

ORIGINAL

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Case No. 2013-464

Plaintiff-Appellee,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

GIANNA COCHRAN,

Court of Appeals
Case No. 11AP-408

Defendant-Appellant.

MOTION OF PLAINTIFF-APPELLEE FOR SUMMARY AFFIRMANCE

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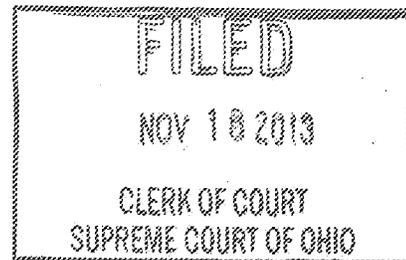
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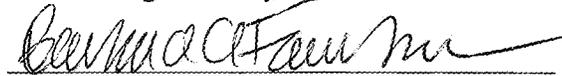
Defendant-Appellant.

PLAINTIFF-APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

The State of Ohio, Plaintiff-Appellee, respectfully moves this Court to summarily affirm the appellate court's decision in this case. S.Ct.Prac.R. 4.01. On June 5, 2013, this Court accepted review of the defendant's first proposition of law and ordered this case held for the decision in *State v. Washington*, __ Ohio St.3d __, 2013-Ohio-4982, __ N.E.2d __, released on November 14, 2013. As explained in the accompanying memorandum, the Tenth District Court of Appeals applied the correct analysis. Specifically, the appellate court applied the same analysis articulated and adopted by this Court in *Washington*, and this case should therefore be summarily affirmed based on *Washington*. No further briefing is warranted. Accordingly, the State respectfully moves this Court to summarily affirm the Tenth District Court of Appeals.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

In *State v. Washington*, 2013-Ohio-4982, at syllabus, this Court held as follows: “When deciding whether to merge multiple offenses at sentencing pursuant to R.C. 2941.25, a court must review the entire record, including arguments and information presented at the sentencing hearing, to determine whether the offenses were committed separately or with a separate animus.” In *Washington*, the appellate court determined that the defendant’s convictions for failure to comply and obstruction of official business merged. In *Washington*, the state argued at the resentencing hearing that the defendant’s convictions did not merge because the defendant had engaged in separate conduct constituting separate criminal acts although it was unclear whether the state’s “theory at trial” had been that the defendant’s convictions arose from the same conduct. *Id.* at ¶¶3-6, 22. This Court remanded the case to the appellate court for further proceedings consistent with the opinion.

Unlike the appellate decision in *Washington*, in this case, the Tenth District Court of Appeals reviewed the entire record of the trial court proceedings and applied the *Washington* analysis. Specifically, the Tenth District reviewed and relied upon the entire record of the trial court’s proceedings when it rejected the defendant’s plain error merger argument, stating: “A review of the record of the bench trial, including each video presented by the state, reveals that the state presented evidence of multiple crimes and identified each as a distinct act of abuse.” *State v. Cochran*, 10th Dist. Franklin No. 11AP-408, 2012-Ohio-5899, ¶65. The appellate court correctly considered the conduct underlying each offense charged, along with the prosecutor’s statements to the trial court during opening statement, the presentation of evidence, closing argument and sentencing, before it concluded that, with one exception, separate conduct

supported the defendant's separate convictions. *Id.* at ¶¶65-79. Not only did the appellate court articulate the same legal analysis as contained in *Washington*, at ¶¶15-19, *see Cochran*, at ¶¶60-65, but also the appellate court specifically referenced the prosecutor's opening statement and closing argument, *id.* at ¶¶67, 71, 74, 76, the cross-examination of the defendant, *id.* at ¶71, and the trial court's statements when it announced its verdicts. *Id.* at ¶¶67, 71, 74. The appellate court correctly concluded that, with one exception, separate conduct supported the defendant's separate convictions. *Id.* at ¶¶65-79.

The defendant claims that the State changed its "theory" and relies on a statement of the prosecutor during opening statement, to the effect that the indictment charged offenses in the alternative, as being dispositive of her plain error merger claim. The defendant takes this statement out of context and fails to recognize that the State also identified the defendant's separate conduct in opening statement and in closing argument, *see Cochran*, at ¶¶67, 71, 74, 76; the State presented evidence of separate crimes and differentiated acts, *see id.* at ¶¶73, 77; the State "specifically asked the trial court to find appellant guilty of each felony and each misdemeanor during closing arguments", *id.* at ¶77, and requested consecutive sentences, noting that, by operation of law the misdemeanor sentences would run concurrently with the felony sentences. (T. 230) The court of appeals correctly rejected the defendant's claim in this regard, *id.* at ¶77, and her assertion that the state changed its "theory" is meritless.

Here, the appellate court applied the same legal analysis articulated by this Court in *Washington*, and correctly rejected the defendant's plain error merger claim, with one exception. *Cochran*, at ¶¶58-79. Accordingly, because the lower court applied the analysis adopted by this Court in *Washington*, when it rejected the defendant's claims, no further review of the defendant's claims is warranted, and the lower court's decision should be summarily affirmed.

Respectfully submitted,

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Prosecuting Attorney

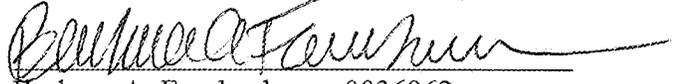


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, November 18th, 2013, to SARAH M. SCHREGARDUS, Kura, Wilford & Schregardus Co., L.P.A., 492 City Park Ave., Columbus, Ohio 43215; Counsel for Defendant-Appellant.



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