon Evidence Code regardless of whether the unreliability resulted from a suggestive police procedure or from other variables not within the control of the police. *Lawson*, 352 Or at ___ (slip op at 25). Thus, to the extent that the state's argument and the trial court's ruling relied on the fact that influences other than the police may have tainted the witness's memory, that argument does not foreclose the application of the *Lawson* test. Resp Br at 33-34.

Second, the *Lawson* evidence-code based test places the initial burden on the state to establish that the witness's identification of defendant was based on his own perception and not altered by estimator of system variables. The state cannot meet that burden on this record. Under OEC 602, the state cannot establish by a preponderance of the evidence that the witness (1) had an adequate opportunity to view the person or people in the car or (2) did, in fact, observe or perceive the

person or people in the car. As the court explained in *Lawson*, scientific research shows that the most reliable descriptions occur *immediately* after an incident and before system variables could contaminate an eyewitness's memory. *Lawson*, 352 Or at ___ (slip op at 20-24). Here, the witness's most-detailed reports about what he saw during the incident came during his pre-trial and trial testimony, months after the incident.

For the same reasons, the state cannot meet its burden under OEC 701(1) to “establish by a preponderance of the evidence that [The witness's] identification was based on his * * * own perceptions [instead of] on any other source.” *Lawson*, 352 Or at ___ (slip op at 36).

The trial court erroneously relied on *Classen* to conclude that the witness's self-confidence in his identification after his exposure to several potential sources for contaminating his memory constituted a sufficient basis on which to conclude that his identification of defendant was reliable enough to be admitted at trial. In particular, after the witness saw in the news that defendant had been arrested for the victim's murder and Detective showed the witness a photograph of defendant under circumstances strongly implying that defendant had committed the crime, those suggestive influences “could have affected every subsequent attempt [he] made to recall the event.” *Lawson*, 352 Or at ___ (slip op at 47). For that reason alone, the trial court erred in concluding that the witness's subsequent

identification of defendant was reliable enough to be admitted at trial. Moreover, the rest of the estimator and system variables present illuminate the error in admitting the evidence.

A. Estimator Variables

“High levels of stress or fear can have a negative effect on a witness’s ability to make accurate identifications.” *Lawson*, 352 Or at ___ (slip op at 53). Here, the witness allegedly viewed defendant while under a hail of gunfire. Tr 87-88. That high-stress situation likely negatively affected his ability to recall “particular details—like facial features or clothing.” *Id.*

Witness attention: “Studies consistently show that the visible presence of a weapon during an encounter negatively affects memory for faces and identification accuracy because witnesses tend to focus their attention on the weapon instead of on the face or appearance of the perpetrator, or on other details of the encounter.” *Id.* at ___ (slip op at 56). Further, “the negative effect of weapon-focus on identification accuracy may be magnified when combined with stress, short exposure times, poor viewing conditions, or longer retention intervals and may also result in less accurate initial descriptions of the perpetrator.” *Id.* at ___ (slip op at 56) (footnote omitted). Here, co-defendant shot a gun at the witness as the car in which he was riding rapidly approached the witness. The witness never described the facial characteristics of the perpetrators, and the retention interval was long—

the identification event did not occur until months after the incident. Accordingly, the weapon-focus effect significantly decreases the likelihood that the witness could accurately identify the driver of the car.

Duration of Exposure: “longer durations in exposure (time spent looking at the perpetrator) generally result in more accurate identifications.” *Id.* at ___ (slip op at 57). Here, the witness had a brief time to view the perpetrators, reducing probability that he could accurately identify them. Tr 87-89.

Obviously, a witness’s physical and mental characteristics affect his or her ability to perceive and recall a perpetrator. *Id.* at ___ (slip op at 59). Here, the witness admitted that he has used methamphetamine the night before the incident. Tr 49, 117. His drug use likely influenced his ability to perceive the characteristics of the perpetrators.

Witness certainty is a poor indicator of accuracy, and certainty increases when a witness receives confirming feedback by being informed that the witness has made a correct identification. *Lawson*, 352 Or at ___ (slip op at 64). Further, the court note[d] that “witness certainty, although a poor indicator of identification accuracy in most cases, nevertheless has substantial potential to influence jurors.” *Id.* Here, the witness’s retrospective certainty caused the trial court to conclude he had accurately identified defendant as one of the people in the car. App Br at 28. However, that very likely bore no relation to whether the witness perceived and

accurately recalled the people in the car. By the time of the first identification event while on the phone with Victim's father, the witness had already been influenced by confirming feedback from media reports, Detective's single photograph throwdown, and Victim's father's pressure.

Memory decay occurs exponentially with the greatest decay occurring immediately after an event. *Lawson*, 352 Or at ___ (slip op at 65). Here, the witness initially reported that he could not identify the people in the car. He did not identify defendant until months after the event when he memory would have decayed significantly. App Br at 7-10.

B. System Variables

Here, the witness viewed defendant's face multiple times under circumstances suggesting defendant had participated in the crime and was also subjected to suggestive influences before he identified defendant. *See Lawson*, 352 Or at ___ (slip op at 72-77) (summarizing danger of multiple viewings, suggestive questioning, and other post-event memory contamination). Law enforcement engaged in suggestive procedures and took no steps to mitigate the effective of those procedures or the other suggestive circumstances that could have altered the witness's memory of the event. Days after the event, the detective showed the witness a single photograph of defendant, a patently suggestive procedure likely to cause source-confusion and alter the witness's memory. At that time, the witness

had already seen media reports showing pictures of defendant and reporting that he had been arrested for Victim's murder. App Br at 8. Months later, Victim's father told the witness that he needed to identify defendant to strengthen the prosecution's case. App Br at 8-9. Only then did the witness identify defendant. *Id.*

Finally, an oft-cited study "found that witnesses who received confirming feedback were not only more certain in the accuracy of their identification, but also reported having had a better view of the perpetrator, noticing more details of the perpetrator's face, paying closer attention to the event they witnessed, and making their identifications quicker and with greater ease than participants who were given no feedback or disconfirming feedback." *Lawson*, 352 Or at ___ (slip op at 78-79). The witness received confirming feedback, both express and implied, from the police and Victim's father. Accordingly, it is no surprise that he provided his most confident and detailed description of the event during the pre-trial hearing and trial when defendant sat accused in the courtroom. The trial court erred when it relied almost entirely on the witness's retrospective certainty and detail to conclude that the identification was reliable enough to be admitted at trial.

IV. This court should reverse and remand for a new trial.

The state cannot meet its burdens under OEC 602 or 701 as described in *Lawson* because of the estimator and system variables present. The record lacks sufficient evidence that the witness actually perceived the driver of the car and that

his identification of defendant was based on his perception. OEC 602; OEC 701(1). Even if the state could meet its burdens, the suggestive identification procedure and source contamination from state and non-state actors significantly reduced the probative value of the witness's testimony and the limited probative value was substantially outweighed by the danger of unfair prejudice. Because the witness expressed certainty—a certainty likely produced by source-contamination and confirming feedback—cross-examination could not expose the problems with the identification evidence. *Lawson*, 352 Or at __ (slip op at 40). Accordingly, the trial court abused its discretion under OEC 403 when it admitted the identification evidence.

Alternatively, this court should reverse and remand, like the Supreme Court in *Lawson* because the application of the newly announced test could have resulted in the exclusion of the eyewitness identification evidence for the reasons explained above. Thus, this court should provide the parties with an opportunity to develop the record, and provide the trial court with an opportunity to apply the *Lawson* test and fashion a remedy it believes appropriate, including exclusion of the evidence or jury instructions explaining the potential unreliability of the evidence.