IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARLON THOMAS,	)	
	)	
Defendant Below,	)	
Appellant,	)	Case No. 397, 2021
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE OF DELAWARE'S ANSWERING BRIEF

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DATE: July 5, 2022

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities

NATURE AND STAGE OF THE PROCEEDINGS

On November 9, 2020, a Sussex County grand jury indicted Appellant Marlon Thomas for second degree rape and third degree unlawful sexual contact ("USC"). A1. On March 8, 2021, a grand jury indicted Thomas for two counts of tampering with a witness, tampering with physical evidence, two counts of noncompliance with bond, and second degree conspiracy; and reindicted Thomas for the rape and USC charges. A8, 12–15.

Thomas waived his right to a jury trial, and, after a two day bench trial, the Superior Court judge found Thomas guilty on October 12, 2021 of all charges. A4–5, 9–10. The court ordered a presentence investigation and sentenced Thomas on December 10, 2021 to 55 years of Level V incarceration (with credit for 472 days served), suspended after 25 years for decreasing levels of supervision. A5, 10; Ex. A to Opening Br. at 1–4. Thomas appealed and filed a timely Opening Brief. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Appellant's claims are DENIED. The Superior Court did not violate the Fifth, Sixth, or Fourteenth Amendments to the United States Constitution when it did not conduct an on-the-record colloquy with Thomas to determine whether he was knowingly, intelligently, and voluntarily waiving his right to testify. No such colloquy is constitutionally required. Moreover, Thomas has waived his argument under the Delaware Constitution because he failed to adequately brief it.

STATEMENT OF FACTS

On August 25, 2020, G.T.[1] came home from her job at a fast food restaurant a little before midnight. A31. G.T. lived in Georgetown in a home with her mother, her aunt, and her cousin, Thomas. A30. She changed into comfortable clothes and lounged in her room, eating dinner and listening to music. A33, 58. Thomas knocked on her door. *Id.* She invited him in, he sat down on a chair, and the two watched television for a little while together. A59–60.

At some point, Thomas decided he wanted to have sex with G.T.. A34. She objected, saying, "no, we're cousins." A35. But Thomas, ignoring G.T.'s protests, got up, put on a condom, came towards her, pulled her shorts down and put his penis into her vagina from on top of her and from behind. A35–36, 39. Thomas also kissed G.T.'s breasts. A38. G.T. managed to get away and escaped to the bathroom. A39–40.

After a little while, G.T. returned to her room and Thomas was still there, sitting on a chair. A40–41. He asked, "What, you going to tell on me?" A41. She told him she had to get up early and he had to leave. A41. As soon as he left, G.T. began texting her friend Monika, telling her that she had just been raped. A41, 44–45, 301. She took a photograph of the condom Thomas had left behind on the floor and then she collected it, wrapping it and a red Lifestyles condom wrapper in a black

[1] For privacy concerns, the State refers to the victim by her initials.

bag. A42, 45, 116, 151; State's Ex. 13. Monika picked up G.T. and took her to the Georgetown police station. A45. From there, G.T. was taken to Nanticoke Hospital, where a forensic nurse conducted a sexual assault exam. A102, 108.

Georgetown police arrested Thomas and searched G.T.'s and Thomas's rooms. A96, 176–77. In G.T.'s room, officers found the corner of a red condom wrapper. A184. In Thomas's room, they found a bag of condoms with multiple brands in it, including Lifestyle condoms in red wrappers. A179–80. In a post-*Miranda* interview Thomas denied having sex with G.T. A166. A lab test revealed the presence of Thomas's DNA on G.T.'s right breast but was inconclusive as to whether Thomas or G.T. could be included as potential contributors to DNA mixtures found on the inside and the outside of the condom. A245–47. Lab testing also found no semen in the condom or on G.T.'s underwear or her vaginal swabs. A243.

At the time of his arrest on August 26, 2020, Thomas was ordered to have no contact with G.T. A264. Sometime thereafter, Thomas had his mother deliver a letter to G.T., in which he told her to recant her story and to talk to his attorney. A47–48. He also called G.T. from prison and repeated the same request. A47. Thomas asked his mother in a recorded prison phone call to destroy the letter that he had had her deliver to G.T. (and which she (his mother) had retained). A261–62; State's Ex. 62.

ARGUMENT

I. THE SUPERIOR COURT DID NOT VIOLATE THE FIFTH, SIXTH, OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN IT FAILED TO HOLD A COLLOQUY WITH THOMAS ABOUT HIS DECISION NOT TO TESTIFY, AND THOMAS HAS WAIVED HIS ARGUMENT BASED ON THE DELAWARE CONSTITUTION.

Question Presented

Whether the Superior Court violated Thomas's rights under the Delaware and United States Constitutions when it did not hold a colloquy with him to determine whether he was knowingly, intelligently, and voluntarily choosing not to testify.

Standard and Scope of Review

This Court reviews constitutional violations *de novo.*[2]

Merits of the Argument

Thomas did not testify at trial and the Superior Court did not hold a colloquy with him to determine whether he was knowingly, intelligently, and voluntarily waiving his right to testify. Thomas claims that the court's failure to do so violated his constitutional rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and under sections 4 and 7 of Article 1 of the Delaware Constitution. Opening Br. at 5. Thomas's claim is unavailing. Federal constitutional law does not require a court to hold such a

[2] *See Panuski v. State*, 41 A.3d 416, 419 (Del. 2012); *Martini v. State*, 2007 WL 4463586, at *2 (Del. Dec. 21, 2007).

colloquy, and Thomas failed to adequately brief his state constitutional law claim and has waived it.

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so."[3] This right is grounded in three provisions of the United States Constitution—the Fourteenth Amendment, from which the right to due process "includes a right to be heard and to offer testimony";[4] the Sixth Amendment's Compulsory Process Clause, "which grants a defendant the right to call 'witnesses in his favor'";[5] and the Fifth Amendment's guarantee against compelled testimony.[6] Although the United States Supreme Court seems to have acknowledged that a defendant's decision to testify or not is a personal right, waivable only by the defendant,[7] it has never addressed whether a court must conduct a colloquy to determine that a defendant is making his decision knowingly, intelligently, and

[3] *Harris v. New York*, 401 U.S. 222, 225 (1971).

[4] *United States v. Leggett*, 162 F.3d 237, 245 (3d Cir. 1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 51 (1987)).

[5] *Id.* (quoting *Rock*, 483 U.S. at 52 (quoting *Washington v. Texas*, 388 U.S. 14, 17–19 (1967))).

[6] *Id.* (citing *Rock*, 483 U.S. at 52).

[7] *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.").

voluntarily.[8] The vast majority of the federal circuit courts, however, have concluded that although the right is personal,[9] no colloquy is constitutionally required,[10] except in very limited circumstances where there is an obvious conflict

[8] *See Jenkins v. Bergeron*, 824 F.3d 148, 153 (1st Cir. 2016) ("[T]he Supreme Court has never articulated the standard for assessing whether a criminal defendant has validly waived his right to testify.").

[9] *See Brown v. Artuz*, 124 F.3d 73, 77–78 (2d Cir. 1997) (collecting cases and noting "every circuit that has considered this question has placed the defendant's right to testify in the 'personal rights' category—*i.e.*, waivable only by the defendant himself regardless of tactical considerations"); *accord Leggett*, 162 F.3d at 245; *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993). Citing the United States Supreme Court, this Court has also recognized that the right to testify is a personal decision "reserved for the defendant alone to make." *Cooke v. State*, 977 A.2d 803, 843 (Del. 2009) (citing *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring) (citing *In re Oliver*, 333 U.S. 257, 273 (1948))).

[10] *See Brown*, 124 F.3d at 79 ("We agree with those courts that place no general obligation on the trial court to inform a defendant of the right to testify and ascertain whether the defendant wishes to waive that right."); *United States v. Lall*, 852 F. App'x 625, 629 (3d Cir. 2021) *cert. denied*, 142 S. Ct. 344 (2021) ("A court 'has no duty to explain to the defendant that he or she has a right to testify or to verify that the defendant who is not testifying has waived that right voluntarily.'" (quoting *United States v. Pennycooke*, 65 F.3d 9, 11 (3d Cir. 1995))); *United States v. Muslim*, 944 F.3d 154, 163 (4th Cir. 2019) ("Courts, including this one, have held that the trial court does not have a *sua sponte* duty to conduct a colloquy with the defendant at trial to determine whether the defendant has knowingly and intelligently waived the right to testify." (internal quotation and citation omitted)); *United States v. Rodriguez-Aparicio*, 888 F.3d 189, 193–94 (5th Cir. 2018) (noting that an "overwhelming majority of circuits" have held that a trial court generally has no duty to verify that a defendant has voluntarily waived his right to testify); *accord United States v. Yono*, 605 F.3d 425, 426 (6th Cir. 2010); *United States v. Boyd*, 86 F.3d 719, 722 (7th Cir. 1996); *United States v. Gillenwater*, 717 F.3d 1070, 1080 (9th Cir. 2013); *Cannon v. Trammell*, 796 F.3d 1256, 1273, n.9 (10th Cir. 2015); *United States v. Anderson*, 1 F. 4th 1244, 1259 (11th Cir. 2021); *United States v. Ortiz*, 82 F.3d 1066, 1071 (D.C. Cir. 1996).

between a defendant and his counsel.[11]

The Sixth Circuit has noted, for example, that not all fundamental rights must be waived by a defendant in an on-the-record colloquy—"The waiver of certain fundamental rights can be presumed from a defendant's conduct alone, absent circumstances giving rise to a contrary inference."[12] And most of the circuit courts have held that it is primarily trial counsel's burden, not the court's, to advise a defendant of his rights surrounding his own testimony and to discuss with him the implications of his decision.[13] Indeed, the Third Circuit has even concluded that "it is inadvisable for a court to question a defendant directly about his or her waiver of the right to testify."[14] The court was concerned that such a colloquy might inadvertently cause the defendant to think that the court believed his defense was insufficient and prompt him "to abandon an appropriate defense strategy without

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[11] *See Muslim*, 944 F.3d at 163 (noting that a number of courts have recognized "exceptional, narrowly-defined circumstances" where a court has a duty to conduct a colloquy, such as when the court has reason to believe there is a conflict between a defendant and his counsel about the issue (citing *Rodriguez-Aparicio*, 888 F.3d at 194; *United States v. Manjarrez*, 258 F.3d 618, 624 (7th Cir. 2001); *Pennycooke*, 65 F.3d at 13)).

[12] *United States v. Stover*, 474 F.3d 904, 908 (6th Cir. 2007).

[13] *See Sexton v. French*, 163 F.3d 874, 881–82 (4th Cir. 1998) (noting that the Fourth Circuit, as well as others, have concluded that the primary responsibility for advising the client of his right to testify lies with trial counsel, not with the court; collecting cases).

[14] *Pennycooke*, 65 F.3d at 11.

good reason."[15] Such a concern might be even more pervasive in a case like Thomas's, in which the trial court was the trier of fact.

In any case, Thomas does not argue, nor is there any indication in the record, that his case fits within one of the narrow circumstances that might require an on-the-record colloquy. Thomas's claim that the trial court's failure to inquire on the record into whether he wanted to waive his right to testify violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution has no merit.

Thomas also makes the conclusory claim that the Superior Court's failure to conduct a colloquy to determine whether he voluntarily waived his right to testify violated Sections 4 and 7 of Article I of the Delaware Constitution.[16] But a conclusory assertion that a defendant's rights as guaranteed by the Delaware

[15] *Id. See also Cannon*, 796 F.3d at 1273, n.9 ("[R]equiring judges to question each non-testifying defendant about his decision not to testify may result in defendants feeling pressured to give up their right not to testify."); *Yono,* 605 F.3d at 426 ("[A] colloquy into the defendant's waiver of his right not to testify might impede the defendant's right to testify and, therefore, not only is not required, but is inadvisable."); *United States v. Gordon*, 290 F.3d 539, 546 (3d Cir. 2002) (noting that a district court should not inquire as to the defendant's waiver of the right to testify, "because the decision to testify or not is a part of trial strategy into which a judge should not intrude." (citation omitted)).

[16] Section 7 of Article I provides, *inter alia*, that "[i]n all criminal prosecutions, the accused hath a right to be heard by himself or herself and his or her counsel." Section 4 states, "Trial by jury shall be as heretofore." Thomas does not explain how Section 4 is implicated in his argument.

Constitution have been violated is insufficient to sustain such an argument.[17] In *Ortiz v. State*, this Court delineated the proper form for raising a state constitutional contention and held that "conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal."[18] Citing *Jones v. State*,[19] the Court identified at least a partial list of criteria to utilize in determining whether a United States constitutional provision has an identical or similar meaning to a similar provision in the Delaware State Constitution.[20] These criteria include: textual language; legislative history; preexisting state law; structural differences; matters of particular state interest or local concern; state traditions; and public attitudes.[21] A proper allegation of a State constitutional violation should include a discussion and analysis of one or more of these enumerated criteria.[22] Thomas makes no mention of any of the criteria necessary to make a viable claim that his

[17] *See Sykes v. State*, 953 A.2d 261, 266 n. 5 (Del. 2008) ("Sykes's conclusory assertion that his rights under the Delaware Constitution have been violated results in his waiving the State constitutional law aspect of this argument."). *See also Jackson v. State*, 990 A.2d 1281, 1288 (Del. 2009); *Betts v. State*, 983 A.2d 75, 76 n. 3 (Del. 2009); *Jenkins v. State*, 970 A.2d 154, 158 (Del. 2009); *Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008).

[18] 869 A.2d 285, 290-91, n.4 (Del. 2005).

[19] 745 A.2d 856, 864-65 (Del. 1999).

[20] *Ortiz*, 869 A.2s at 291 n.4.

[21] *Id.*

[22] *Id.*

State constitutional rights were violated. By not adequately addressing his State constitutional law claims, Thomas has waived them.[23]

[23] *See Green v. State*, 238 A.3d 160, 171 n.27 (Del. 2020) (declining to consider appellant's Delaware constitutional claims because he did not distinguish his rights under the Delaware Constitution nor separately address them (citing *Ortiz*, 869 A.2d at 290–91)).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 2,591 words, which were counted by Microsoft Word 2016.

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