

FILED
Court of Appeals
Division II
State of Washington
8/14/2019 2:34 PM

NO. 52345-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SATNAM SINGH RANDHAWA,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Judge Stanley J. Rumbaugh

No. 17-1-00759-7

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

 A. Did the trial court abuse its discretion in denying Randhawa’s motion to dismiss based on prosecutorial vindictiveness where prosecutors have broad discretion in making charging decisions and where there was no showing that the charges were refiled for retaliatory purposes? (Appellant’s Assignment of Error 1) 2

 B. Has Randhawa shown a basis for an evidentiary hearing where he never requested one below and where he fails to produce any evidence to support his claim of prosecutorial vindictiveness? (Appellant’s Assignment of Error 2)..... 2

III. STATEMENT OF THE CASE..... 2

 A. Assault and Protection Order Violation Charges 2

 B. Motion to Dismiss..... 4

IV. ARGUMENT 6

 A. The trial court did not abuse its discretion in denying Randhawa’s motion to dismiss for prosecutorial vindictiveness..... 6

 1. Prosecutors possess broad discretion in making charging decisions..... 7

 2. Randhawa has not shown the requisite evidence of actual vindictiveness or the presumption of vindictiveness..... 8

| | | |
|----|---|----|
| B. | There was no basis for an evidentiary hearing where Randhawa did not request one below and did not produce any evidence to support his claim of prosecutorial vindictiveness..... | 14 |
| V. | CONCLUSION..... | 18 |

TABLE OF AUTHORITIES

State Cases

| | |
|---|------------------|
| <i>Johnson Forestry Contracting, Inc. v. Washington State Dept. of Natural Resources</i> , 131 Wn. App. 13, 126 P.3d 45 (2005)..... | 15 |
| <i>State v. Aguilar</i> , 153 Wn. App. 265, 223 P.3d 1158 (2009)..... | 9 |
| <i>State v. Bonisisio</i> , 92 Wn. App. 783, 964 P.2d 1222 (1998) | 14, 16, 17 |
| <i>State v. Dennison</i> , 115 Wn.2d 609, 801 P.2d 193 (1990)..... | 15 |
| <i>State v. Gamble</i> , 168 Wn.2d 161, 225 P.3d 973 (2010) | 8 |
| <i>State v. Johnson</i> , 33 Wn. App. 534, 656 P.2d 1099 (1982)..... | 9 |
| <i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)..... | 14 |
| <i>State v. Korum</i> , 157 Wn.2d 614, 141 P.3d 13 (2006)..... | 8, 9, 10, 11, 12 |
| <i>State v. Lewis</i> , 115 Wn.2d 294, 797 P.2d 1141 (1990)..... | 6, 7 |
| <i>State v. McDowell</i> , 102 Wn.2d 341, 685 P.2d 595 (1984) | 9 |
| <i>State v. McKenzie</i> , 31 Wn. App. 450, 642 P.2d 760 (1981) | 9 |
| <i>State v. Miller</i> , 92 Wn. App. 693, 964 P.2d 1196 (1998) | 6 |
| <i>State v. Serr</i> , 35 Wn. App. 5, 664 P.2d 1301 (1983) | 9 |

Federal and Other Jurisdictions

| | |
|--|------|
| <i>U.S. v. Meyer</i> , 810 F.2d 1242 (D.C. Cir. 1987)..... | 8 |
| <i>United States v. Goodwin</i> , 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982)..... | 8, 9 |

Rules

| | |
|---------------------|----------|
| CrR 3.3 | 4 |
| CrR 8.3(b) | 4, 6, 13 |
| RAP 10.3(a)(5)..... | 4 |
| RAP 10.3(a)(6)..... | 15 |
| RAP 2.5(a) | 14 |

I. INTRODUCTION

Satnam Singh Randhawa punched his girlfriend, Olga Shkarina, in the face and broke her jaw on February 18, 2017. The State charged him with assault in the second degree and violation of a protection order. In September 2017, while Randhawa was out on bail, Randhawa and Ms. Shkarina were both shot by an unknown assailant at Ms. Shkarina's residence. Based on this shooting, the State dismissed the assault and protection order charges in November 2017 and relayed its intention to refile them upon the conclusion of the shooting investigation and the availability of Ms. Shkarina as a witness. On March 23, 2018, the State refiled the assault and protection order violation charges after law enforcement informed the State that the shooting investigation was complete.

The trial court did not abuse its discretion in denying Randhawa's motion to dismiss for prosecutorial vindictiveness. The State properly exercised its broad discretion in determining when to refile the charges based on the status of the shooting investigation. Randhawa fails to show prosecutorial vindictiveness merely because the completion of the shooting investigation and the refiling of charges happened to occur within days of his posting an appellate bond on an unrelated case. Further, there is no basis for an evidentiary hearing where Randhawa never requested one below and

where he failed to produce any evidence to support his claim of prosecutorial vindictiveness. This Court should affirm the trial court's denial of Randhawa's motion to dismiss the charges for prosecutorial vindictiveness and affirm the convictions.

II. RESTATEMENT OF THE ISSUES

- A. Did the trial court abuse its discretion in denying Randhawa's motion to dismiss based on prosecutorial vindictiveness where prosecutors have broad discretion in making charging decisions and where there was no showing that the charges were refiled for retaliatory purposes? (Appellant's Assignment of Error 1)
- B. Has Randhawa shown a basis for an evidentiary hearing where he never requested one below and where he fails to produce any evidence to support his claim of prosecutorial vindictiveness? (Appellant's Assignment of Error 2)

III. STATEMENT OF THE CASE

A. Assault and Protection Order Violation Charges

On February 21, 2017, the State charged Satnam Singh Randhawa with assault in the second degree and violation of a protection order. CP 3-4. These charges stemmed from allegations that Randhawa punched his girlfriend, Olga Shkarina, in the face and broke her jaw. CP 1-2; RP 49. At the time of the assault, there was a no contact order in place prohibiting Randhawa from contacting Ms. Shkarina. CP 1-2. Randhawa posted bail

and was released. CP 20-22. The trial court entered orders prohibiting Randhawa from having contact with Ms. Shkarina. CP 18-19, 119-20.

Approximately seven months later, in September 2017, Randhawa and Ms. Shkarina were both injured in a shooting that occurred at Ms. Shkarina's house while Randhawa was visiting in violation of the no contact order. CP 5-6, 11, 18-19, 119-20; RP 6-7. Randhawa was shot in the stomach, and Ms. Shkarina was shot twice in the chest; Randhawa denied knowing Ms. Shkarina and the identity of the shooter. CP 11.

On November 20, 2017, the State dismissed the assault and protection order charges related to this case because of the ongoing investigation into the September 2017 shooting involving the defendant and Ms. Shkarina. CP 5-6.¹ At that time, Ms. Shkarina was terrified and in hiding after being shot. CP 5-6. The State had always intended to refile the assault and protection order charges, as indicated in its dismissal on November 20th: "The State intends to refile charges against the defendant once the other investigation is complete and/or when it is safe for Olga Shkarina to testify at trial." CP 5. The State did not want to force her to testify until the investigation into the shooting was complete. CP 5.

¹ The State filed an amended information charging a no-contact order violation based on the September 2017 shooting incident but later dismissed this charge once it was discovered that the shooting investigation was ongoing. CP 7-13.

After a sergeant informed the State that the shooting investigation was complete, the State refiled the charges on March 23, 2018. *See* CP 11. Randhawa’s counsel argued that the State vindictively refiled the charges two days after Randhawa posted an appellate bond on an unrelated case. RP 18-20, 39-43.²

B. Motion to Dismiss

In May 2018, Randhawa filed a CrR8.3(b) motion to dismiss, alleging that the State mismanaged his case and prejudiced his right to a speedy trial under CrR 3.3. CP 38-47. This written motion was based on a speedy trial issue—not prosecutorial vindictiveness. CP 38-47.³ At the May 30, 2018 hearing on his motion, Randhawa raised the issue of prosecutorial vindictiveness for the first time in oral argument, asserting that a presumption of prosecutorial vindictiveness arose when the State refiled the assault and protection order charges two days after Randhawa posted a large appellate bond on another case. RP 19-23, 39-43.

The court denied Randhawa’s motion to dismiss, concluding that it would not engage in “speculation as to [the State’s] motive.” RP 43-45. Although the court briefly questioned the State about the timing of the

² Randhawa only cites to his argument at the hearing for his assertion that charges were refiled two days after he posted an appellate bond on an unrelated case; he does not cite to the actual record for this assertion. *See* Br. of Appellant at 2-3 (citing RP 18-20, 39-43); *see also* RAP 10.3(a)(5).

³ Randhawa does not raise any speedy trial violations on appeal. *See* Br. of Appellant.

refiled charges, noting that it was unusual, the court determined that the claim of prosecutorial vindictiveness was unsupported by the record. RP 21-23, 41-44. The court explained that in order to create a presumption of vindictiveness, “you have to have facts that you are relying on to support the presumption. And the facts that you are asking me to rely on are really basically speculation about the thought process of the charging DPA in this case.” RP 41. The court also noted that Randhawa had notice of these charges from the outset. RP 41-42. The court ruled that it “cannot find any kind of misconduct” and would not “infer some kind of wrongful intent in the dismissal.” RP 44. The court explained that the decision to refile the charges appeared to be “simply a decision that the State had to make in order to balance everybody’s rights here, including the right of this Defendant, who apparently was also injured in the attack” in 2017. RP 44.⁴

After the trial court denied Randhawa’s motion to dismiss the charges, the court held a jury trial where Randhawa was found guilty of assault in the second degree and felony violation of a no contact order. CP 85-86, 90. The jury also returned a verdict that Randhawa and Ms. Shkarina were members of the same family or household to support the State’s domestic violence allegations. CP 87, 90-91. The court sentenced

⁴ The trial court referred to the attack as occurring in November 2017, but the record indicates that this occurred in September 2017. *See* RP 44, CP 11.

Randhawa to 70 months incarceration. CP 94-95. Randhawa timely appealed. *See* CP 102.

IV. ARGUMENT

A. The trial court did not abuse its discretion in denying Randhawa's motion to dismiss for prosecutorial vindictiveness.

The trial court did not abuse its discretion when it denied Randhawa's motion to dismiss for prosecutorial vindictiveness. A trial court's ruling on a motion to dismiss for vindictive prosecution is reviewable only for manifest abuse of discretion. *State v. Miller*, 92 Wn. App. 693, 702, 964 P.2d 1196 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* "Discretion is abused only where it can be said that no reasonable person would take the view adopted by the court." *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990). Before charges can be dismissed under CrR 8.3(b), the defendant must show arbitrary action or governmental misconduct as well as prejudice that affects the defendant's right to a fair trial. *Miller*, 92 Wn. App. at 702. Dismissal is an extraordinary remedy, not warranted unless the defendant shows prejudice. *Id.* at 702-03. The State's refile of charges at the conclusion of the shooting investigation, which happened to occur two days after Randhawa posted an appellate bond on a

separate case, does not constitute arbitrary action or governmental misconduct and does not prejudice his right to a fair trial.

1. Prosecutors possess broad discretion in making charging decisions.

It is well established that prosecutors are vested with broad discretion when determining how and when to file criminal charges. *Lewis*, 115 Wn.2d at 299. Here, the State used this prosecutorial discretion to decide to dismiss the charges and refile them at a later date once the investigation into the shooting was complete. CP 5, 11. When the State dismissed the charges in November of 2017, the State explicitly noted its intent to refile the charges upon the completion of the shooting investigation “and/or when it is safe for Olga Shkarina to testify at trial.” CP 5. The ongoing shooting investigation, which involved Randhawa and Ms. Shkarina, yielded additional evidence regarding this case. RP 29-31. During an interview about the shooting, Ms. Shkarina provided further information about the assault and protection order violation at issue in this case. *Id.* The State determined it would be appropriate to refile the charges upon the conclusion of the ongoing shooting investigation. CP 11. At the hearing on Randhawa’s motion to dismiss the charges, the trial court properly recognized the State’s broad discretion in the timing of these charging decisions. *See* RP 21-22.

2. Randhawa has not shown the requisite evidence of actual vindictiveness or the presumption of vindictiveness.

Prosecutorial vindictiveness arises when the government abuses its broad discretion in making charging decisions to retaliate against defendants for exercising their constitutional or statutory rights. *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006). A prosecutorial action is vindictive only if designed to penalize a defendant for asserting legally protected rights. *Id.*; *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). Prosecutorial vindictiveness may occur in two ways: actual vindictiveness or the presumption of vindictiveness. *Korum*, 157 Wn.2d at 627.

Actual vindictiveness requires a defendant to show objective evidence that a prosecutor acted in retaliation to punish the defendant for asserting legal rights. *U.S. v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987) (citing *United States v. Goodwin*, 457 U.S. 368, 380-81, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982)). Randhawa neither argues that actual vindictiveness applies nor provides any objective evidence that the State retaliated to punish him for asserting any legal rights. Br. of Appellant at 4-5.

A presumption of vindictiveness arises when the defendant can prove that “all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.” *Korum*, 157 Wn.2d at 627. The mere

appearance of vindictiveness is not sufficient to establish a due process violation. *State v. Serr*, 35 Wn. App. 5, 11, 664 P.2d 1301 (1983) (citing *State v. McKenzie*, 31 Wn. App. 450, 452-53, 642 P.2d 760 (1981)). Courts will presume vindictive motives only where a reasonable likelihood of vindictiveness exists. *State v. Aguilar*, 153 Wn. App. 265, 280, 223 P.3d 1158 (2009) (citing *Goodwin*, 457 U.S. at 373).

Federal courts have not conclusively decided whether a presumption of vindictiveness can even exist in a pretrial setting. *Korum*, 157 Wn.2d at 628. But Washington case law, in accord with *Goodwin*, suggests that “actual vindictiveness is required to invalidate the prosecutor’s adversarial decisions made prior to trial.” *Id.* (citing *State v. McDowell*, 102 Wn.2d 341, 344, 685 P.2d 595 (1984)); *see also State v. Johnson*, 33 Wn. App. 534, 536-37, 656 P.2d 1099 (1982).

Randhawa cites no legal authority to support the claim that the presumption of vindictiveness even applies to charging decisions in a pretrial setting. Br. of Appellant at 4-5. Washington case law suggests it does not. However, this Court need not reach this issue because, even assuming that a presumption of vindictiveness may arise in the pretrial context, Randhawa fails to establish this presumption. *See Korum*, 157 Wn.2d at 629.

Randhawa wrongly contends that a presumption of vindictiveness arose merely because the State refiled charges against Randhawa two days after he posted a large appellate bond in an unrelated case. *See* Br. of Appellant at 1. Prosecutorial vindictiveness occurs when the State acts in retaliation against a defendant for exercising a legal right. *Korum*, 157 Wn.2d at 627. In this case, nothing in the record supports Randhawa's contention that the actions of the prosecutor were punitive. And nothing in the record shows the State refiled the charges to retaliate against Randhawa for exercising his right to post the appellate bond. The State refiled the charges after the shooting investigation was complete and the State determined Ms. Shkarina could safely testify. CP 5-6, 11. The State's decision to refile charges was well within the State's legal authority and discretion, so no reasonable likelihood of vindictiveness existed in this case.

In *Korum*, as part of plea negotiations, the State promised to reduce the number of substantive charges and agreed not to file additional charges in exchange for the defendant's guilty plea. *Korum*, 157 Wn.2d at 620-21. In exchange for these promises, the defendant pled guilty. *Id.* at 621. When the defendant subsequently withdrew his guilty plea, the State amended its complaint as it had promised to include numerous additional charges. *Id.* at 620-21. The Court concluded that the mere filing of additional or more serious charges after the withdrawal of the guilty plea, without proving

additional facts, does not give rise to a presumption of vindictiveness. *Id.* at 630-31. Similar to the prosecutor in *Korum*, who had the discretion to file additional charges after the defendant withdrew his guilty plea, the State in Randhawa's case properly exercised its discretion to refile the charges at the conclusion of the shooting investigation. *See* CP 5, 11.

Although the trial court briefly questioned the State about the timing of refiling the case, the court recognized the State's broad discretion in making charging decisions. RP 21-23. The assumption that the State possessed nefarious punitive motives in refiling charges (as the State promised to do in its dismissal) is merely speculation on the part of Randhawa. The sole evidence of vindictiveness proffered by Randhawa is his speculation that the State refiled the charges only because he posted bail on an unrelated case. Br. of Appellant at 3-4; RP 40. But its Randhawa's burden to show that "all of the circumstances, when taken together" show a realistic likelihood of vindictiveness. *See Korum*, 157 Wn.2d at 627. The record does not support Randhawa's claim of vindictiveness. Rather, the record shows that the State filed charges upon the conclusion of the shooting investigation, which yielded additional discovery in this case. CP 11; RP 29, 31-34, 43-44.

Randhawa claims that his speculation alone gives rise to the requisite realistic likelihood of vindictiveness to support a presumption of

vindictiveness. Br. of Appellant at 4-5. The trial court properly refused to speculate about the State's motive in refiling the charges:

MR. CHAN (Defense): On March 21st, he posted a very large appellate bond that Judge Martin had set in the 2016 case on March 21st. On March 23rd, the charges were refilled in this case...I think that the Court can read through the lines. The Court can do the math.

THE COURT: I tend to not speculate, Mr. Chan.

RP 19.

The trial court then rightly disagreed with Randhawa that the refiling of the charges on March 23rd created a presumption of vindictiveness:

MR. CHAN: But how would that explain a refiling of the original charges, the misdemeanor, on March 23rd?

THE COURT: I don't know. I have no explanation. I'm not obliged to speculate, and I won't.

MR. CHAN: But I do think that it does create a presumption.

THE COURT: To create a presumption, you have to have facts that you are relying on to support the presumption. And the facts that you are asking me to rely on are really basically speculation about the thought process of the charging DPA in this case.

RP 41.

Randhawa's conjecture is not enough to establish a presumption of vindictiveness when a realistic likelihood of vindictiveness must arise out of "*all of the circumstances, when taken together.*" See *Korum*, 157 Wn.2d at 627 (emphasis added).

The trial court acknowledged that in light of the ongoing attempted murder investigation, “the State in its judgment could well have decided they didn’t want to compromise [the investigation] by turning over documents related to that investigation” because it involved the same victim and defendant in this case. RP 43-44. The court noted that Randhawa had notice of these charges from the beginning, which were “filed, dismissed, and then ultimately refiled.” RP 41-42. Randhawa was also on notice that the State intended to refile the charges once the investigation was complete. CP 5-6, 11. When the court denied Randhawa’s CrR 8.3(b) motion to dismiss, the court explained that it “cannot find any kind of misconduct” and that it is “not going to infer some kind of wrongful intent in the dismissal” of the charges. RP 44. The court further explained that the State’s decision to refile the charges “was simply a decision that the State had to make in order to balance everybody’s rights here, including the right of this Defendant, who apparently was also injured in the [2017] attack.” RP 44.

Neither the speculation by Randhawa into the reasons why charges were refiled, nor the fact that charges happened to be refiled two days after Randhawa posted an appellate bond on an unrelated case, is sufficient to show the requisite realistic likelihood of vindictiveness. Thus, Randhawa has not shown actual vindictiveness or the presumption of vindictiveness,

and the trial court did not abuse its discretion in denying his motion to dismiss the charges.

B. There was no basis for an evidentiary hearing where Randhawa did not request one below and did not produce any evidence to support his claim of prosecutorial vindictiveness.

Once a defendant makes the required showing of vindictiveness, the prosecution must justify its decision with “legitimate, articulable, objective reasons” for its actions. *State v. Bonisisio*, 92 Wn. App. 783, 791, 964 P.2d 1222 (1998). Randhawa fails to show that an evidentiary hearing is warranted in this case for several reasons. First, he failed to raise this issue below and should be precluded from raising it for the first time on appeal. Second, he cites no legal authority for his claim that he is entitled to an evidentiary hearing. Finally, there was no basis to hold an evidentiary hearing where he failed to produce any evidence to support his claim of prosecutorial vindictiveness.

First, because Randhawa failed to request an evidentiary hearing below, he is precluded from raising it for the first time on appeal. Generally, appellate courts will not consider issues raised for the first time on appeal, unless the issue reflects a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Not only did Randhawa not request an evidentiary hearing below, he concedes he did not provide any briefing to the trial court on the law

regarding prosecutorial vindictiveness or under what circumstances an evidentiary hearing was required. *See* RP 19-20, 23. Whether the trial court should have held an evidentiary hearing when Randhawa never requested one does not constitute a “manifest error” of “constitutional dimension” such that it may be raised for the first time on appeal.

Second, Randhawa fails to cite any legal authority to support his contention that the trial court erred in not requiring the State to set forth “objective justification” for the refiled charges at an evidentiary hearing. Br. of Appellant at 5. Appellate courts will not consider arguments made without citation to legal authority. *Johnson Forestry Contracting, Inc. v. Washington State Dept. of Natural Resources*, 131 Wn. App. 13, 27, 126 P.3d 45 (2005); *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (appellate court refusing to review issue that defendant neither briefed nor cited to any authority); *see also* RAP 10.3(a)(6). Thus, this Court should decline to address whether an evidentiary hearing was required where Randhawa has not adequately briefed the issue or cited to any legal authority.

Finally, Randhawa fails to proffer any evidence of vindictiveness to support his claim that he is entitled to an evidentiary hearing. Although case law does not specify when a trial court must grant an evidentiary hearing to examine a claim of prosecutorial vindictiveness, courts have applied the

same analysis used in selective prosecution claims. *Bonisisio*, 92 Wn. App. at 791. For selective prosecution claims, a defendant “must produce some evidence” that the State could have prosecuted similarly situated defendants but declined to do so. *Id.* That evidence “must tend to show the existence of the elements of the claim.” *Id.*

Applying that analysis to this case, a defendant must first produce some evidence that tends to show the existence of his claim. It is only after a defendant adequately demonstrates the existence of the presumption of vindictiveness that the State must respond by showing “legitimate, articulable, objective reasons” for its actions. *Id.* Randhawa has not shown any evidence of prosecutorial vindictiveness to justify an evidentiary hearing. Randhawa erroneously contends that because his speculation into the State’s motivation led him to find a presumption of vindictiveness, he is entitled to an evidentiary hearing where the State should be required to set forth “objective justification” for the refiling of charges.

In *Bonisisio*, after the defendant rejected the State’s plea offer, the State amended the information charging him with ten additional counts. *Bonisisio*, 92 Wn. App at 788. The defendant filed a motion to prohibit the State from filing the amended information for prosecutorial vindictiveness and requested an evidentiary hearing to examine the motives of the State in filing the amended information. *Id.* The trial court denied Bonisisio’s

motion for an evidentiary hearing after concluding that he failed to make the necessary prima facie showing of vindictiveness sufficient to overcome the presumption that the State filed the additional charges for a proper reason. *Id.* at 788-89. The Court held that the trial court did not err in denying Bonisisio an evidentiary hearing because he failed to present evidence supporting his prosecutorial vindictiveness claim. *Id.* at 791-92.

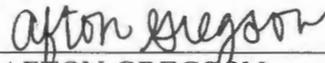
Unlike Bonisisio, Randhawa never requested an evidentiary hearing below. But even if Randhawa had requested an evidentiary hearing, nothing in the record indicates that the result of the proceedings would have been different. The purpose of an evidentiary hearing is to examine the motives of the State. *See Bonisisio*, 92 Wn. App. at 790-92. Here, the reasons for the State's decision in refileing the charges are substantiated by the record. The State dismissed the charges due to the ongoing shooting investigation and Ms. Shkarina's availability to testify, and then refiled the charges upon the completion of that investigation. CP 5-6, 11. There is nothing vindictive about the State's charging decision in this case.

V. CONCLUSION

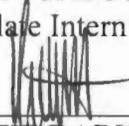
For the foregoing reasons, the State respectfully requests this Court affirm the trial court's denial of Randhawa's motion to dismiss for prosecutorial vindictiveness and affirm the convictions.

RESPECTFULLY SUBMITTED this 14th day of August, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



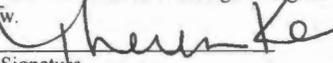
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Superior Court Case Number: 17-1-00759-7

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