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Case Number 244,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN WHEELER,	)	
	)	
Defendant Below,	)	
Appellant,	)	**Case No. 244, 2022**
	)	
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: October 5, 2022

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NATURE AND STAGE OF THE PROCEEDINGS

On October 20, 2016, Stephen Wheeler was arrested and a Sussex County grand jury later indicted him for Home Invasion, Robbery in the Second Degree, Assault in the Second Degree, and Conspiracy in the Second Degree. DI 1, 7;[1] A17–19. On April 13, 2017, Wheeler's counsel filed a motion to suppress, which the Superior Court scheduled for a hearing. DI 21-22. After conducting further investigation, Wheeler's counsel withdrew the motion to suppress on August 7, 2017. DI 24, 30. By August 28, 2017, Wheeler obtained new trial counsel. DI 33. Wheeler's new counsel, who continued through trial, refiled the motion to suppress. DI 34. The Superior Court held a hearing on the motion on October 27, 2017 and denied it. DI 46.

On March 26, 2018, in a pre-trial office conference, the State moved to amend the indictment: (1) to change the assault charge from subsection (a)(5) to (a)(6); and (2) to change the property in the robbery charge to add electronics to the items stolen. A184–85. The Superior Court granted the former and denied the latter. DI 57; A184–85. Trial counsel also discussed with the court the admissibility of evidence about a witness's sexual relations with the victim. A179–83. The court told trial counsel the scope of his questions on that issue would be limited. A183.

[1] "DI #" refers to items on the Superior Court criminal docket in *State v. Stephen Wheeler*, ID #1610013171 (A1–9d).

Trial counsel informed the court in a second office conference that day that Wheeler had decided to elect a "judge" trial instead of a jury trial. DI 57; A190–91, 223. Through a colloquy with the Superior Court, Wheeler, with the approval of the court and the consent of the State, waived his right to a trial by jury. A220–23. Neither Wheeler nor the State signed a written jury trial waiver. A191.

After a two-day bench trial, on March 26-27, 2017, the trial judge found Wheeler guilty as charged. DI 58-59; A639–52. The Superior Court ordered a limited presentence investigation. DI 58; A6. On April 6, 2018, the Superior Court sentenced Wheeler to a total of 67 years at Level V, to be suspended after 13 years for 8 years of Level III probation. DI 63, 76; A661–62. Wheeler appealed, and this Court affirmed his convictions and sentence on April 11, 2019.[2]

On January 27, 2020, Wheeler filed a *pro se* motion for postconviction relief along with a motion for appointment of counsel. DI 85–87; A798–830. On June 1, 2021 Wheeler filed an affidavit. A832–33. Counsel was appointed to represent Wheeler, and postconviction counsel filed an amended postconviction relief motion on September 27, 2021. DI 88, 101; A831; A834–70. Trial counsel filed an affidavit, the State filed a response to the amended motion, and Wheeler filed a reply to the State's response. DI 107, 110, 111; A882–88; A891–916; A917–28. The Superior Court heard oral argument on March 24, 2022 and held an evidentiary

[2] *Wheeler v. State*, 2019 WL 179600 (Del. Apr. 11, 2019).

hearing on April 8, 2022. DI 115, 118; A930–41; A943–91. After the State and Wheeler submitted post-hearing letter memoranda (DI 122, 127; A994–1012), the court denied Wheeler's postconviction relief motion on June 14, 2022. DI 124, 125; Ex. A to Opening Br.[3] Wheeler timely appealed and filed his opening brief. This is the State's answering brief.

[3] *State v. Wheeler*, 2022 WL 2134686 (Del. Super. Ct. June 14, 2022).

SUMMARY OF THE ARGUMENT

I. Appellant's claim is DENIED. The Superior Court did not abuse its discretion in denying Wheeler's motion for postconviction relief. The court correctly held that trial counsel's advice to Wheeler that a benefit of having a judge trial was that certain evidence could come in before a judge that could not come in with a jury was not deficient. The court further found that trial counsel's postconviction hearing testimony was credible, while Wheeler's was not. That finding is entitled to deference, and Wheeler has not presented clear and convincing evidence to rebut it. In addition, the court did not err in finding that, notwithstanding that Wheeler did not sign a written waiver, his colloquy established that he waived his right to a jury trial knowingly, intelligently, and voluntarily. The Superior Court also did not abuse its discretion in finding Wheeler did not establish prejudice because the record did not show that Wheeler would have chosen a jury trial.

STATEMENT OF FACTS

The Crime[4]

In the early morning hours of October 20, 2016, in Millville, Delaware, a 64-year-old man was awakened in his bed by several suspects who put a blanket over his head and assaulted him. He suffered multiple injuries including a broken nose and broken ribs. The victim also testified that numerous electronics and his wallet containing cash were taken. [Wheeler] was charged in connection with the incident, as well as Lauren Melton ("Melton") and Jerome Wheeler. Both Melton and Jerome Wheeler pled guilty as codefendants prior to [Wheeler's] trial. Melton testified that [Wheeler] had discussed with her plans to rob the victim on October 19, 2016, the day before the home invasion robbery. Text messages between Melton and the telephone she identified as belonging to [Wheeler] and which was found by police in [Wheeler's] possession included the following messages: "The back door is unlocked", "We are laying down", "I'm scared lol", "He is sleep", "I'm looking for the keys", "He called the cops", "What TF am I going to do yo" and, "Call your mom in u delete the messages". Melton testified that [Wheeler], Jerome Wheeler, and "Pat" came into the victim's house, that [Wheeler] did not participate in the

[4] The facts the crime are taken from the Superior Court's decision denying postconviction relief, *Wheeler*, 2022 WL 2134686, at *1 (footnotes omitted).

beating of the victim, but that all three men went through the house, taking mostly electronics.

The Pretrial Conferences and Waiver of Jury Trial

At an office conference on the day of trial, trial counsel told the court that he wanted to introduce a sexually explicit video taken from Melton's phone that involved her interacting with another woman while the victim watched and masturbated. A180. Trial counsel pointed out that in one interview with police, Melton had reported that the victim locked her in his house and refused to allow her to leave. *Id.* The court questioned the video's relevance. *Id.* Trial counsel argued that it exhibited Melton's moral turpitude. A181–82. The court found the video was not relevant to Melton's credibility. A182. Trial counsel further argued that the nature of Melton's relationship with the victim would be relevant to show her bias. A183. The court instructed counsel to review Delaware Rule of Evidence ("D.R.E.") 608 before asking Melton at trial about whether her relationship with the victim was sexual, noting, "Sex is not a credibility issue." *Id.*

At some point that same morning, trial counsel spoke with his client in lockup. A190. Trial counsel then reported back to the court:

> I just went down to talk to my client again. Last minute thing. And last week when we were talking, he was mentioning about waiving jury or not. And I went through the benefits and the downfalls with waiving a jury.

> I told him what was going on this morning. I went down again. He says, I still feel that I want to waive jury. I said, Here's the benefit, here's the downfall, it's up to you. All parties agree. It's not just us. It's the judge and the State.
>
> I approached the State. State has no opposition. And I'm just telling the Court, informing the Court what's going on.

Id. The court pointed out that it would have been nice to have known that earlier because a jury had been brought in for Wheeler's case. *Id.* Trial counsel responded, "You don't have to kill the messenger, Your Honor. I'm just communicating." *Id.* The court agreed to allow Wheeler to waive his right to a jury trial and ordered him to be brought in for a colloquy. A191. Trial counsel then asked the judge if the court had a paper waiver. *Id.* The judge responded, "I haven't done it in so long, I don't know." *Id.* Then a discussion was held off the record. *Id.*

The court conducted a colloquy with Wheeler as follows:

> THE COURT: . . . [Trial counsel] has advised me this morning that you have thought about some discussions you had with him last week further and wish to waive a jury trial. Is that correct?
>
> [WHEELER]: Yes, sir.
>
> ***
>
> THE COURT: There are certain decisions that you get to make and only you get to make. . . . To have a jury trial or have a bench trial, have a judge try it, that's your call. . . . Each one of those you get your advice from your lawyer, but you make the decision. Do you understand that?
>
> [WHEELER]: Yes, sir.

THE COURT: You're the captain of your ship.

If you waive a jury trial, this is what you give up: A jury consisting of 12 citizens of Sussex County, and the 12 citizens would listen to the evidence and listen to the testimony, and at the end of the trial, they would be asked to make a verdict.

For them to make a verdict which ends the case, there are two possible verdicts; guilty and not guilty. All 12 jurors have to be in complete agreement that you're guilty, all 12 have to be in complete agreement that you're not guilty in order to reach one of those verdicts. The jurors decide the facts of the case based on the testimony. They must apply the law as instructed by the judge.

If at the end of trial the 12 of them can't agree, we don't ask them whether it's 11 to 1, 1 to 11, 7 to 5 or 8 to 4. We just set it down for another trial.

Do you understand that?

[WHEELER]: Yes, sir.

THE COURT: So in a jury trial, the jury applies the law, as instructed by the judge, to the facts as they find them, based upon all of the testimony, and they make credibility determinations and basically attempt to decide what happened.

When you have a bench trial, the judge does everything. He has to apply the same law, but the judge makes the credibility determinations and makes the finding of facts.

Do you understand that?

[WHEELER]: Yes, sir.

THE COURT: Is it your personal decision that you would rather have a judge try this case than a jury?

[WHEELER]: I would have a judge trial.

***

THE COURT: This is your decision?

[WHEELER]: Yes, sir.

> THE COURT: Nobody is forcing you or threatening or twisting your arm. This is how you want to do it?
>
> [WHEELER]: Yes, sir.

A221–23.

Trial

In his opening statement, trial counsel began by pointing out that the victim was a 64-year-old man who was living with several women who were teenagers; he was buying drugs for them and having sex with them. A228. The court interrupted counsel and asked him how that information was relevant. *Id.* The court allowed counsel to go on, however, because there was no jury. A229. Trial counsel then argued that the intruders had beaten up the victim because of allegations that he had a sex slave in his house who needed rescuing; "He's 64 years old. He's running with teenagers, and sometimes if you run down the wrong rabbit hole, there's consequences." A230. He also argued Wheeler was not a part of the attack. A232.

During trial, trial counsel was able to elicit through cross examination of the witnesses that Melton had met the victim through Wheeler when she texted the victim out of blue to ask if he needed any company. A333, 374. He paid her $300 the first time they met, during which time they had sexual intercourse. A334. Melton said she slept with people for money, including the victim. A374, 395. Melton stayed at the victim's house off and on for about two months before the robbery. A309–10, 328. She was also still dating Wheeler. A404. The victim knew

of this relationship, and that Melton had sex with other men for money, and he did not like it. *Id.* Melton, who was 19 at the time, would sometimes invite other girlfriends to the victim's house. A328. They were all around her age, and they would smoke marijuana and do cocaine together and with the victim. A329. Sometimes they would have threesomes. A381. During one of Melton's four interviews with investigators, she told a federal officer investigating human trafficking allegations that the victim kept her locked in the house and never gave her money. A376–77. At trial, Melton said she made up that statement to protect Wheeler. A377. Initially the judge would not let trial counsel introduce that recorded interview, but he ultimately acquiesced, stating he would review the DVD in chambers. A378; *see* Def. Ex. 2.

The Postconviction Hearing

Wheeler testified during the postconviction hearing that about a week before the trial, trial counsel spoke with him over video and told him that they were going to have a jury trial because the prosecutor was new and was only "looking at one tree in the forest." A948. Wheeler understood that to mean that the State's primary witness was Melton, and trial counsel felt he could "attack her credibility based off of the four statements she made." A948–49. On the morning of trial, Wheeler testified, trial counsel met with him in lock up and told Wheeler that he thought it would be best if he had a bench trial. A951. Wheeler said, "[Trial counsel] told me

that it's best for me to have a bench trial because certain evidence could come in in a bench trial that couldn't come in during a jury trial." A951–52. According to Wheeler, trial counsel did not explain what that evidence would be. A952, 960–61. Wheeler decided to have a bench trial "because of where he told me that he was going to get some evidence in." *Id.* Wheeler also testified that trial counsel told him to answer yes to the questions that the judge would be asking him when he went up to the courtroom. *Id.* Wheeler further testified that even though he told the judge he wanted a judge trial, he really wanted a jury trial. A953. He explained that he did so because "I went with my lawyer's advice. I thought . . . he knew what was best." A954. Wheeler also said he was not being "accurate" when he told the court that no one was forcing him or twisting his arm. *Id.*

Trial counsel testified that he recalled having several conversations with Wheeler about the difference between a judge and jury trial:

> So there were several conversations with Mr. Wheeler concerning the benefits and the drawbacks for having a jury or nonjury trial. So I can't tell you exactly when I spoke to him. I know one was the day or, and I know there was at least one other time that I talked to him about the benefits and drawbacks.

A965–66. Trial counsel said he was concerned about having a jury trial because Jerome Wheeler's lawyer was not going to let Jerome testify, and counsel was worried about the potential racial mix of the jury because Melton and the victim were Caucasian while Wheeler was African American. A970, 972. But trial counsel

could not remember if he explained those reasons to Wheeler. A973, 977–78, 986–87. Trial counsel recalled explaining to Wheeler that:

> [I]f you have a bench trial, [the judge] will see or hear the evidentiary arguments before being made and make a decision on those arguments, and he will also be the finder of fact. So everything goes in front of a judge in a bench trial.
>
> In a jury trial, the jury doesn't see the evidentiary arguments and just sees what the evidence presented that would be admitted by the judge. So I explained that to [Wheeler], and I believe – I can't be certain, but the concern about trying to at least get the flavor that [the victim] was – didn't have clean hands.

A973. Trial counsel recalled that Wheeler was very active in his defense (A971) and Wheeler was certain that Melton's testimony was going to be favorable to him (A975). Trial counsel emphasized that he did not tell Wheeler which option to choose, but rather explained the options to him and let Wheeler decide. A979, 983. And Wheeler never told him that he specifically wanted a jury trial. A984. Trial counsel testified that he did not tell Wheeler how to respond to the judge's questions during the colloquy. A980.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING WHEELER'S MOTION FOR POSTCONVICTION RELIEF BECAUSE TRIAL COUNSEL'S ADVICE TO WHEELER ABOUT THE BENEFITS OF A BENCH TRIAL WAS NOT DEFICIENT AND WHEELER DID NOT ESTABLISH PREJUDICE.

Questions Presented

Whether the Superior Court abused its discretion in finding trial counsel's advice to Wheeler—that "a bench trial would be better because certain evidence could come in with a judge that could not come in with a jury"—was not deficient.

Whether the Superior Court abused its discretion in finding Wheeler could not show prejudice because the record did not establish that he would have chosen a jury trial.

Standard and Scope of Review

This Court reviews the Superior Court's denial of postconviction relief for abuse of discretion.[5] "[F]actual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous."[6] Questions of law are reviewed *de novo*.[7]

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[5] *Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008) (citation omitted).

[6] *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008).

[7] *Neal v. State*, 80 A.3d 935, 941 (Del. 2013); *Gattis*, 955 A.2d at 1280-81.

Merits of the Argument

In denying Wheeler's postconviction motion, the Superior Court found that trial counsel's advice to Wheeler was not deficient and that, in any case, Wheeler had failed to show prejudice because the record did not establish that he would have chosen a jury trial.[8] Wheeler claims the court erred; asserting: (1) the Superior Court misapprehended the facts; (2) Wheeler's waiver of his right to a jury trial could not have been knowing, intelligent, and voluntary because he was relying on flawed advice from trial counsel; (3) Wheeler's waiver was not valid because he did not execute a written waiver as required by Superior Court Criminal Rule 23; and (4) "[i]t is unrebutted that Mr. Wheeler wanted to go to trial and only changed his mind minutes before jury selection based on trial counsel's deficient advice." Opening Br. at 36–43. Wheeler's arguments are unavailing.

The Law Applicable to Establishing Ineffective Assistance of Counsel

In order to prevail on a claim of ineffective assistance of counsel, "'the defendant must show that counsel's representation fell below an objective standard of reasonableness,' and 'that there is a reasonable probability that, but for counsel's

[8] *Wheeler*, 2022 WL 2134686, at *6–9. Although the Superior Court analyzed the prejudice prong of the *Strickland* test under both the traditional analysis and under the one espoused by the Third Circuit in *Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 857 (3d Cir. 2017), as noted below, it is the State's position that the proper test is the latter. *See Wheeler*, 2022 WL 2134686, at *8 (finding no prejudice under either version of the test).

unprofessional errors, the result of the proceeding would have been different.'"[9] There is a strong presumption that counsel's representation was professionally reasonable, and judicial scrutiny of counsel's actions is highly deferential.[10] Likewise, a court must eliminate the "distorting effects of hindsight" after counsel's defense proves unsuccessful.[11] The Constitution does not require that the performance of former counsel be error free in order to satisfy the effectiveness standard.[12] The performance inquiry turns on whether counsel's assistance was reasonable under all the circumstances.[13] Evidence of isolated poor strategy, inexperience, or bad tactics does not necessarily establish ineffective assistance.[14] Under the Sixth Amendment, counsel's actions are measured against an "objective standard of reasonableness under the prevailing professional norms."[15]

"[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove

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[9] *Albury v. State*, 551 A.2d 53, 58 (Del. 1988) (applying *Strickland v. Washington*, 466 U.S. 668, 688 (1984) standard to Delaware).

[10] *Strickland*, 466 U.S. at 689-90; *Grosvenor v. State*, 849 A.2d 33, 35 (Del. 2004); *Righter v. State*, 704 A.2d 262, 264 (Del. 1997).

[11] *Strickland*, 466 U.S. at 689; *Gattis*, 697 A.2d at 1178.

[12] *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970).

[13] *Wong v. Belmontes*, 558 U.S. 15, 17 (2009); *Strickland*, 466 U.S. at 688.

[14] *Bellmore v. State*, 602 N.E. 2d 111, 123 (Ind. 1992).

[15] *Strickland*, 466 U.S. at 688. *See also Ploof v. State*, 75 A.3d 811, 821 (Del. 2013).

prejudice."[16] A defendant must specifically allege prejudice, and then substantiate that allegation.[17] If it is easier to dispose of an ineffectiveness of counsel claim on the basis of lack of prejudice, this Court may do so and focus its analysis on the second prong of the *Strickland* two-part test.[18] The failure to establish sufficient prejudice alone is enough to defeat an ineffective assistance of counsel allegation. The Third Circuit has held that "where a defendant claims ineffective assistance based on a pre-trial process that caused him to forfeit a constitutional right, the proper prejudice inquiry is whether the defendant can demonstrate a reasonable probability that, but for counsel's ineffectiveness, he would have opted to exercise that right."[19]

The Law Applicable to a Defendant's Waiver of his Right to a Jury Trial

"Both the United States and Delaware Constitutions guarantee a criminal defendant the right to trial by jury."[20] Nevertheless, the United States Supreme Court

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[16] *Strickland*, 466 U.S. at 693. *See Id.* at 696 (court "must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.").

[17] *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

[18] *See Ploof*, 75 A.3d at 825; *Strickland*, 466 U.S. at 697; *Swan v. State*, 28 A.3d 362, 391 (Del. 2011).

[19] *Vickers*, 858 F.3d at 857.

[20] *Davis v. State*, 809 A.2d 565, 568 (Del. 2002) (citing U.S. Const. art. III, § 2; U.S. Const., amend. VI; Del. Const. art. I, §7) (other citations omitted). The Sixth Amendment right to a jury trial applies to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 148-54 (1968).

has recognized that "since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury."[21] Thus, a defendant may waive his right to a jury trial.[22]

Waiver of the right to trial by jury must be knowing, intelligent, and voluntary.[23] "Generally, the waiver of a constitutional right will be intelligent and voluntary if the defendant is aware of the right in question and the likely consequences of deciding to forego that right."[24] In addition, "[t]he determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[25]

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[21] *Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942), *quoted in Davis*, 809 A.2d at 568.

[22] *Deshields v. State*, 706 A.2d 502, 508–09 (Del. 1998) (citing *Adams*, 317 U.S. at 275; *Patton v. United States*, 281 U.S. 276, 299 (1930), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78, 26 L. Ed. 2d 446 (1970)).

[23] *Vickers*, 858 F.3d at 851 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 236–37 (1973); *Adams*, 317 U.S. at 276–77).

[24] *Davis*, 809 A.2d at 569 (citing *Lewis v. State*, 757 A.2d 709, 714–15 (Del. 2000) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970))).

[25] *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *See also Bradley v. Cheshire Correctional Inst.*, 2020 WL 6684995, at *19 (D. Del. Nov. 12, 2020) (noting that for a waiver to be knowing and voluntary, it must be "the product of a free and deliberate choice rather than intimidation, coercion or deception" (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986))).

The procedure in Delaware for waiving a jury trial is governed by Superior Court Criminal Rule 23(a) ("Rule 23(a)"), which states: "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the Court and the consent of the State."[26] Delaware's Rule 23(a) is identical to Federal Rule of Criminal Procedure 23(a).[27] Although not required under Rule 23(a) or the federal[28] or State constitutions, this Court has held that Delaware trial judges should also conduct a colloquy with a defendant "to ensure that the defendant understands the nature of the right to trial by jury that is being relinquished and the implications of that decision."[29]

The Superior Court's Factual and Credibility Determinations are Entitled to Deference and are Supported by the Record

Wheeler's arguments are grounded on his belief that his version of events is unassailable. However, the Superior Court found Wheeler's testimony at the evidentiary hearing lacked credibility, including his assertion that he really wanted

[26] Super. Ct. Crim. R. 23(a).

[27] *Polk v. State*, 567 A.2d 1290, 1294 (Del. 1989). *See id.* (noting the common law requirements laid out in *Patton* in 1930 by the United States Supreme Court for waiver of jury trials were incorporated into Federal Rule 23(a)).

[28] *See Vickers*, 858 F.3d at 853–54 (noting that an on-the-record waiver is not constitutionally required, although it is probative and strongly encouraged).

[29] *Davis*, 809 A.2d at 572.

a jury trial and had been untruthful during the colloquy, and his claim that his decision to waive his jury trial was made at the last minute.[30] The court noted:

> I find serious discrepancies in Petitioner's testimony. He himself admitted that he was untruthful with the Court during his jury trial waiver colloquy immediately preceding his trial. During that colloquy he told the Court that he wanted to have a bench trial and that no one was forcing him to do that. However, at the evidentiary hearing, he admitted that that was not true, that he wanted a jury trial, and that he was forced into having a bench trial.[31]

The court also pointed out that, although Wheeler claimed he made his decision at the last minute, the record showed that trial counsel spoke with Wheeler about waiving his right to a jury trial on at least two separate occasions, and that "both [Wheeler] and [t]rial [c]ounsel informed the Court that they had a conversation the week before the trial as well as the day of the trial about the advantages and disadvantages of waiving a jury trial.[32]

In addition to reviewing a lower court's factual findings with deference, this Court reviews a court's credibility determinations after an evidentiary hearing with substantial deference and "will reverse only if the findings are clearly erroneous."[33]

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[30] *Wheeler*, 2022 WL 2134686, at *7.

[31] *Id.*

[32] *Id.* at *8.

[33] *Collins v. State*, 2016 WL 2585782, at *2 (Del. May 2, 2016) (citing *Woody v. State*, 765 A.2d 1257, 1261 (Del. 2001)). *See Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999) ("When reviewing decisions based on live testimony of witnesses [and]

Here, the Superior Court's credibility determinations were not clearly erroneous. Trial counsel consistently informed the court of his interactions with Wheeler. He told the court on the first day of trial and during the evidentiary hearing that he had discussed with Wheeler on at least two occasions the option of waiving a jury trial for a bench trial and the benefits and downfalls of each. In contrast, Wheeler testified at the postconviction evidentiary hearing that they had only discussed waiver of a jury trial on the morning of trial, but when the Superior Court asked him during the pre-trial waiver colloquy if it was correct that he had thought further about discussions he had had with trial counsel "last week" about waiving a jury trial, Wheeler responded, "Yes, sir." Wheeler also told the judge during the colloquy that he understood the decision to have a judge trial was his and his alone to make, that that was what he wanted, and that no one was forcing him to make that decision.

"It is well-settled that '[s]olemn declarations in open court carry a strong presumption of verity [creating a] formidable barrier in any subsequent collateral proceedings.'"[34] Wheeler's statements during his plea colloquy belie his postconviction allegations. The Superior Court found trial counsel's recollection of

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determinations of credibility, . . . this Court affords the lower court's decision substantial deference." (citations omitted)).

[34] *Jobes v. Mears*, 2022 WL 4747361, at *6 (D. Del. Sept. 30, 2022) (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). *Accord Dabney v. State*, 2010 WL 703108, at *3 n.20 (Del. Mar. 1, 2010).

events was more credible than Wheeler's present version of events and Wheeler has not presented clear and convincing evidence to rebut that determination.[35]

Trial Counsel's Advice Was Not Objectively Unreasonable

Both Wheeler and trial counsel agree that, in essence, counsel advised Wheeler that a benefit to having a judge trial was that he could get more evidence in front of a judge in a bench trial than he could in a jury trial. *See* Opening Br. at 36; A793. Wheeler argues that he relied on that advice in making his decision to waive his right to a jury trial, but the advice was flawed. Therefore, he claims, his waiver could not have been knowing, intelligent, and voluntary. Wheeler is wrong. Trial counsel's advice was not deficient, and the Superior Court's conclusion was not an abuse of discretion.

The United States Supreme Court has recognized that a jury trial bears burdens as well as benefits, and that some of the benefits of a judge trial are "the less rigorous enforcement of the rules of evidence" and "the greater informality in trial procedure."[36] Here, trial counsel explained to Wheeler that in a bench trial, the judge

[35] *Cf. Smith v. State*, 2014 WL 1017277, at *3 (Del. Mar. 13, 2014) (finding no error in Superior Court's rejection of ineffective assistance of counsel claim because appellant was bound by sworn statements in plea colloquy in the absence of clear and convincing evidence to the contrary). *Accord Webb v. State*, 2006 WL 3613635, at *1 (Del. Dec. 12, 2006).

[36] *Adams*, 317 U.S. at 278.

would hear more evidence as the trier of fact than a jury would because the judge would also be making decisions on the admissibility of the evidence. A793. The Superior Court found trial counsel's testimony to be credible and understood counsel to have been suggesting that "when there is an objection in a bench trial, the Court often hears evidence with the understanding that he or she is able to give it appropriate weight and to parse through the evidence to separate the inadmissible from the admissible in a way a jury cannot."[37] Trial counsel wanted to use that distinction to try to introduce more salacious impeachment evidence than might be admissible with a jury. Indeed, as noted by the Superior Court, "[t]rial [c]ounsel was able to get the salacious impeachment evidence into the record, although presumably the Judge did not consider it as to credibility, in keeping with his prior ruling on inadmissibility."[38] Although trial counsel was not successful in convincing the judge of his client's innocence, his tactic (and related advice to Wheeler) was a reasonable strategy.

Wheeler Did Not Establish Prejudice

Wheeler claims that he established prejudice because it was unrebutted that "[he] wanted to go to trial and only changed his mind minutes before jury selection based on trial counsel's deficient advice." Opening Br. at 43. But the Superior Court

[37] *Wheeler*, 2022 WL 2134686, at *7.

[38] *Id.*

found his assertion lacked credibility. Trial counsel testified that he had discussed waiver of a jury trial with Wheeler on at least one prior occasion, and Wheeler did not disagree when the court asked him if he had made up his mind based, in part, on a discussion that had occurred a week prior. The court's credibility determination is entitled to deference, and it did not abuse its discretion in finding that, assuming counsel's advice was unreasonable, Wheeler did not establish he would have chosen a jury trial—"the record shows . . . that [Wheeler] made an informed, strategic decision to proceed with a bench trial after consultations with [t]rial [c]ounsel."[39]

The Fact that Wheeler Did Not Sign a Written Waiver Does Not Change the Analysis in This Case.

Wheeler argues that it was error for the Superior Court to find his waiver was valid because he did not sign a written waiver as required by Superior Court Criminal Rule 23. Opening Br. at 41–42. Although Rule 23 requires a written waiver, that

[39] *Id.* at *9. *Cf. Vickers*, 858 F.3d at 857 (finding defendant did not establish he was prejudiced from counsel's failure to ensure a proper waiver of his jury trial right when "the record is devoid of any credible evidence that Vickers otherwise would have opted for a jury trial and affirmatively indicates that he made an informed, strategic decision to proceed with a bench trial after numerous consultations with his counsel"); *Muffley v. Cameron*, 2017 WL 6892909, at *9 (E.D. Pa. Mar. 17, 2017), *report and recommendation adopted*, 2018 WL 372290 (E.D. Pa. Jan. 10, 2018) (finding no merit to claim trial counsel was ineffective for advising defendant to choose a bench trial rather than a jury trial because "[t]he colloquy between the trial judge, trial counsel, and Petitioner clearly reflects that Petitioner was fully informed of the pros and cons of a jury trial versus a non-jury trial, and he knowingly and willfully decided to have a non-jury trial").

requirement is a procedural failsafe and the absence of a written waiver does not affect the validity Wheeler's knowing, intelligent, and voluntary waiver. As noted by the Superior Court, "[w]hile written waiver is important and preferable," trial counsel and the court ensured that "an appropriate and extensive" colloquy occurred in open court and on the record.[40] The court was satisfied that Wheeler understood that he was knowingly, intelligently, and voluntarily waiving his right to a jury trial. The court did not err in so finding.[41] Moreover, because Wheeler's colloquy adequately captured his waiver, it cannot be said that trial counsel was ineffective for failing to ensure Wheeler signed a written waiver.

[40] *Wheeler*, 2022 WL 2134686, at *7.

[41] *Cf. United States v. Saadya*, 750 F.2d 1419, 1420 (9th Cir. 1985) (noting that the purpose of a writing under Federal Rule 23 is to provide the best evidence of a defendant's consent and it is the least that is required; however, "express consent given orally by the defendant personally and appearing on the record may be equally good evidence." (citations omitted)).

CONCLUSION

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

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DATED: October 5, 2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN WHEELER,	)	
Defendant Below,	)	No. 244, 2022
Appellant,	)	
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
Plaintiff Below,	)	
Appellee.	)	

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2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 5,893 words, which were counted by Microsoft Word 2016.

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