

NO. 47970-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MARKIS OVERLY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Helen Whitener, Judge

No. 13-1-02658-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is defendant's felony harassment conviction supported by sufficient evidence when the State proved he made a true threat to fatally shoot police and coworkers that instilled in them a reasonable fear the threat would be promptly carried out?

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B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with threat to bomb or injure property and felony harassment. CP 1-2. His incriminating statements to police were ruled admissible over his objection. 5RP 414. A motion to proceed *pro se* was made between empanelment and opening statements. 2RP 82; 3RP 133

(5/19/15). Defendant withdrew the motion, clarifying he only sought more contact with counsel. 3RP 135, 139. The jury convicted him of felony harassment. CP 74-75. He made a post-verdict motion to proceed *pro se*. 6RP 563. It was initially denied, but granted on reconsideration before the next critical phase of his case. 6RP 566-577. Defendant represented himself at sentencing in accordance with his request. 6RP 593-94, 600-01, 612-621.

The court imposed credit for time served and 12 months community custody. CP 193, 229-230; 6RP 626. Discretionary LFOs were waived. 6RP 619. Only the mandatory \$500 Crime Victim Assessment, \$100 DNA fee and \$200 filing fee were imposed. 6RP 619, 632; CP 190. Defendant did not request a RCW 9.94A.777 mental health waiver. 6RP 615, 619-620, 632. His notice of appeal was timely filed. CP 176.

2. Facts

On June 27, 2013, defendant attended an 11:00 AM session with Dr. Hickey, a psychiatrist who had been treating him for several months. 3RP 144-45. Defendant wanted a letter declaring him permanently disabled, so he could retire from the Veteran's Administration. 3RP 145-46. Hickey refused to write one for him. 3RP 146. Defendant made it clear there was no reason for him to continue treatment if he could not get what he wanted. 3RP 146-47. Defendant complained VA police and coworkers disrespected him. 3RP 149. VA police refused to make an arrest he requested. 3RP 148-49. Defendant said he planned to go to the VA with a gun the next day and

kill 20 people. 3RP 150. He described that response as the way of the world, so it would be his solution, a solution he believed would embarrass the VA. 3RP 150-51. His exit strategy was suicide by cop. 3RP 150-51.

Dr. Hickey perceived he was very angry. *Id.* In an effort to dissuade him, she asked how his son would feel about the plan. 3RP 151. He said his son would be proud once old enough to understand. 3RP 151. Defendant left the session about 20 minutes early, stating he would not return. 3RP 152-53. Hickey repeatedly tried to reach his psychologist. 3RP 156. The next day, she made several unsuccessful attempts to reach defendant. 3RP 157. Out of options, she called the FBI. 3RP 157.

A supervising officer at the VAPD received a call from defendant shortly thereafter. 3RP 177, 183. Defendant expressed dissatisfaction with the department's unwillingness to make an arrest he requested, and was not appeased by the officer's willingness to research the matter. 3RP 185-86. Defendant called his VA supervisor, Mr. Tangen, about an hour later. 3RP 212. He told Tangen things were coming to an end, he was not coming back to work, he was tired of dealing with everyone, and felt VA police violated his rights by failing to make the arrest he requested. 3RP 213-14. Defendant mentioned being off of his meds, then said he planned to exercise his Second Amendment right to "strap up." 3RP 213, 215. Tangen understood the expression to mean arm himself with a gun. 3RP 215. While repeatedly

referencing his Second Amendment right, defendant said police were going to be first. 3RP 216. In this context, defendant said the "no weapons" sign at the VA was a "joke." 3RP 216-17. He commented on the media attention the incident would draw. 3RP 217.

Like Hickey, Tangen tried to dissuade defendant by appealing to parental instincts, asking if he wanted his kids to remember him this way. 3RP 218. Defendant replied his kids would know once his plan got out, and said he would exercise his Second Amendment right the next day. 3RP 218-19. When Tangen asked him not to buy a gun, he said he had a plan. 3RP 230. Tangen requested assistance with the call. 3RP 238. Officers Gladson and Sherman arrived as the call continued on speakerphone. 3RP 256; 4RP 277. Gladson heard defendant say he was mad at the VA, VA police, and Detective Rambayon. 4RP 278, 280. Gladson interpreted his remarks about exercising the Second Amendment right to mean he planned to bring a gun into the VA. 4RP 279. The remarks and angry demeanor left Gladson concerned the threats would be carried out. 4RP 278-80. Defendant's anger and methodical explanation of the plan left Sherman with the same belief. 4RP 313. When arresting officers asked defendant if he had any weapons, he said: "I don't have any, but I'm getting some." 5RP 438.

C. ARGUMENT.

1. DEFENDANT'S HARASSMENT CONVICTION IS SUPPORTED BY EVIDENCE OF THE TRUE THREAT HE MADE TO FATALLY SHOOT POLICE AND COWORKERS THAT INSTILLED IN THEM A REASONABLE FEAR THE THREAT WOULD BE PROMPTLY CARRIED OUT.

Evidence is sufficient to support a conviction if any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* All inferences must be drawn most strongly against the defendant. *Id.* Sufficiency is reviewed *de novo*. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

The jury was accurately instructed on felony harassment's elements:

- (1) That on or about 27th day of June, 2013, the defendant knowingly threatened to cause bodily injury to a person immediately or in the future;
- (2) That the words or conduct of the defendant placed the person threatened in reasonable fear that the threat would be carried out;
- (3) That the person threatened was a criminal justice participant while performing his official duties, and the fear from the threat was a fear that a reasonable criminal justice participant would have under all the circumstances;
- (4) That the defendant acted without lawful authority; and
- (5) That the threat was made or received in the State of Washington.

CP 87; RCW 9A.46.020. Conviction for felony harassment requires proof of a "true threat." *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

True threats are not protected speech due to the need to protect people from fear of threatened violence and the disruption caused by such fear. *Id.*

a. Defendant's true threat was amply proved.

True threats are assessed according to an objective test. The inquiry focusses on the speaker to determine if the threat was made in a context wherein a reasonable person would foresee the threat would be interpreted as a serious expression of intention to inflict bodily harm upon or take the life of another. *Kilburn*, 151 Wn.2d at 44; *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001). Conviction does not turn on the speaker's intent to carry out the threat. *State v. Locke*, 175 Wn. App. 779, 790, 307 P.3d 771 (2013) (citing *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010)). Context often distinguishes true threats from benign expressions of humor or frustration. *Kilburn*, 151 Wn.2d at 46. It is improper to limit the inquiry to a literal translation of the words spoken. *Locke*, 175 Wn. App. at 790 (citing *State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003)).

Defendant's threats were true. They were detailed, specific, goal oriented expressions of his resolve to kill people at the VA. None could be reasonably confused with benign frustration or poorly considered humor. Defendant told Dr. Hickey that on following day he would settle his grudge against the VA by using his paycheck to buy a gun he would use to kill 20 people in retaliation for the failure of VA personnel to given him the respect he deserved. 3RP 150-51. An act he said his son would be proud of when old enough to understand. 3RP 151. This remark revealed resolve to murder

20 innocent people to restore a perceived loss of dignity, believing the act would be vindicated in time. That plan was then repeated to supervisors and police. 3RP 150, 183, 186, 204, 212, 214-215, 245; 4RP 278.

Defendant's threats were directed at people tied to the grievances he planned to readdress through publicity seeking mass murder: a psychiatrist who would not approve his retirement, an officer who would not make a requested arrest, and supervisors responsible for the coworkers who failed to show him the respect he thought he deserved. He remained as consistent about his dignity-restoring motive for seeking that revenge as he was about his means of brining it about. Once the score was settled, he planned suicide by cop. Any reasonable person of our country, in this time, would know his behavior invoked all too familiar signs of an imminent workplace shooting, *i.e.*, threats, intimidating remarks, inappropriate interaction with superiors, paranoia, perceived persecution, blaming others, unreasonable grievances, and disproportionate anger. ER 201; 53 No. 6 DRI For Def. 74.¹

"Horror stories of workplace violence saturate American ... front page headlines."² This is the social context into which defendant made his threats with appreciation for the force it added to them as demonstrated by references to the media attention the shooting would receive. By explaining

¹ *A Priority for Employers: Confronting Workplace Violence* (citing *Intervening Early Can Prevent Workplace Shootings*, AOL News (Aug. 4, 2010), [http://www.aolnews.com/2010/08/04/expert-early-intervention-can-prevent-workplace-shootings/\(2011\)](http://www.aolnews.com/2010/08/04/expert-early-intervention-can-prevent-workplace-shootings/(2011))).

² *Workplace Violence: Vicarious Liability and Negligence Theories As A Two-Fisted Approach to Employer Liability. Is Louisiana Clinging to an Outmoded Theory*, 62 La. L. Rev. 897 (2002).

his plan for mass murder to several individuals who personified the objects of his aggression, he left no room for a rational person to dismiss his threats as empty words. In this modern era of mass shootings in the workplace, any reasonable person would perceive his threats to be serious expressions of an intent to inflict bodily harm or death. Consider the grave consequences, the outrage that would have followed if law enforcement failed to intervene for the reasons defendant asserts in this appeal, and he proved true to his word.

b. The fear defendant foreseeably instilled in his coworkers was also well-proved.

Foreseeability of how a reasonable person would interpret the threat can be gauged by the reaction it received. *See State v. Kohonen*, 192 Wn. App. 567, 580, 370 P.3d 16 (2016). Reactions by the recipients should be the same as the reasonably foreseeable response in a vast majority of cases. *Id.* (citing *Kilburn*, 151 Wn.2d at 45 n. 3). Long-recognized concerns for public safety have taken on greater urgency through recurrent tragedies triggered by gun violence in workplaces and public spaces. *People v. Farley*, 46 Cal.4th 1053, 1060, 210 P.3d 361 (2009) (fatally shot seven people at work); *Com. v. McDermott*, 448 Mass. 750, 751, 864 N.E.2d 471 (2007)(workplace rampage); *Bridgeport Bd. of Educ. v. NAGE, Local RI-200*, 160 Conn.App. 482, 494, n.8, 125 A.3d 658 (2015) (disgruntled employee returned from leave, went on a shooting spree, killing four people then himself.). *Barker v. Smiscik*, 49 F.Supp.3d 489, 498 (E.D.Mich.2014).

Tragedies that showed armed men behaving suspiciously must be taken seriously. *E.g.*, *McKown v. Simon Prop. Group, Inc.*, 182 Wn.2d 752, 758, 344 P.3d 661 (2015) (mass-shooting at Tacoma mall); *Smiscik*, 49 F.Supp.3d at 498, n.5 (12 shot dead, 58 injured at movie). These now ubiquitous tragedies have led to common appreciation for the capacity of a single disgruntled gunman to inflict massive casualties with little restraint, even less forewarning. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771 (5th Cir. 2007).

The recipients of defendant's threats reacted consistent with public expectations of how people responsible for the safety of others must act when confronted with someone who expresses resolve to make a statement through mass murder. Dr. Hickey tried to talk him out of it. 3RP 151. Based on her professional judgment, the danger defendant posed invoked the "dangerous patient" exception to her duty of confidentiality, which explains the *Tarasoff*³ warning she gave to the FBI. 3RP 150, 156-57, 168-70.

Tangen reacted similarly. Yet his appeal to defendant's anticipated desire to spare his children the legacy of a disgruntled father who committed mass murder was equally unavailing. 3RP 218. Tangen was alarmed enough to seek immediate assistance, again aligning his reactions with defendant's psychiatrist. 3RP 221-22. Officer Gladson was concerned defendant would

³ *Petersen v. State*, 100 Wn.2d 421, 427, 671 P.2d 230 (1983) (citing *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal.3d 425, 551 P.2d 334 (1976)).

carry out his threats against VA police. 4RP 279-80. Officer Sherman shared that opinion, due in part to the "very methodical" way defendant explained his plan. 4RP 313. There is no reason any right thinking person would interpret defendant's threats to be anything less than he repeatedly explained them to be—notice of the next mass shooting to senselessly claim more innocent American lives. Defendant's conviction should be affirmed.

2. THE DIMINISHED CAPACITY DEFENSE
DEFENDANT CLAIMS HE WAS DEPRIVED IS
NOT SUPPORTED BY THE RECORD.

Counsel's performance is examined to ensure defendants receive a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-87, 104 S.Ct. 2052 (1984). *Id.* at 684. To establish ineffective assistance, a defendant must show counsel's performance was deficient, and the deficiency prejudiced the case. *In re Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012).

- a. Defendant cannot show counsel's strategic decision to advance a defense of denial over diminished capacity was deficient based on the available record.

Counsel's performance is only deficient when it falls below an objective standard of reasonableness based on the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption counsel's performance was not deficient. *Id.* Claims of

deficient performance asserted in a direct appeal cannot prevail if they depend on evidence outside the record. *Id.* They will also fail whenever there is a legitimate strategic or tactical reason for the challenged conduct. *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 252-53, 172 P.3d 335 (2007). Once a reasonable defense is selected it is not deficient to forego others. *Id.* at 253. "Counsel is not ... obliged to raise every conceivable point ... which in retrospect may seem important to the defendant." *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967).

Defendant contends his counsel was deficient for failing to advance a diminished capacity defense, which requires substantial evidence in the form of expert testimony that establishes a "mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). The testimony must logically and reasonably connect the ... mental condition with the asserted inability to form the requisite mental state. *State v. Griffin*, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983); *State v. Ferrick*, 81 Wn.2d 942, 945, 506 P.2d 860 (1973). It is not enough a defendant may suffer from a mental disorder. *Astebha*, 142 Wn.2d at 921. The decision not to assert diminished capacity is case dependent. *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001).

Defense counsel performed reasonably in pursuing the only defense the available record could support. Contrary to defendant's claim, there is no evidence counsel failed to investigate or pursue diminished capacity. *See*

McFarland, 127 Wn.2d at 335. Criminal defense counsel are not required to disclose failed efforts to retain favorable experts. CrR 4.7. It remains possible a favorable opinion on diminished capacity could not be obtained despite counsel's efforts, and the record remains silent about them as counsel chose not to reveal unfavorable evidence to the State. Speculation as to what the ideal strategy might have been is inadequate proof of deficiency. *State v. Carson*, 184 Wn.2d 207, 220, 357 P.3d 1064 (2015).

There is nothing in the record to support defendant's claim counsel irrationally abandoned a diminished capacity defense. Proof defendant was seeing professionals to treat a mental health diagnosis and failed to remain consistent with his medication is not enough to prove he could not form the mental state required to commit felony harassment. *Astebha*, 142 Wn.2d at 918-19 (diagnosis with syphilitic encephalopathy, major depression as well as substance abuse inadequate to prove diminished capacity). Defendant's diagnosis of anxiety, secondary insomnia and substance abuse likewise fails to bridge the gap. CP 3-11. Absent evidence to the contrary, it must be presumed counsel chose not to pursue diminished capacity because he could not assert it in good faith or find an expert willing to endorse it.

Defendant argues counsel erred in not calling defendant's doctors as experts, but, again, this argument wrongly assumes they would support the defense. Counsel may have known they would not. One can infer a helpful opinion would not have come from the psychiatrist exposed to defendant's threats, for she did not think he was disabled enough to retire. 3RP 145-46.

The admission he was only attending treatment to get a letter of disability further supports the inference he was a disgruntled malingerer looking for early retirement. 3RP 145-46. Deficient performance has not been proved.

- b. Defendant failed to show he was prejudiced by the presumptively strategic pursuit of a defense of general denial.

Deficient performance prejudices a defendant if there is a reasonable probability it affected the verdict. *McFarland*, 127 Wn.2d at 335. Proof of demonstrable strategic or tactical errors will not support reversal so long as adversarial testing envisioned by the Sixth Amendment occurred. *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045 (1984).

Defendant's failure to adduce proof of a viable diminished capacity defense makes it impossible for him to show verdict-affecting prejudice. The available record supports the opposite inference by revealing the trial court disbelieved his claims of impairment:

Now, in regards to mental health, Mr. Overly, you're one headstrong gentleman, but at no point in time did I see you have any mental health problem that warrants me monitoring mental health.

If you do have a mental health problem . . . I did not receive any information to support it.

6RP 620. Without proof of irrational abandonment of a viable mental health defense, defendant cannot establish deficiency or outcome determinative prejudice. The ineffective assistance claim should fail.

3. DEFENDANT INCORRECTLY CONTENTS THE COURT DENIED HIS REQUEST TO PROCEED PRO SE BECAUSE HIS FIRST REQUEST WAS EQUIVOCAL, THEN WITHDRAWN, AND HIS SECOND REQUEST WAS TIMELY GRANTED.

Criminal defendants enjoy a qualified right to represent themselves, which is subject to several procedural requirements that must be observed to maintain judicious and orderly administration of justice. *Faretta v. California*, 422 U.S. 806, 818, 95 S. Ct. 2525 (1975); *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010); *State v. Fritz*, 21 Wn. App. 354, 356, 585 P.2d 173 (1978). A motion to proceed *pro se* must be timely, knowing, intelligent and unequivocal. *State v. Paumier*, 155 Wn. App. 673, 686, 230 P.3d 212 (2010), *aff'd* 176 Wn.2d 29, 288 P.3d 1126 (2012). Respect for the right to represent oneself must be balanced with the other important rights a defendant waives to proceed *pro se*. *State v. Imus*, 37 Wn. App. 170, 189, 679 P.2d 376 (1984). Every reasonable presumption against waiver of the right to counsel is indulged. *State v. Coley*, 180 Wn.2d 543, 560, 326 P.3d 702 (2014). The decision on a request to proceed *pro se* is reviewed for an abuse of discretion. *Madsen*, 168 Wn.2d at 504; *State v. Breedlove*, 79 Wn. App. 101, 106, 900 P.2d 586 (1995).

- a. Defendant's pretrial motion to proceed *pro se* was equivocal, then withdrawn, so it cannot have any impact on his conviction.

A request to proceed *pro se* must be unequivocal. *State v. Stenson*, 132 Wn.2d 668, 741-42, 940 P.2d 1239 (1997). Requests are unequivocal

when they leave no doubt by expressing one clear, unambiguous meaning.
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 2494 (2002).

Defendant's pretrial motion to proceed *pro se* was equivocal. Raised by counsel, the closest defendant came to asking to represent himself was sharing a *pro se* success with the court. 3RP 133-34. He then explained:

All's [sic] I want is personal time with my attorneys prior to court every day so we can discuss so I know what we're going to do, so I know what to expect in front of whoever . . . so we could probably resolve this issue if you ordered these guys to meet with me

3RP135. The court inquired to reconcile the apparent contradiction:

So are you raising a motion now to represent yourself, or did you want the contact with your attorneys, which is what I believe your last request was of the Court?

3RP 139. Defendant replied: "[A]ffirm. The latter." 3RP 139. A clarifying discussion followed:

Court: So you're withdrawing your motion to represent yourself?

Defendant: Correct. I just want contact. If I get that, that's fine. If I don't, then, yes, I want to represent myself.

3RP 139. The requested interaction with counsel was ordered. 3RP 139. There is no pretrial denial of the right to proceed *pro se* capable of affecting the integrity of defendant's conviction.

- b. Defendant's claim he was wrongly deprived the right to proceed *pro se* at sentencing is equally meritless, for upon reconsideration that motion was timely granted.

Critical to the right of self-representation is a defendant's "chance to present [the] case in his own way." *McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S. Ct. 944 (1984). This right is actualized in proceedings held outside the jury's presence if a defendant is allowed to address the court freely on his or her own behalf. *See Wiggins*, 465 U.S. at 179.

Defendant's second request to proceed *pro se* came after the verdict was entered, so the trial court's resolution of the motion could only effect the integrity of post-verdict proceedings. 6RP 563. The trial court explicitly assured defendant of his ability to address the court at sentencing:

You will have an opportunity to present whatever you want to the Court. The difference is, the trial, attorneys presented the case on your behalf to the jurors.

You get an opportunity to present whatever you want to tell me at sentencing, irrespective of whatever your attorneys put forth.

6RP 567. Although the post-verdict request was initially denied, it was timely granted upon reconsideration prior to the sentencing hearing where defendant represented himself. 6RP 567-577, 582, 593-94, 601. Because the pretrial request to proceed *pro se* was equivocal, then withdrawn, and the post-verdict request was granted before sentence was imposed, neither the conviction nor sentence are capable of supporting the claimed *Faretta* error.

4. THIS COURT SHOULD DECLINE REVIEW OF DEFENDANT'S UNPRESERVED CHALLENGE TO MANDATORY LFOs.

RCW 9.94A.777 requires courts to decide if mental health problems undermine a defendant's ability to pay some mandatory LFOs.

a. Failure to object to mandatory LFOs based on RCW 9.94A.777 should preclude review.

Failure to specifically object to an alleged nonconstitutional error should preclude review. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985); RAP 2.5. Strict adherence to this rule promotes efficiency by giving trial courts an opportunity to fix potential errors, thereby avoiding unnecessary appeals. See *State v. Lindsey*, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

Defendant did not object to imposition of mandatory LFOs pursuant to RCW 9.94A.777, so he should be precluded from challenging them on that basis in his appeal.

b. The claim also fails on the merits.

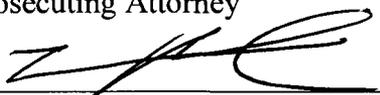
The trial court was of the opinion defendant's alleged mental health problems were either contrived or without support. 6RP 620. In so finding, the court decided the predicate requirement for waiver of mandatory LFOs under RCW 9.94A.777 was not present. There was no error in the court failing to reiterate the finding in the context of a RCW 9.94A.777 analysis defendant never requested. In the alternative, remand for application of the statute to the DNA and court fees is the only available relief.

D. CONCLUSION.

The harassment conviction is well supported by evidence defendant truly threatened to fatally shoot VA police and coworkers. Absent evidence to the contrary, counsel's decision to forego a diminished capacity defense is presumed to be unreviewable trial strategy. The *Faretta* error does not exist as the equivocal pretrial request to proceed *pro se* was withdrawn and the post-verdict request was timely granted. Failure to raise a RCW 9.94A.777 objection to mandatory LFOs should preclude review, but the claim otherwise fails on the merits as the predicate mental health problem was determined to be false or unproved. Remand for application of the statute to DNA and court fees is the only available relief; still, defendant's well-proved conviction and correctly imposed sentence should be affirmed.

RESPECTFULLY SUBMITTED: July 25, 2016.

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