COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1477-CR **Cir. Ct. No. 2009CF15**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH E. ARIENT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Joseph Arient appeals from a judgment of conviction of two counts of second-degree sexual assault of a child and from an order denying without a hearing his postconviction motion alleging ineffective assistance of trial counsel. Arient argues that his trial counsel was ineffective in

six ways and that the trial court erred in rejecting his claim of sleeping jurors and request for a new trial in the interests of justice. Arient also claims that this court must review military medical records inspected in camera by the trial court. We reject his appellate arguments and affirm the judgment and order.

¶2 Arient was charged with sexually assaulting his stepdaughter between April and June 2001, when she was fourteen years old. The victim testified that the two assaults occurred approximately two months apart and on a weekday when her mother was at work. Arient's wife, Sandi, testified that she was sure Arient watched her children while she was at work two times. There were other times when it appeared Arient had been in the home because things were missing or moved but she did not know how many times Arient had been there when she was not there.

¶3 In early 2001, Arient was a resident of the Exodus House, a residential drug and alcohol treatment facility which had restrictive rules regarding residents' comings and goings from the facility. The parties stipulated that Arient was at the facility from January 9 to February 20, March 1 to May 18, 2001, and that all other times until January 21, 2003, he was incarcerated in jail or prison. Evidence at the trial established the time periods or dates when Arient, as a resident of the Exodus House, had permission to leave the facility for medical appointments, job or apartment searches, family visits, work, or the opportunity to babysit his wife's children. The lead counselor at the facility, Rick Stordock, testified that Arient asked to babysit the children at least twice. February 20, 2001, a Monday night, was one date Arient babysat. Stordock did not recall any other times but acknowledged that Arient would have been again allowed to babysit after April 1, 2001.

¶4 Arient's postconviction motion alleged that his trial counsel was ineffective in the following ways: 1.) failing to provide the trial court with correct legal and factual support to garner admission of evidence that Arient had offered to take a polygraph examination when confronted by a detective with allegations of the sexual assaults; 2.) neglecting to challenge prejudicial charging delay between the victim's July 2007 report and the January 13, 2009 filing of the criminal complaint; 3.) failing to correctly inform Arient of the concerns underlying the trial court's inquiry whether a mistrial would be requested because Arient was unable to see the victim during her testimony and the consequences of a mistrial; 4.) failing to fully consult with Arient regarding the advantages and disadvantages of testifying on his own behalf; and 5.) failing to object to the prosecutor's alleged misrepresentations of the evidence during the examination of the victim and during closing arguments or failing to otherwise remedy the alleged misrepresentations. On appeal Arient also argues that trial counsel failed to request a limiting instruction regarding evidence that Arient was in a rehabilitation facility or incarcerated for significant periods of time. The trial court denied his claims without conducting a ***Machner***[1] hearing.

¶5 In order to find that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***Id.*** at ¶21. The trial court's findings of fact, which include "the circumstances of the case and the counsel's conduct and strategy" will be upheld unless clearly erroneous. ***Id.***

[1] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.*** The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). Under the second prong of the test, the question is whether counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable trial outcome. ***Id.*** at 640-41. An error is prejudicial if it undermines confidence in the outcome. ***Id.*** at 642. When reviewing a claim of ineffective assistance of counsel, the reviewing court may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶6 A postconviction motion alleging ineffective assistance of trial counsel does not automatically trigger a right to a ***Machner*** hearing. ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. A hearing is not required if the defendant does not allege sufficient facts or if the record conclusively demonstrates that the defendant is not entitled to relief on the facts alleged. ***Id.*** We review the trial court's decision not to hold an evidentiary hearing on a postconviction motion using a mixed standard of review. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). We determine de novo whether the motion alleges facts sufficient to demand a ***Machner*** hearing. *Cf.* ***Bentley***, 201 Wis. 2d at 310 (whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law to be reviewed de novo). If the motion fails to allege sufficient facts, the trial court has the discretion to deny the postconviction motion without a hearing. ***Id.*** at 310-11. We review that

determination under the deferential erroneous exercise of discretion standard. ***Id.*** at 311.

¶7 The first claim of ineffective assistance of counsel challenges trial counsel's performance in response to the prosecution's motion in limine to exclude evidence that Arient, when interviewed by a detective in the State of Washington on August 3, 2007, offered to take a polygraph examination. An offer to take a polygraph examination may be relevant and admissible to bolster the offeror's credibility as long as the person making the offer believes that the examination is possible, accurate, and admissible. ***State v. Santana-Lopez***, 2000 WI App 122, ¶4, 237 Wis. 2d 332, 613 N.W.2d 918. Arient contends that his trial counsel failed to adequately meet the prosecution's hearsay objection because counsel did not cite ***Santana-Lopez***, ¶6 n.4, to support application of the state-of-mind hearsay exception to an offer to take a polygraph examination. Arient also claims trial counsel could have argued that his offer to take a polygraph examination was admissible under the excited utterance hearsay exception because he spontaneously made the offer while under the stress of being accused of sexually assaulting his stepdaughter. It is not necessary to address whether or not counsel advanced a proper hearsay exception for admission of the offer to take a polygraph examination.[2] The trial court's pretrial ruling recognized that there is a limited exception for a party's willingness to take a polygraph. The trial court's ultimate ruling was based on the factual determination that Arient did not believe

[2] The prosecution made a hearsay objection to having the Washington detective testify at all. Having resolved the question of whether the detective would be allowed to repeat Arient's statements in denying the accusations, the trial court turned specifically to the offer to take a polygraph. Trial counsel argued that the offer to take a polygraph was relevant to Arient's state of mind as he was confronted with the allegations.

the test was admissible in court, not that the evidence was inadmissible hearsay. The record conclusively shows that Arient was not prejudiced by trial counsel's failure, if any, to advance a proper hearsay exception.

¶8 In ruling on the prosecution's motion in limine the trial court found that Arient did not offer to take the polygraph based on its admissibility in court; the court found Arient hoped that the polygraph would convince Wisconsin authorities that the case was not worth pursuing. Arient claims the court's findings are based on an inaccurate summary of Arient's interview. He contends that trial counsel was ineffective because counsel's summary was inaccurate, he failed to have Arient testify at the hearing about his offer to take a polygraph, he failed to play the recorded interview at the pretrial hearing, or at a minimum he failed to provide the court with a transcript of the recording.

¶9 We need not rely on the disputed portion of the recorded interview to sustain the trial court's finding.[3] Arient's first assertion of an offer to take a polygraph was accompanied by the requirement that the victim take one as well. Arient told that detective that if the victim was proven to be telling the truth, he would plead guilty as soon as the matter went to court. Thus, the trial court accurately determined that Arient's offer to take a polygraph was not based on a belief that the result would be used in court. Indeed Arient's own proposed bargain would have precluded admissibility in court. Arient's second mention of a

[3] Specifically Arient focuses on a later part of the conversation after his second assertion of his willingness to take a polygraph. Trial counsel represented that in response to the detective's assertion that "a polygraph can only help you because law enforcement can never use that against you," Arient stated, "Polygraph can help me. Can't help me in court." Based on a transcript Arient provided with his postconviction motion, Arient contends that he really stated, "Polygraph can help me—can help me in court." Even on appeal the parties disagree about whether at that point in the recording Arient said a polygraph "can" or "can't" help him in court.

polygraph during the interview was "Let's do a polygraph," and came in reply to the detective's proposal of dual polygraphs. Arient remained focused on the use of competing polygraphs as a tool for law enforcement and a means for determining whether charges should be filed. The trial court also found that Arient knew the polygraph was not admissible in court and he continued to offer to take it any way. That finding is also not clearly erroneous. Arient made further repeated offers to take a polygraph but those came after the detective advised Arient that the results could not be used in court. The trial court properly excluded the evidence by determining that Arient's offer to take a polygraph did not meet the requirement that it was made in belief that the result was admissible. The record conclusively shows that Arient was not prejudiced by alleged deficiencies in trial counsel's response to the motion in limine regarding evidence of an offer to take a polygraph.

¶10 Next we examine the claim that trial counsel failed to challenge prejudicial charging delay. The delay between the victim's reporting of the assaults (July 15, 2007) and the filing of the criminal complaint (January 13, 2009) was approximately sixteen months. A defendant has a due process right to be free from excessive precharging delay which substantially prejudices his or her right to a fair trial. ***State v. Blanck***, 2001 WI App 288, ¶21, 249 Wis. 2d 364, 638 N.W.2d 910. "To establish a due process violation, a defendant must prove that actual prejudice has been suffered as a result of the delay, and must show that the government caused the delay for an improper purpose." ***Id.***, ¶22.

¶11 Arient touts the destruction of sign in/out logs at the Exodus House as the actual prejudice he suffered.[4] Stordock, Arient's Exodus House counselor, testified on the basis of his case notes. There was not a complete loss of information about Arient's comings and goings from the house. Also the victim could not be specific about the dates of the assaults. The loss of the logs was not shown to be actually prejudicial. Moreover, Arient offered nothing but speculation that the prosecution deliberately delayed charging in order to gain a tactical advantage. Although the Wisconsin detective acknowledged that he listened to Arient's Washington interview in which Arient raised that he was in and out jail and a halfway house in early 2001, Arient makes no showing that the detective or prosecutor were aware that records nearly subject to destruction were available. Indeed the police report on which referral for prosecution was based does not reflect that law enforcement tried to discover records regarding Arient's whereabouts on dates certain in early 2001. Arient indicates that the prosecutor did not do any further investigation before filing the criminal complaint. There is nothing to suggest the prosecution was waiting out the destruction of the records. It is also just speculation that the prosecution delayed to avoid the possibility that a conviction would result in a concurrent sentence to the prison sentence Arient was serving in Washington. A motion to dismiss based on charging delay would have been unsuccessful. "Trial counsel's failure to bring a meritless motion does not constitute deficient performance." ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

[4] Richard Stordock of the Exodus House testified that he would have to check with his secretary to see if any logs existed because the house was required to keep them for only seven years. Arient extrapolates that the seven year destruction time would have been in 2008, after the case was turned over to the prosecutor but before the criminal complaint was filed.

¶12 During the victim's direct testimony a computer monitor blocked defense counsel's and Arient's view of the victim. When trial counsel commenced cross-examination he noted that he could not see the victim because of the computer monitor. The trial court stopped the proceeding and excused the jury. Arient confirmed that he not been able to see anything but the top of the victim's head during her direct examination. When the court pointed out that he had a constitutional right to confront his accuser and to actually see her testify, Arient replied, "I think she's hiding. Don't matter to me." The trial court took a recess to give Arient and trial counsel an opportunity to consider whether Arient wanted to continue the trial. The court made clear it would grant a mistrial and rehear the matter where the victim could be seen. Trial counsel subsequently informed the court that the defense was ready to proceed. The trial court addressed Arient directly explaining that the fact that he would be able to see the victim during cross-examination was likely adequate and that by electing to proceed he was waiving any objection over the fact that he could not see her during direct examination. Arient confirmed his understanding and declined any further opportunity to consult with trial counsel.

¶13 A defendant is constitutionally guaranteed a face-to-face meeting with witnesses against him. *See* ***Coy v. Iowa***, 487 U.S. 1012, 1016 (1988). Postconviction Arient claimed that trial counsel gave him "an unreasonably truncated explanation of the situation" pertaining to the violation of his right of confrontation which precluded him from considering the seriousness of the problem. He further indicated that he believed a mistrial would result in a need to start the case over from the very beginning causing a delay of more than six months and that he had no desire to remain in jail awaiting trial for another six or seven months. He argued that trial counsel was ineffective for not advising him of

the nature of the right of confrontation and in failing to explain that a mistrial would only result in delay of less than four months to the alternative trial date set in early November.

¶14 We consider how Arient was prejudiced. Vigorous cross-examination was had and Arient's right to confrontation was fully satisfied. *See* ***Virgil v. State***, 84 Wis. 2d 166, 186, 267 N.W.2d 852 (1978). Arient suggests a new trial would have come after he had gained insight regarding the victim's demeanor. Arient did not observe the victim's demeanor during her direct examination and would not have seen any further testimony if the mistrial had been requested. He was already of the opinion that the victim was lying and hiding during her testimony. Additionally, Arient said the inability to see his victim did not matter to him. He declined the opportunity to further discuss the matter with trial counsel even after the trial court emphasized that "you need to see someone testify when they're testifying against you." Finally, the alleged prejudice that he thought he faced six to seven months in jail rather than just four is not related to the trial result but only to his place of residence. Arient did not assert that he told trial counsel he dreaded waiting six or seven months in jail for a new trial. Trial counsel was not required to dispel Arient of a notion counsel was not aware of. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §2.4 (3d ed. Supp. 2003) (a client has a duty to "arm the lawyer with sufficient truthful information to enable the lawyer to carry out his side of the bargain effectively.") As the trial court noted, trial counsel was not obligated to persuade Arient to seek a mistrial when the inability to see the victim did not change anything. Arient was not prejudiced by counsel's handling of the opportunity to seek a mistrial.

¶15 Arient alleged in his postconviction motion that he was inclined to take the stand in his own defense but decided not to when counsel discouraged him from doing so because of his extensive criminal history. Arient argues his trial counsel was ineffective because counsel only advised him of the disadvantages of testifying and not of any potential benefits.

¶16 Because a criminal defendant has a fundamental right to testify, the trial court must ensure waiver of this right is knowing, intelligent, and voluntary. ***State v. Weed***, 2003 WI 85, ¶¶40-41, 263 Wis. 2d 434, 666 N.W.2d 485. Arient does not challenge the adequacy of the trial court's colloquy with him regarding his decision not to testify. The trial court's colloquy gave Arient an opportunity to ask the trial court questions about the advantages or disadvantages of testifying or not testifying and obtained Arient's confirmation that he had enough time to discuss the decision not to testify with his attorney. Arient does not challenge the trial court's determination that his waiver of the right to testify was knowing and intelligent. Thus, there is a finding of fact that Arient had all the information he needed to make his choice.

¶17 Arient's attack on the breadth of counsel's discussion of the issue with him is nothing more than an attack on counsel's opinion that it was in Arient's best interest not to have to admit his prior convictions. Counsel's advice to not testify to avoid admission of the number of prior convictions was consistent with the defense trial strategy of putting the State to its burden of proof after the passage of so much time. This strategy and opinion was professionally reasonable and does not render trial counsel ineffective. *See* ***State v. Arredondo***, 2004 WI App 7, ¶27, 269 Wis. 2d 369, 674 N.W.2d 647. The record conclusively shows that Arient is not entitled to relief on a claim that trial counsel failed to adequately consult about the decision not to testify.

¶18 Arient points to times during the trial where he believes the prosecutor mischaracterized the evidence and defense counsel failed to object; he claims trial counsel was deficient in failing to object. The first instance he cites occurred during the prosecutor's redirect examination of the victim as the prosecutor attempted to rehabilitate the witness after cross-examination pointed out a discrepancy between her trial testimony and preliminary hearing testimony on whether Arient said anything to the victim during the first assault. The victim testified at trial that during the first assault Arient told her not to fight or not to do anything or he would kill her. During cross-examination, defense counsel read the questions and the victim's answers on page fifteen of the preliminary hearing transcript and obtained the victim's confirmation that she had testified at the preliminary hearing that during the first assault Arient said nothing. On redirect examination the prosecutor referenced the cross-examination questions in which defense counsel read from the preliminary hearing and related the preliminary hearing testimony to the second assault. (At both the preliminary hearing and trial the victim indicated that Arient said nothing to her during the second assault.) The preliminary hearing questions quoted by the prosecutor were from page eighteen of the preliminary hearing transcript and related to the second assault. The victim confirmed that her testimony that Arient said nothing to her during the second assault was consistent with her preliminary hearing answers.

¶19 We acknowledge that the prosecutor referred to different preliminary hearing questions than the cross-examination referenced and left the impression that no inconsistency existed because the cross-examination referred to preliminary hearing questions related only to the second assault. We see no prejudice to Arient from counsel's failure to object to the misimpression. During cross-examination the victim disavowed any discrepancy in the two sets of

testimony because "he said nothing to me during the incidents." The victim testified that after the first assault Arient told her not to tell anyone or he would kill her. There was no inquiry at the preliminary hearing about what might have been said after the assault as the victim fled. The lost point of impeachment was minor. Moreover, whether or not Arient said anything during the assaults had no bearing on the elements of the offense.

¶20 Arient also cites the prosecutor's references in closing argument to the victim's testimony regarding timing of the assaults and to Stordock's testimony about times that Arient was allowed to babysit as misrepresentations to which trial counsel failed to object. The trial court found that the prosecutor had not mischaracterized the evidence and recognized that during closing arguments "evidentiary paraphrasing is often less than 100% accurate." It also found that the alleged mischaracterizations were "minutia at best." The finding that there were no mischaracterizations is not clearly erroneous because the victim only testified in generalities as to the months in which the assaults occurred. She testified that the second incident occurred "a couple months after" the first but she was never certain of the month of the first assault. Stordock's testimony about babysitting was also subject to differing interpretations in that he first said Arient had asked to babysit the children twice and then after repeating the date of the first babysitting occurrence indicated that he could not recall any other times. That which Arient characterizes as a mischaracterization of the evidence was the prosecutor's view on how the evidence could be construed. The closing was proper comment on evidence arguing to a conclusion and did not overstep by asking the jury to consider anything other than the evidence. *See* ***State v. Cockrell***, 2007 WI App 217, ¶41, 306 Wis. 2d 52, 741 N.W.2d 267. The record conclusively shows that

Arient was not prejudiced by trial counsel's failure to object to alleged mischaracterizations of the evidence.

¶21 A stipulation of the dates that Arient was a resident at Exodus House, incarcerated in jail, and incarcerated in prison between 2001 and 2003 was read at trial and sent back to the jury with the instructions. Arient argues that trial counsel was ineffective for not requesting a limiting instruction based on WIS JI—CRIMINAL 275, restricting the use of the stipulated facts to its proper scope. *See* WIS. STAT. § 901.06 (2009-10).[5] Arient acknowledges that he did not raise this final claim of ineffective assistance of counsel in his postconviction motion. Issues not preserved in the trial court, even issues of constitutional magnitude, will generally not be considered on appeal. ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Aside from waiver of the issue, we note that the jury was instructed, "You are to decide the case solely on the evidence offered and received at trial" and to not be "swayed by sympathy, prejudice or passion." We presume that the jury follows the instruction given by the trial court. ***State v. Smith***, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992). Considering these instructions and the evidence presented at trial, our confidence in the outcome is not undermined by trial counsel's failure to request a specific limiting instruction.

¶22 Arient makes a concluding argument that the cumulative effect of counsel's deficiencies were prejudicial. We have rejected Arient's claims of trial counsel's deficiencies. Overall our confidence in the outcome is not undermined. "[A] defendant is entitled to a fair trial, not a perfect trial, and an adequate lawyer,

[5] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

not the best lawyer." ***State v. Hanson***, 2000 WI App 10, ¶20, 232 Wis. 2d 291, 606 N.W.2d 278 (citation omitted). The record conclusively shows that Arient is not entitled to relief on his claims. The trial court was not required to conduct a ***Machner*** hearing.

¶23 Arient's postconviction motion alleged that "multiple jurors were sleeping or dozing off during significant portions of [the victim's] testimony on direct examination." He supported his allegation with an affidavit from an investigator who interviewed Arient's mother and brother, each of whom observed the trial from the public section of the courtroom. Arient's mother and brother told the investigator they observed jurors sleeping for significant periods of time during the victim's testimony.

¶24 Implied in the constitutional right to an impartial jury "is the presence of jurors who have heard all of the material testimony. The absence of this condition, whether it is due to a hearing deficiency or a state of semi-consciousness, could imperil the guarantees of impartiality and due process." ***State v. Hampton***, 201 Wis. 2d 662, 668, 549 N.W.2d 756 (Ct. App. 1996). Here the trial court determined postconviction that no juror was asleep during the trial. Arient argues that the trial court cannot reject the observations of his mother and brother and make a credibility finding without conducting an evidentiary hearing. The trial court did not reject the truth of what Arient's mother and brother believed they had observed during the trial. Rather it concluded that even upon hearing testimony that persons in the public viewing section of the courtroom believed jurors were sleeping, the court would find that no juror was sleeping based on its own observations from a better vantage point. The court's finding is also based on the failure of the prosecutor and defense to report jurors sleeping during the trial and their better vantage point to observe the jury. It also noted that the victim's

testimony would be of substantial interest to the jury and not likely to induce sleep. We conclude the trial court's finding of fact that no jurors slept during the victim's testimony is not clearly erroneous. Arient was not entitled to a hearing on his claim that jurors were sleeping during the trial.

¶25 Arient makes an additional catch-all argument: that based on the cumulative effect of errors which required an evidentiary hearing, the trial court erred in denying his motion for a new trial in the interests of justice without conducting a hearing. A final catch-all plea for discretionary reversal based on the cumulative effect of non-errors cannot succeed. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992). "[Z]ero plus zero equals zero." ***Id.*** (citations omitted). The trial court properly exercised its discretion in denying Arient's request for a new trial in the interests of justice. *See* ***State v. Betterley***, 183 Wis. 2d 165, 179, 515 N.W.2d 911 (Ct. App. 1994).

¶26 As the final issue in this appeal, Arient asks this court to review the victim's military medical records which the trial court inspected in camera. A trial court's in camera inspection determines whether confidential records contain information that is material to the defense of the accused. ***State v. Richard A.P.***, 223 Wis. 2d 777, 785, 589 N.W.2d 674 (Ct. App. 1998). The trial court produced a written report regarding its inspection of the confidential records. It concluded that the medical records reflected routine and uneventful medical information and contain nothing remotely relevant to this case.

¶27 We question why this court should simply conduct a second review when the trial court's report reflects a thorough and thoughtful review. This court has stated that in order to determine whether the trial court erred in not providing the defense with confidential records this court needs to independently review

them. ***Id.***; ***State v. Darcy N.K.***, 218 Wis. 2d 640, 655, 581 N.W.2d 567 (Ct. App. 1998); ***State v. Solberg***, 203 Wis. 2d 459, 462, 553 N.W.2d 842 (Ct. App. 1996), *rev'd.* 211 Wis. 2d 372, 564 N.W.2d 775 (1997). In those cases the trial court's limited disclosure or failure to disclose any of the confidential records was under attack on appeal. Here Arient does not provide any minimal basis for attacking the trial court's report on the in camera inspection. We acknowledge Arient's explanation in his reply brief that because he is not allowed to view the records, he cannot in any way advance an argument that the trial court erred in its assessment of the records. Arient's lack of access does not preclude him from identifying the type of information that might be found in the records and materiality to his defense. That some reason for conducting a second review of the records should be advanced is appropriate here because the need to review the military records was advanced by the trial court without any preliminary showing of materiality by the defense.[6] Arient has not suggested that the trial court's inspection lacked the focus that coincided with the defense's purpose and he could not because the trial court demonstrated its understanding of what would be helpful to the defense. Further, Arient has not developed an argument for a blanket requirement that this court must conduct a second inspection of records and we do not read ***Richard A.P.***, 223 Wis. 2d at 785, to impose such a requirement.

[6] Arient did not make the preliminary showing of materiality to obtain an in camera inspection of the records. The trial court was immediately on board with the defense's request for the victim's military records because of its belief that the military application questions and general evaluation conducted of applicants might touch upon prior sexual abuse. The trial court determined that the military record should be inspected to honor the holding in ***Pennsylvania v. Ritchie***, 480 U.S. 39 (1987). After the prosecution made an offer of proof that the military application and evaluation did not include any questions about prior sexual abuse, the trial court was skeptical that the military records would provide any helpful information to the defense. It continued, however, to recognize Arient's right to have the military records inspected and even delayed the trial to have the prosecution obtain and produce the records.

> If this court deemed itself obliged to review in camera inspections merely because the trial court found nothing exculpatory or held to be immaterial what the appellant cannot make a substantial claim is material, then in every criminal case we would be forced to perform de novo in camera inspections. … It is conceivable that mountains of reports and data would have to be studied, perchance to find some scrap of evidence which the trial court has already said does not exist and which we would have no reason to believe does exist; or material examined in camera would have to be analyzed anew to find some material exculpation which the trial court has said is not there and for which the appellant cannot marshall an argument otherwise.
>
> We will not assume such a burden. This court is not a trial court and not a fact finder. The Court of Appeals is a court for the correction of errors below; it is not a court of original jurisdiction. If the possibility that materially exculpatory evidence was suppressed is so strong, the defendant ought at least be able to name it and describe how it is material. Otherwise he has no right, under ***Brady*** [***v. Maryland***, 373 U.S. 83 (1963),] or otherwise, to ask this court to fish amongst the files and substitute its judgment for that of the trial court.

Barnes v. State, 277 S.E.2d 916, 921 (Ga. Ct. App. 1981) (citations omitted). We will not review the records subjected to the in camera inspection.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.