Supreme Court No. _____
Court of Appeals No. 34981-1-III

Supreme Court
of the State of Washington

State of Washington,

Respondent,

v.

Carissa D. Cannon,

Petitioner.

Petition for Review

Kevin Hochhalter
Attorney for Petitioner

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com
WSBA # 43124

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Rules

1. Identity of Petitioner

Carissa Cannon, Defendant and Appellant, asks this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

State v. Cannon, No. 34981-1-III (August 29, 2017, reconsideration denied October 24, 2017) (unpublished). A copy of the decision is included in the Appendix at pages 1-13.

3. Issues Presented for Review

1. This Court has held that it is constitutional error to exclude from evidence the plea agreement of a codefendant witness, in violation of the right to confront and cross-examine witnesses. The trial court excluded testimony regarding significant details of the plea agreement of the State's key witness. Should the case be remanded for a new trial?

2. This Court has made it clear that discretionary LFOs cannot be imposed unless the court, after a particularized inquiry into the defendant's present and future ability to pay, finds that the defendant will have the ability to pay. This issue can be raised for the first time on appeal. The trial court did not make any inquiry. Should the case be remanded for an inquiry into Cannon's ability to pay discretionary LFOs?

4. Statement of the Case

Carissa Cannon was charged with first degree robbery with a firearm enhancement. Her defense depended on undermining the credibility of the State's witnesses against her. One of those witnesses, Samuel Jackson, was a co-defendant who made a plea agreement with the State in exchange for his testimony against Cannon. The plea agreement put Jackson under great pressure to corroborate the victim's story and implicate Cannon, even if it meant lying under oath. The trial court limited the details of the plea agreement that could be admitted. At sentencing, the trial court imposed LFOs without making any inquiry into Cannon's ability to pay.

4.1 Summary of the incident

At about 3 a.m., an unknown male came running toward Officer Rodney Halfhill's patrol car, frantically waving his arms, saying that he had just been robbed and "he's got a gun, he's got a gun." 2 RP 105. The male, Ludwin Borgen, pointed toward the alleged robber, and Officer Halfhill gave chase. *Id.* Officer Halfhill apprehended the suspect, Samuel Jackson, outside a residence about one block away. 2 RP 107.

Earlier that night, Borgen had spent some time at Jackson's house a few blocks to the south. 3 RP 243, 395, 398. Borgen testified that he was accompanied by a woman named

"Aliyah." 3 RP 241-42. While at the house, they consumed drugs and "Aliyah" purchased some methamphetamine. 3 RP 247, 249, 404. When they left the house, they discovered that Borgen's rear tires had been slashed. 3 RP 251. Borgen drove the car one block and stopped near a used car lot. 3 RP 252. Borgen testified that while he attempted to replace one of the tires, "Aliyah" went back to the house. 3 RP 256. The robbery occurred after "Aliyah" left. *See, e.g.,* 4 RP 444. Police never located "Aliyah" and she was not produced as a witness at trial. 4 RP 453; s*ee* 1 RP 51.

After Jackson was apprehended, officers located Borgen's vehicle. 2 RP 182-84. When the officers approached the vehicle, they found Carissa Cannon waiting in the driver's seat. 2 RP 184. Cannon was detained. *Id.*

Borgen consented to a search of open areas of the vehicle, but not the glove box, trunk, or center console compartments. 2 RP 191. Borgen feared that the officers might find the purchased methamphetamine. 3 RP 284-85. Borgen was already facing charges in King County for DUI and possession of methamphetamine. 3 RP 364-65. Despite the earlier activities at Jackson's house, Borgen told the officers that he had not taken any drugs that night. 3 RP 321.

Cannon was found to have in her pockets two cell phones, a USB charge cord, and $380 in cash. 2 RP 187, 195-96. Borgen

told police these items had been stolen from him. 2 RP 195, 197. Borgen identified Jackson and Cannon as the robbers. 4 RP 451. Jackson and Cannon were both arrested and charged with First Degree Robbery with a Firearm. *See* CP 7; 4 RP 394. Jackson entered into a plea agreement with the State in exchange for testimony against Cannon. 4 RP 394.

At trial, the State's two key witnesses were Borgen and Jackson. Borgen and Jackson were the only witnesses to testify regarding the robbery itself. Cannon elected not to testify. 4 RP 469-70.

4.2 The victim, Ludwin Borgen, testified about the robbery.

Borgen testified that after he stopped to fix his tires and "Aliyah" left the scene, he was approached by a woman, who he identified as Cannon, coming from the direction of Jackson's house. 3 RP 263. The woman asked if Borgen was Aliyah's friend. 3 RP 264. Borgen responded, "yes," then noticed Jackson following 10 to 15 feet behind, with a gun between his belt and his pants. *Id.* Jackson pulled the gun. *Id.* Borgen turned toward Cannon only to see that she had a gun, too. *Id.* Jackson and Cannon instructed Borgen to walk into a nearby alley. 3 RP 266.

In the alley, Cannon instructed Borgen to empty his pockets. *Id.* Borgen placed his belongings on a trash can. 3 RP 267. He believed he had about $460 in his wallet. 3 RP 270-71.

Cannon took Borgen's belongings from the trash can lid. 3 RP 272. Cannon and Jackson, brandishing their guns, demanded that Borgen give them "the drugs," and threatened to "pop" him if he didn't. 3 RP 272-73. Borgen told them maybe Aliyah put the drugs in the car. 3 RP 274. Cannon went back to the car, and Jackson walked Borgen further down the alley. 3 RP 274-75. When they reached the end of the alley, Borgen saw two police cars and ran to them for help. 3 RP 276.

On cross-examination, Cannon's counsel questioned Borgen's memory, observational accuracy, and honesty. *See, e.g.,* 3 RP 337-45 (questioning Borgen's memory, observation, and recognition of clothing and individuals); 3 RP 320-22 (questioning Borgen's denial of using drugs). In closing, counsel argued that there was little evidence corroborating Borgen's story that the robbery actually occurred. 4 RP 514-15. Counsel noted Borgen's pending charges for possession of methamphetamine, which would have given Borgen a strong motive to lie to police to avoid discovery of the drugs he and Aliyah purchased that night. 4 RP 516, 518

4.3 The co-defendant, Samuel Jackson, testified about the robbery.

Before Jackson testified, he was aware of the story Borgen had told to police and to the parties' attorneys in a transcribed

interview. 3 RP 415-16. He was also aware of the contents of the police reports. 3 RP 416.

Jackson testified that he and Cannon had been living together for about one month. 3 RP 395-96. One of their other roommates was selling methamphetamine out of his upstairs room. 3 RP 398. Jackson had tried to convince him to stop, but he did not. 3 RP 400-01. Jackson decided to rob the next person who came to buy drugs. 3 RP 401. Borgen was selected as the target. 3 RP 402-03.

A friend named "D" slashed Borgen's tires while Borgen was upstairs. 3 RP 403. After Borgen and Aliyah left the house, Aliyah returned and told Jackson that Borgen had two flat tires and was stopped "down the road." 3 RP 405. Jackson testified that he and Cannon changed into black clothing, got two handguns, and walked to find Borgen. 3 RP 405-06. Jackson testified that Cannon approached first with the real pistol while Jackson followed behind with the BB gun. 3 RP 406-07.

Jackson ordered Borgen to empty his pockets. 3 RP 409. Cannon collected Borgen's things. 3 RP 410. Borgen told them the drugs were in the car. 3 RP 412. Cannon and Jackson switched guns. 3 RP 407-08. While Cannon went to search the car, Jackson walked Borgen down the alley. 3 RP 410. At the end of the alley, Borgen saw the patrol cars and took off running. 3 RP 410. Jackson fled but was soon apprehended. 3 RP 411.

On cross-examination, Cannon's counsel noted Jackson's prior knowledge of Borgen's version of events from police reports and interview transcripts. 3 RP 415-16. Counsel questioned how well Jackson actually knew Cannon. 3 RP 422-24. In closing, counsel argued that Jackson offered his testimony solely to get the benefit of his plea agreement—a sentence 100 months less than he would otherwise face. 4 RP 525. Counsel emphasized that Jackson knew all of the details he needed to match Borgen's story. 4 RP 524-25, 527.

4.4 The trial court excluded evidence of some details of Jackson's plea agreement.

Prior to Jackson's testimony, both parties inquired with the court regarding the limits to discussion of the details of Jackson's plea agreement in light of *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010). 3 RP 383-92. Knowing that Cannon's counsel would want to introduce details that could undermine Jackson's credibility, the State wanted to introduce other details it hoped could rehabilitate that credibility. 3 RP 383-84. Although Cannon's counsel expressed concerns about improper vouching by the State (3 RP 385), both parties demonstrated a desire to stay within the bounds imposed on both sides by *Ish* (*e.g.,* 3 RP 390-92).

The trial court had the opportunity to review the written plea agreement. 3 RP 383:14-18. The court held that the parties

could inquire of Jackson regarding the benefit he was to receive (*e.g.,* reduced sentence) and the contingent nature of that benefit, but that the requirement of truthfulness could only be raised if Jackson's credibility was questioned, and the written agreement could not be admitted into evidence. 3 RP 388-91.

Jackson testified that he entered into the plea agreement. 3 RP 393-94. As part of the agreement, he entered a guilty plea for first degree robbery with a firearm and for first degree unlawful possession of a firearm, for which he would face a sentence of 189 to 231 months on the robbery charge and 87 to 116 months on the possession charge. 3 RP 394. In exchange for his testimony against Cannon, the State could choose to allow him to withdraw that plea and instead plead guilty to second degree charges, with an 84 month sentence. *Id.*

The record also reflects that the state would only allow Jackson to withdraw his original plea if his testimony was "truthful." 3 RP 384. The State had the option of requiring Jackson to take a polygraph test to verify the truthfulness of his testimony. *Id.* These details were not before the jury. 3 RP 382. The written agreement was tagged as Exhibit 51 at trial.

4.5 At sentencing, the trial court imposed discretionary LFOs without inquiring into Cannon's ability to pay.

The trial court sentenced Cannon to 140 months for the robbery charge, plus 60 months flat time for the firearm

enhancement. 5 RP 556. The trial court imposed discretionary legal financial obligations (LFOs) totaling $2,300, including $1,500 for recoupment of appointed defense counsel's fees. *Id.* The court did not inquire into Cannon's ability to pay the fines. *See Id.* The court simply stated, "She is a young woman. She has earning potential when she gets out." *Id.*

The Judgment and Sentence included boilerplate language that the court had considered "the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change," CP 24, but the court had not asked Cannon a single question about any of these factors. *See* 5 RP 556. Indeed, the full extent of the trial court's inquiry was as follows:

> **The Court:** So it's just, I don't know anything about you. You didn't testify. So all I know is that you have a whole bunch of convictions here in Washington. What brought you to Washington?
>
> **The Defendant:** My mom married a guy in the military at McChord.
>
> **The Court:** Did you go to high school here?
>
> **The Defendant:** No.
>
> **Mr. MacFie:** She got a GED at the age of 16. She was going to school in Texas, moved up at the age of 21, if I recall correctly, up here with her mother, and she's been here for ten years.

5 RP 554-55.

On appeal, Cannon argued that the court should remand for resentencing because the trial court had failed to engage in the individualized inquiry required by *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), and *State v. Duncan*, 185 Wn.2d 430, 374 P.3d 83 (2016). Br. of App. at 16-18; Reply Br. of App. at 8-9. The Court of Appeals declined to review the LFO issue because Cannon's counsel had not objected at sentencing. Unpublished Opinion at 11-12.

4.6 The Court of Appeals found no error in the trial court's exclusion of the plea agreement.

Cannon argued on appeal that the trial court's ruling excluding the plea agreement violated her right to confront the witnesses against her, as this Court held in *State v. Farnsworth*, 185 Wn.2d 768, 374 P.3d 1152 (2016). Br. of App. 11-14. At trial, the parties had expressed their desire to present evidence of the agreement to the fullest extent allowable under the law. *See* 3 RP 383-92. The trial court limited the evidence based on its understanding of *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010). Cannon argued on appeal that the trial court's ruling prevented her from showing specific reasons why Jackson's testimony should not have been believed. Br. of App. 13; Reply Br. of App. at 4-6.

The Court of Appeals interpreted Cannon's strategy as simply opposing admission of the "truthfulness" provisions on the grounds of improper prosecutorial vouching. *See* App. 10. However, the court overlooked the fact that Cannon's entire defense was focused on showing that Borgen had fabricated his story and that Jackson, knowing Borgen's story, fabricated his own testimony in order to please the prosecution and shave 100 months off his own sentence. *E.g.,* 4 RP 524-25, 527. Had the trial court not excluded the plea agreement, Cannon could have presented its actual terms in order to demonstrate that the agreement gave Jackson a strong incentive to provide fraudulent testimony in order to implicate Cannon and thereby obtain the benefit of his bargain. *See, e.g.,* Ex. 51 at 2 ("SAMUEL JACKSON III will take no action that … adversely affects the State's case against State vs. Carissa Cannon").

The Court of Appeals held that there was no error, reasoning that the trial court had not restricted Cannon's cross-examination of Jackson. App. 10-11. But the court overlooked the fact that while the trial court allowed Cannon to ask questions about the terms—at risk of opening the door to redirect questions about other terms—the trial court also **refused to admit** the plea agreement itself. 3 RP 390 (Prosecutor: "You can use it as an exhibit, but not offer it up." Court: "Correct"); *see* 3 RP 388-91 (speaking in terms of allowing

certain questions, but not about presentation of the agreement itself).

5. Argument

A petition for review should be accepted when the decision of the Court of Appeals is in conflict with a decision of this Court or when the case involves a significant constitutional question. RAP 13.4(b)(1), (3). First, the decision of the Court of Appeals in this case conflicts with this Court's decision in *State v. Farnsworth*, 185 Wn.2d 768, 374 P.3d 1152 (2016), in which this Court held that exclusion of the text of a plea agreement violates a defendant's constitutional right to confront witnesses. Second, the decision of the Court of Appeals conflicts with this Court's decisions in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), and *State v. Duncan*, 185 Wn.2d 430, 374 P.3d 83 (2016), in which this Court held that a trial court cannot impose discretionary LFOs without an individualized inquiry into the defendant's ability to pay and that the defendant may raise the issue for the first time on appeal.

5.1 The Court of Appeals decision affirming the trial court's exclusion of the plea agreement conflicts with this Court's decision in *Farnsworth*.

In *State v. Farnsworth*, 185 Wn.2d 768, 374 P.3d 1152 (2016), this Court held that exclusion of the text of a plea

agreement violated the defendant's constitutional right to confront and cross-examine witnesses under U.S. Const. amend. VI and Wash. Const. art. I, § 22. *Farnsworth*, 185 Wn.2d at 790 (Gordon-McCloud, J., dissenting).[1]

This case is an illustration of the saying, "There is no honor among thieves." All of the participants in this case (Cannon, Jackson, Borgen, and the mysterious "Aliyah") had criminal records, at the least including drug charges. All were present at Jackson's house, where each of them consumed methamphetamine and were present for a drug deal. But at some point that night, the participants turned against each other. Borgen chose to bring in law enforcement and then carefully wove a story that he hoped would let him get away clean, implicating Jackson and Cannon in the process.

The key issue at trial was whether Borgen's story should be believed. The State's closing argument emphasized Jackson's

---

[1] The Court's opinion on the confrontation issue was set forth in the dissent. The lead opinion, which only four justices signed, upheld Farnsworth's conviction, reasoning that the jury was informed of the contents of the plea agreement, justifying the trial court in excluding the agreement itself. *Id.* at 784-85. Chief Justice Madsen's concurring opinion "agree[d] with the dissent's conclusion that the plea agreement should have been admitted into evidence and failure to do so amounted to constitutional error." *Id.* at 790. Justice Gordon-McCloud's dissent was signed by four justices. Adding the concurrence results in five justices in favor of the dissent's conclusion that excluding the plea agreement was constitutional error.

testimony as corroboration of Borgen's story. *E.g.,* CP 44-45; 5 RP 495-96. Cannon argued that both Borgen and Jackson fabricated their testimony to implicate Cannon. 5 RP 524-25. Jackson's plea agreement gave him a significant incentive to make sure his testimony matched Borgen's, in order to please the State and obtain the reduced sentence he bargained for. *See* Ex. 51 at 2. Because the trial court excluded the text of the agreement, Cannon was unable to present the jury with complete information from which to fully judge Jackson's credibility.

This Court noted in *Farnsworth*, "With a cooperating codefendant witness's plea agreement, the devil is in the details: they establish the extent of the benefit that the witness stands to gain, what will trigger the benefit, and **why the witness might testify falsely to gain that benefit."** *Farnsworth*, 185 Wn.2d at 790 (emphasis added). For this reason, excluding the plea agreement and all its details violates a defendant's confrontation rights. *Id.* This Court reasoned that the jury must have full information about the plea agreement in order to intelligently evaluate the witness's testimony. *Id.* at 795. The defendant must be able to engage in cross examination designed to reveal the witness's bias to the jury. *Id.* at 794.

The trial court prevented Cannon from doing so. Cannon's hands were tied by the trial court's exclusion of the agreement.

Under the trial court's ruling, Cannon could not challenge Jackson's credibility without opening the door to the "polygraph" and "testify truthfully" terms to be discussed, without context and without the ability to explore the text and details of the entire agreement.

Here, the context is everything. Viewing the "polygraph" and "testify truthfully" terms in their context demonstrates the heavy hand of the State in coercing Jackson's testimony. *See* Ex. 51 at 2. The State would be the sole judge of whether Jackson's testimony would be deemed truthful. *See Id.* If Jackson failed in any way to "cooperate fully" or provide testimony that was pleasing to the State, the State would not only hold him to the greater charges, but reserved the right to bring any additional charges that might fit. *Id.*

Six successive paragraphs emphasized repeatedly that Jackson must be "truthful" in every way at every stage of the case. Ex. 51 at 2. The fifth of these (¶ 7) emphasizes, "SAMUEL JACKSON III understands that the State will not tolerate deception from him." *Id.* The full text of the agreement leaves no question that Jackson must please the State if he is to obtain the benefit of the plea agreement.

The last of these paragraphs (¶ 8) provided the standard that Jackson must meet to obtain the benefit: "SAMUEL JACKSON III will take no action … that adversely affects the

State's case against State v. Carissa Cannon." *Id.* This is the message that Jackson would have received from this agreement: if he would testify consistently with Borgen's story implicating Cannon in the armed robbery, the State would accept his testimony as "truthful" and would give him the benefit of the bargain. Conversely, if he testified in a way that harmed the State's case against Cannon—truthfully or not—the State would judge him untruthful or uncooperative and would refuse to give him the benefit of the bargain. Jackson knew what the State would want to hear because he knew Borgen's story from police reports and interview transcripts. *See* 3 RP 415-16.

Jackson's incentive to corroborate Borgen's story—true or not—was much greater than what was conveyed to the jury by the limited testimony admitted by the trial court. With full information, a reasonable jury could have considered, as a source of reasonable doubt, that Borgen had fabricated the story of Cannon's involvement in a robbery and that Jackson had corroborated Borgen's story in hopes of pleasing the State and reducing his prison term by some 15 years. Exclusion of the plea agreement greatly restricted Cannon's ability to cross examine Jackson.

The Court of Appeals decision overlooks the fact that the trial court excluded the text of the agreement, and essentially holds that it is enough that the defense was not restrained from

inquiring about those terms. App. 10-11. This decision conflicts with this Court's decision in *Farnsworth*. Admissibility of the text of the agreement makes all the difference. The text of the agreement shows, in ways that mere inquiry could not, that Jackson was under immense pressure to testify in a manner that would lead to a conviction of Cannon. Cannon could have used the text of the agreement to raise reasonable doubt about Borgen's story, in a way that simply inquiring about those terms could not.

The Court of Appeals decision in this case conflicts with this Court's decision in *Farnsworth* and involves a significant constitutional question. This Court should accept review, reverse the conviction, and remand for a new trial.

5.2 The Court of Appeals decision to not review the LFO issue conflicts with this Court's decisions in *Blazina* and *Duncan*.

The Court of Appeals declined to review the LFO issue because Cannon did not object in the trial court. App. 11-12. This Court rejected that reasoning in *State v. Duncan*, 185 Wn.2d 430, 374 P.3d 83 (2016). In *Duncan*, this Court squarely addressed the question, "whether Chad Duncan can challenge the legal financial obligations (LFOs) imposed by the trial court for the first time on appeal," and answered, "yes." *Duncan*, 185 Wn.2d at 433.

This Court remanded for resentencing "with proper consideration of [Duncan's] ability to pay LFOs." *Id.* at 433-34. The same rule should apply to Cannon. She should be entitled to challenge her LFOs for the first time on appeal and to have the case remanded for resentencing with the proper inquiry.

This Court reasoned,

> While appellate courts "may refuse to review any claim of error which was not raised in the trial court," they are not required to. RAP 2.5(a). Recently, in *Blazina*, we chose to exercise "our own RAP 2.5 discretion [to] reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." 182 Wn.2d at 830.
>
> We reached this issue in *Blazina* because we found ample and increasing evidence that unpayable LFOs "imposed against indigent defendants" imposed significant burdens on offenders and our community, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Id.* at 835-87 (citing extensive sources). Given that, and given the fact that the trial courts had not made an individualized inquiry into the defendants' ability to pay before imposing the LFOs, we remanded to the trial court for new sentencing hearings. *Id.* at 839.
>
> Consistent with our opinion in *Blazina* and our other cases decided since then, we remand to the trial court for resentencing with proper consideration of Duncan's ability to pay LFOs. *See*

> *id.* at 830; *see also State v. Marks*, 185 Wn.2d 143, 368 P.3d 485 (2016); *State v. Licon*, noted at 184 Wn.2d 1010, 359 P.3d 791 (2015); *State v. Leonard*, 184 Wn.2d 505, 358 P.3d 1167 (2015) (per curiam); *State v. Vansycle*, noted at 183 Wn.2d 1013, 353 P.3d 634 (2015); *State v. Cole*, 183 Wn.2d 1013, 353 P.3d 634 (2015).

Duncan, 185 Wn.2d at 437-38. In other words, due to the constitutional importance of the inquiry (*see also Duncan*, 185 Wn.2d at 436) and the severe impacts on indigent defendants, this Court held that defendants are entitled to challenge the imposition of LFOs for the first time on appeal. This Court has remanded every such case that has come its way. In short, the decision of the Court of Appeals to decline review of the LFO issue conflicts with the decisions of this Court.

On the merits of the issue, the record demonstrates that the trial court failed to make any individualized inquiry into any matters that would factor into a determination of Cannon's ability to pay. As the trial court itself admitted, "I don't know anything about [Cannon]." 5 RP 554. The trial court's conclusion that Cannon would have the ability to pay LFOs was without any basis in fact. This Court should accept review and remand to the trial court for the required inquiry.

6. Conclusion

The decision of the Court of Appeals in this case conflicts with prior decisions of this Court in *Farnsworth*, *Blazina*, and

Duncan. This Court should accept review, reverse the Court of Appeals, and remand to the trial court for a new trial, or at the very least, for the required inquiry into Cannon's ability to pay discretionary LFOs.

Respectfully submitted this 24th day of November, 2017.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Petitioner
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on November 24, 2017, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

Chelsey L Miller
Attorney at Law
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102
cmille2@co.pierce.wa.us

DATED this 24th day of November, 2017.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

FILED
AUGUST 29, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. CARISSA DANELLE CANNON, Appellant.	)	No. 34981-1-III
	)	UNPUBLISHED OPINION

SIDDOWAY, J. — Carissa Cannon appeals her conviction for first degree robbery, arguing the trial court violated her confrontation right when it excluded terms of a plea agreement entered into by her partner in the robbery, who agreed to testify against her in exchange for a possible 147-month reduction in his sentence. She also argues for the first time on appeal that the trial court failed to conduct a *Blazina*[1] inquiry into her ability to pay legal financial obligations (LFOs).

The trial court imposed limits on only the State's direct examination about terms of the plea agreement; the defense was unconstrained. No violation of the confrontation clause is shown. The *Blazina* error she alleges was not preserved. We affirm.

[1] *State v. Blazina*, 182 Wn.2d 827, 833, 344 P.3d 680 (2015).

FACTS AND PROCEDURAL BACKGROUND

At the conclusion of a blind date with a woman Ludwin Borgen knew only as Aliyah, Mr. Borgen drove her to the home of her friends, where she bought methamphetamine. Unbeknownst to Mr. Borgen, she also agreed to a plan to set him up for a robbery. Upon leaving the home with Aliyah, Mr. Borgen drove only 500 feet before realizing his back tires had been slashed. Aliyah, expressing a concern that she "had warrants," left at that point and never returned. Report of Proceedings (RP) at 256. As Mr. Borgen worked to replace one of his damaged tires with his spare, he was approached by the defendant, Carissa Cannon, and her boyfriend, Samuel Jackson, who was a resident of the home Mr. Borgen and Aliyah had just visited. Both Ms. Cannon and Mr. Jackson were dressed in black and armed.

Ms. Cannon and Mr. Jackson ordered Mr. Borgen to walk to a nearby alley, which he did, at gunpoint. Once there, they had him empty his pockets. Ms. Cannon collected cash, a wallet, two cell phones, a flashlight, a half pack of cigarettes, and a lighter from him. She then demanded "the drugs," telling Mr. Borgen, when he denied having any, that Aliyah said he did. RP at 272. She said, "If you don't give me the drugs, I'm going to pop you," and moved her hand as if prepared to shoot him. *Id.* Mr. Borgen insisted that it was Aliyah, not him, who purchased drugs, and maybe she left them in his car. At that point, Ms. Cannon returned to Mr. Borgen's car to look for drugs, trading the Ruger

.22 caliber handgun she had been carrying for what turned out to be a BB gun with which Mr. Jackson had been armed.

Mr. Jackson walked Mr. Borgen further down the alley, and when it opened into a parking lot, Mr. Borgen saw two police patrol cars nearby. Mr. Jackson had turned around, evidently watching for Ms. Cannon, and Mr. Borgen took the opportunity to run toward the patrol cars, yelling that he had just been robbed. He directed the attention of the first officer with whom he spoke to Mr. Jackson, who was fleeing. The officer caught up with Mr. Jackson, detained him, and radioed other officers that the victim's car and an involved female should be found nearby. A second officer found Ms. Cannon sitting in the driver's seat of Mr. Borgen's car. Upon searching her and the car, he found a BB gun under the front passenger seat; Mr. Borgen's wallet in the back seat, emptied of what Mr. Borgen later testified had been $400-$500 in cash; and Mr. Borgen's cell phones in Ms. Cannon's pockets. Mr. Borgen was able to identify Ms. Cannon and Mr. Jackson as the people who robbed him. Cash in the amount of $380 was found in the back pocket of Ms. Cannon's jeans when she was booked into jail.

The State charged Ms. Cannon and Mr. Jackson with first degree robbery. Mr. Jackson entered into a plea agreement with the State, in which he agreed to testify against Ms. Cannon.

At trial, before the State called Mr. Jackson to testify, the prosecutor raised a concern outside the presence of the jury about how far she could go into the details of his

plea agreement, specifically mentioning *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010). In that case, all nine members of the Washington Supreme Court agreed that promises to "testify truthfully" that are commonly included in plea agreements can be written by prosecutors in a self-serving fashion and are prejudicial if jurors understand them to mean the State has some means of ensuring that the witness will comply and testify truthfully. *Id.* at 198, 203-04, 207. A majority of the court, consisting of the four justices who signed the lead opinion and the dissenting justice, analyzed the issue as one of prosecutorial vouching and agreed it was an abuse of discretion for the court to deny a defense objection to such evidence in the State's case-in-chief. The four other justices would have analyzed prejudice on a case-by-case basis, applying ER 403.

In raising her concerns about the issue in this case, the prosecutor told the court, "I don't want to step into anything I'm not supposed to step into." RP at 383.

After hearing from both parties and rereading *Ish*, the trial court told the parties:

> THE COURT: . . . I went back and read [*Ish*], the Supreme Court version, a little more carefully and it actually points out problems in having the state introduce the requirement that the defendant testify truthfully in the direct examination. They did allow it in that case by way of cross-examination, but the specific language in the opinion is that the state could not offer the plea agreement as an exhibit during its direct examination.
>
> [PROSECUTOR]: You can use it as an exhibit, but not offer it up.
>
> THE COURT: Correct. There was language potentially in the plea agreement regarding the agreement to testify truthfully as self-serving vouching, unless the defense is implying on cross-examination attacking the witness's credibility, and then the state can inquire: Did you have a requirement to testify? Yes. On what kind of testimony does that have to be? It needs to be truthful testimony in compliance with the agreement.

> [PROSECUTOR]: Okay. So can only bring that up on redirect if gone into on cross-examination, but can go into on direct the reduction, the time, and the revocation aspect of it?
>
> THE COURT: And the fact that it's not known until the end really that it's the ultimate agreement, so I think beyond that there's a problem with potential vouching and that's what the [*Ish*] Supreme Court opinion discussed.
>
> [DEFENSE COUNSEL]: I can ask about the numbers, and I can say this is what you're facing when you entered the guilty plea, you testified, this is what you potentially get—
>
> THE COURT: Correct.
>
> [DEFENSE COUNSEL]:—as to how much time.
>
> [PROSECUTOR]: But if you attack his credibility at all, then I can bring in the truthfulness requirement. Is that the correct reading?
>
> [DEFENSE COUNSEL]: Are they saying attack his credibility in any sense or is it even clear?
>
> THE COURT: It's not entirely clear from the way it was written in here.
>
> [DEFENSE COUNSEL]: I got it.
>
> THE COURT: Because the way it was done, the state tried to remove the sting during their direct examination, and that that's what they said was improper because the [sting hadn't] arisen yet.
>
> [DEFENSE COUNSEL]: So if I call him a liar, cheater, and a thief, I'm attacking him and they get to bring the truthfulness.
>
> THE COURT: Yes.

RP at 390-91.

Mr. Jackson then testified consistently with what jurors had heard from Mr. Borgen about the robbery. He also testified that he and Ms. Cannon were friends with Aliyah. He claimed the motive for the robbery was to deter drug sales that his roommate had been making from their home by "shak[ing down] or rob[bing] the next person that came through selling drugs." RP at 400-01.

During direct examination, the prosecutor questioned Mr. Jackson about his agreement to plead guilty to first degree robbery and unlawful possession of a firearm. Mr. Jackson testified that in exchange for his testimony, he had "the potential" to withdraw his plea to those charges and enter a plea of guilty to a "substantially reduced charge" of robbery in the second degree and unlawful possession of a firearm in the second degree. RP at 394. He testified to the different sentences, depending on the plea: only 84 months for second degree robbery and 60 months for unlawful possession of a firearm, versus 129-171 months and a 60 month firearm enhancement for the first degree robbery charge, and 87-116 months for first degree unlawful possession of a firearm. He testified that he would not know until the end of the trial whether he would be allowed to withdraw the plea. No questions were asked by the State about Mr. Jackson's promise to testify truthfully. He did not volunteer anything on that score.

In cross-examination, Ms. Cannon's lawyer did not attempt to impeach Mr. Jackson's credibility, so truthfulness was not touched on during redirect. At no point did defense counsel question Mr. Jackson about the provisions of the plea agreement requiring him to testify truthfully.

At the conclusion of the trial, the jury found Ms. Cannon guilty of first degree robbery. She was sentenced to 200 months confinement and 18 months of community custody. The trial court imposed $2,300 in legal LFOs, commenting, "She is a young

woman. She has earning potential when she does get out." RP at 556. The defense did not object. Ms. Cannon appeals.

ANALYSIS

Confrontation clause

Relying heavily on our Supreme Court's 2016 decision in *State v. Farnsworth*, 185 Wn.2d 768, 374 P.3d 1152 (2016)—a case decided after Ms. Cannon's February 2016 trial and that she contends "replaced" a "contradictory" holding of *Ish*—Ms. Cannon argues that the trial court's rulings in response to State concerns about *Ish* violated her right to confront and cross-examine witnesses. Reply Br. at 3; U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. Specifically, she argues that "six successive paragraphs" of Mr. Jackson's plea agreement demonstrated the "heavy hand of the State in coercing Jackson's testimony," providing that Mr. Jackson "must be 'truthful' in every way at every stage of the case." Reply Br. at 4-5. The problem with this argument is not merely that Ms. Cannon did not preserve an error by objecting in the trial court. It is that the trial court never foreclosed cross-examination of Mr. Jackson on those matters.

Turning first to *Farnsworth*, it involved a confrontation clause issue and a witness who had reached a plea agreement with the State, but in an entirely different context from that presented in *Ish*. This is borne out by the fact that neither the lead opinion nor the dissent in *Farnsworth* makes any mention of *Ish*. Unlike the situation in *Ish* and in this

case, where the State wants to offer evidence of a cooperating witness's promises to testify truthfully but the defense wants that evidence excluded, the defendant in *Farnsworth* wanted the plea agreement of his criminal associate to be admitted. He objected to its exclusion.

In *Farnsworth*, the defendant's partner in a first degree robbery, James McFarland, had entered pleas of guilty to first degree robbery and first degree theft. 185 Wn.2d at 791-92. McFarland faced a life sentence under the Persistent Offender Accountability Act, chapter 9.94A RCW, if convicted of robbery, a "'most serious offense.'" *Id.* at 773. His plea agreement with the State provided that the State would move to dismiss the robbery charge after hearing his trial testimony if he complied with the terms of the agreement. *Id.* at 792. During his direct examination by the State, however, McFarland mistakenly or misleadingly told jurors that under his agreement, he had been allowed to plead guilty to only first degree theft. *Id.* at 791-92. Thus, while jurors heard accurate testimony about the very significant difference in the sentences McFarland faced if convicted of theft rather than robbery, they were left with the impression that he had already received the benefit of the agreement through his guilty plea and had no ongoing incentive to testify other than truthfully.

The dissenting opinion, which spoke for the majority of the court on this issue,[2] observes that the State realized that attacking McFarland's credibility was critical for the defense, and "preemptively moved to exclude McFarland's plea agreement so that the defense could not cross-examine McFarland about its details." *Id.* at 791. "Defense counsel also realized this, so he opposed the State's motion to exclude McFarland's guilty plea," "argu[ing] that the guilty plea exposed inaccuracies in McFarland's testimony." *Id.* The trial court granted the State's motion to exclude the evidence because the difference in the sentencing consequences for McFarland had been fully and accurately disclosed in his testimony. It failed to consider that it remained undisclosed that McFarland could be denied the benefit of reduced sentencing unless the State was satisfied—after he testified—that he had complied with the agreement.

Ms. Cannon fastens on this line of cross-examination that Farnsworth wanted to pursue, arguing for the first time on appeal that she should have been allowed to cross-examine Mr. Jackson about his promise to testify truthfully:

> Six successive paragraphs emphasized repeatedly that Jackson must be "truthful" in every way at every stage of the case. CP 39. The fifth of these (¶ 7) emphasizes, "SAMUEL JACKSON III understands that the State will not tolerate deception from him." *Id.* The full text of the

---

[2] The four-member lead opinion found no error by the trial court on this score, and alternatively that any error was harmless. *Farnsworth*, 185 Wn.2d at 783-84. Justice Madsen concurred that the error was harmless but agreed with the dissent that the plea agreement should have been admitted into evidence and that the failure to do so amounted to constitutional error. *Id.* at 790 (Madsen, C.J., concurring).

> agreement leaves no question that Jackson must please the State if he is to obtain the benefit of the plea agreement.

Reply Br. at 5. The problem is that Ms. Cannon never raised this concern in the trial court. Her position when concerns about *Ish* were being discussed with the trial court prior to Mr. Jackson's testimony was that evidence about the truthfulness provisions would be prosecutorial vouching.

It was the State that wanted to present evidence of the "testify truthfully" provisions, as the prosecutor explained:

> [I]f the Court grants defense the ability to go into the details of how much [the potential sentence] reduction is, the [S]tate's position that under *State v. Ish*, which was actually a Pierce County case, the [S]tate should be permitted to go into the restrictions on the plea agreement, and the fact that he does have to testify truthfully. He is required to take a polygraph, if requested to do so. If it's deemed he has breached the plea agreement in any way, shape, or form he's stuck with not being able to withdraw his plea and the original charges.

RP at 383-84. And it was defense counsel who responded by telling the court, "Your Honor, I will make it very simple for you. . . . [W]hen they start saying that he has to be truthful, etc., etc., etc., there is a polygraph, the [S]tate is vouching for the truthfulness of his testimony." RP at 385.

The result was the court's direction to the parties that in light of *Ish*, the State could not introduce the defendant's promises and obligation to testify truthfully in its direct examination, but the Supreme Court "did allow it in that case by way of cross-examination." RP at 390. The court's directions to the parties did not constrain cross-

examination at all, but only discussed the fact that a credibility attack in cross-examination could open the door for the State.

Ms. Cannon argues that if not preserved, a confrontation clause error is manifest constitutional error that can be raised for the first time on appeal. But the problem with her appeal is more fundamental. She cannot point to any error. She has not identified any limits that the trial court imposed on her cross-examination of Mr. Jackson. Nothing prevented questions to Mr. Jackson about the six sequential paragraphs dealing with truthfulness, other than an understandable tactical decision by her trial lawyer.[3]

LFOs

Ms. Cannon argues the trial court did not conduct the required *Blazina* inquiry into her current and likely future ability to pay LFOs. She asks us to remand for the trial court to conduct the proper inquiry.

Although sentenced after *Blazina* was decided, Ms. Cannon made no objection to the finding that she had the present or future ability to pay. She thereby failed to preserve a claim of error. RAP 2.5(a); *Blazina*, 182 Wn.2d at 833 ("[u]npreserved LFO errors do

---

[3] Ms. Cannon raises an issue of ineffective assistance of counsel, but only that her lawyer should have objected to exclusion of evidence of the truthfulness terms. *See* Br. of Appellant at 16. Since the defense was not foreclosed from presenting such evidence, there was nothing for her lawyer to object to. She does not argue that her counsel was ineffective for failing to cross-examine Mr. Jackson about the truthfulness provisions. In light of defendants' general preference to exclude such evidence because it vouches for the credibility of an adverse witness, any challenge to effectiveness on that basis could be rejected summarily.

not command review as a matter of right"). "[A] defendant has the obligation to properly preserve a claim of error" and "appellate courts normally decline to review issues raised for the first time on appeal." *Id.* at 830, 834. The rationale for refusing to review an issue raised for the first time on appeal is well settled—issue preservation helps promote judicial economy by ensuring "that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). A majority of the panel declines to exercise its discretion to review the issue for the first time on appeal.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, A.C.J.

OLYMPIC APPEALS PLLC

November 24, 2017 - 4:20 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington, Respondent v. Carissa D. Cannon, Appellant (349811)

The following documents have been uploaded:

- PRV_Motion_20171124155508SC312016_1329.pdf
  This File Contains:
  Motion 1 - Waive Filing Fee
  The Original File Name was Motion to Waive Filing Fee 2017-11-24.pdf
- PRV_Petition_for_Review_20171124155508SC312016_9077.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review 2017-11-24.pdf

A copy of the uploaded files will be sent to:

- cmille2@co.pierce.wa.us

Comments:

Sender Name: Kevin Hochhalter - Email: kevin@olympicappeals.com
Address:
4570 AVERY LN SE STE C-217
LACEY, WA, 98503-5608
Phone: 360-763-8008

Note: The Filing Id is 20171124155508SC312016