

No. 69593-2-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

FILED
Dec 31, 2015
Court of Appeals
Division I
State of Washington

**IN RE THE PERSONAL RESTRAINT PETITION OF
CALVIN ARTIE EAGLE, Petitioner.**

**SUPPLEMENTAL RESPONSE TO
PERSONAL RESTRAINT PETITION**

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A. QUESTION PRESENTED

This supplemental response is being submitted pursuant to this Court's ruling directing the parties to address the public trial issue regarding the re-arraignment proceeding.

B. SUPPLEMENTAL FACTS

The discussion regarding the amendment of the information occurred in open court towards the end of the pretrial motions. State's Response Brief App. H. The court recessed and then reconvened in chambers to arraign Eagle on the second amended information that had been prepared during the recess. State's Response Brief App. F at 35-36, App. H. The jurors were not sworn in until after the re-arraignment had occurred. App. H. The rest of the facts regarding the hearing are contained in the State's response brief.

Eagle's opening appellate brief was filed on August 27, 2010 and the reply brief on January 18, 2011. See COA No. 65098-0-I. The decision issued on May 31, 2011. In the appeal Eagle alleged that his right to public trial had been violated by the discussion of jury instructions in chambers. See App. L (Opinion, COA No. 65098-0-I).

C. SUMMARY ANSWER

Eagle asks this Court to grant him a new trial based on ineffective assistance of appellate counsel for failure to raise an alleged violation of

his right to public trial regarding the re-arraignment proceeding that occurred in chambers before trial. It is his burden to establish that his appellate counsel was ineffective for failing to raise the issue and to demonstrate prejudice therefrom. In order to prevail, he must show that he would have prevailed on asserting a violation of the right to public trial on appeal. He cannot do so because he has not met his burden to establish that his right to public trial was implicated by the specific proceeding, re-arraignment on an amended information, held in chambers.

Moreover, appellate counsel was not ineffective for failing to raise the issue on appeal because caselaw at the time focused on an adversarial proceeding, legal vs. fact, test, and did not suggest that a brief acceptance of a not guilty plea on an amended information would implicate the right to public trial. Even if appellate counsel had been ineffective for failing to allege a violation of the right to public trial regarding the re-arraignment proceeding, Eagle cannot establish prejudice from the failure to do so because the proceeding was separable from the trial. Eagle does not attempt to establish actual and substantial prejudice from the alleged public trial violation, relying upon the holding in In re Morris¹ that presumes prejudice from ineffective assistance of appellate counsel. That case is distinguishable as it involved a right to public trial violation

¹ In re Personal Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012).

regarding jury selection and not a proceeding that was separable from the trial. Even if Eagle were able to demonstrate prejudice from appellate counsel's failure to assert this right to public trial violation on appeal, he would not be entitled to a new trial, and he seeks no other remedy. Eagle's petition should be dismissed.

D. ARGUMENT

1. Eagle has failed to show that his right to public trial was implicated by the re-arraignment proceeding that occurred in chambers on an amended information.

As set forth in the State's response brief, it is Eagle's burden to demonstrate, under the "experience and logic test" set forth in Sublett², that the right to trial is implicated by the specific hearing challenged here.³ In his supplemental brief, Eagle argues, without citation to authority, that since the right to public trial would attach to arraignment on the original information, it must therefore also attach to re-arraignment on an amended information. It is his burden to demonstrate that *both* experience and logic dictate that such hearings be held in open court. He has failed to do so.

Eagle's argument ignores the fact the experience and logic test is applied to the nature of the *specific, actual*, proceeding at issue, and not to the label of the hearing. The courts have emphasized this distinction. In

² State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012).

³ The State's brief here supplements its previously submitted response brief.

State v. Russell, 183 Wn.2d 720, 357 P.3d 38 (2015), the court noted that the use of the term “jury selection” did not mean that the right to public trial automatically attached. *Id.* at 43. While observing that the right to public trial was implicated by the voir dire portion of jury selection, it concluded that the right was not implicated by the review of juror questionnaires for hardship issues in work sessions by the judge and parties. *Id.* It reasoned that the ability of a juror to serve at a particular time and duration was qualitatively different than the juror’s ability to serve as a neutral fact finder. *Id.* Quoting from the Sublett opinion, the court stated that the court must “consider the actual proceeding at issue for what it is, without having to force every situation into predefined factors.” *Id.* (quoting Sublett, 176 Wn.2d at 73).

The court in State v. Slert, 181 Wn.2d 598, 334 P.3d 1088 (2014) also made this distinction. There, the lead opinion concluded that the right to public trial did not attach to a pre-voir dire, in chambers discussion of juror questionnaire answers and subsequent dismissal of four of those jurors, even though it does to other parts of jury selection. *Id.* at 605-06. Other courts have also concluded that there is a distinction to be made within parts of “jury selection,” some to which the right to public trial attaches, and others not. *See, e.g.*, State v. Love, 183 Wn.2d 598, 354 P.3d 841 (2015) (right to public trial implicated by for cause and peremptory

challenges exercised at sidebar and in writing as part of jury selection), *but see, e.g., State v. Parks*, ___ Wn. App. ___, 2015 WL 6686880 (swearing in of jury venire in assembly room did not implicate right to public trial); *State v. Miller*, 184 Wn. App. 637, 338 P.3d 873, *rev. den.* 182 Wn.2d 1024 (2015) (2014) (right to public trial not implicated by pre-voir dire removal of juror who sat through pre-trial motions); *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013) (right to public trial not implicated by excusal of two jurors before voir dire due to illness).

Likewise, in *State v. Rocha*, 181 Wn. App. 833, 327 P.3d 711 (2014), the court found that the right to public trial applied to motions to recuse judges, but found that the hearing, which was conducted in a closed courtroom, did not actually involve a *motion* to recuse, but rather the supplying of information to the judge so that he could determine if there was a conflict of interest. *Id.* at 840-41. Distinguishing between the conveying of information and a request for action, the court determined that the right to public trial was not implicated by the hearing at which only information was communicated to the judge. *Id.* at 843.

The State acknowledges that the right to public trial is implicated at the initial arraignment hearing. For the reasons set forth in its response brief, the State does not agree, however, that arraignment on a non-substantive amendment to the information need be conducted in open

court. Regarding the experience prong, as previously noted, statutory provisions explicitly require guilty pleas be done in open court, but not pleas of not guilty. *Cf.* RCW 10.40.170 and RCW 10.40.180. The current rule does not require that arraignment occur in open court, although the former rule did. *Cf.* CrR 4.1(1983) and CrR 4.1 (2003). As informations may be amended at any time before a verdict, it would not be unusual for amendments to arise during the course of the trial, thus requiring re-arraignment, if necessary, to occur outside the presence of the jury. CrR 2.1. This is not the first time that re-arraignment on an amended information has occurred in chambers during trial proceedings. *See, State v. Westphal*, 62 Wn.2d 301, 382 P.2d 269 (1963) (defendant was arraigned on amended information, which deleted certain words, in chambers after jurors were selected). Moreover, defendants need not even be arraigned on non-substantive amended informations.⁴

Federal cases regarding violations of the Sixth Amendment right to public trial involving charging procedure hold that such procedural defects do not warrant reversal. *See, e.g., Sweeney v. U.S.*, 408 F.2d 121 (9th Cir. 1969)⁵ (arraignment on superseding indictment at bar did not violate Sixth Amendment right to public trial, finding irregularity in the arraignment

⁴ See State's response brief at p.16-18.

⁵ The facts of *Sweeney* are set forth more fully in the State's response brief.

procedure to be harmless); U.S. v. Oliver, 60 F.3d 547, 549 (9th Cir. 1995) (any error in grand jury indictment procedure was harmless where grand jury indictment was returned in closed courtroom but defendant did not claim any prejudice therefrom); U.S. v. McChristian, 47 F.3d 1499, 1504 (9th Cir. 1995) (harmless error standard applies where superseding indictment received in chambers and not returned publicly as required by court rule). Eagle has failed to show that the experience prong is met under the facts here, where the amended information was either of a non-substantive nature or the substance of the amendment had already been addressed in open court.

Eagle has also failed to show that the logic prong of the test has been met under the specific circumstances here. Since a defendant need not even be re-arraigned on a non-substantive amendment to an information, logically the public trial right should not be implicated by a re-arraignment in chambers on such an amended information, where a hearing need not even be held. All that occurred in chambers here was a waiver of reading of the amended information and the entering of a perfunctory not guilty plea. Nothing was litigated. The substance of the amendment of the information had already been addressed in open court. The second amended information was of public record and the trial proceeded on that information. It is hard to see how the values served by

the *defendant's* public trial right could have been furthered under the specific circumstances here: no witnesses were involved, the amended information was public record, all litigation regarding amending the information had occurred in open court, Eagle had already entered a not guilty plea and was proceeding to trial on the charges.

Eagle argues that the State's focus on the specific proceeding presents an unworkable rule. However, it is not the State, but the courts that emphasize it is the specific nature of the proceeding the court must look at in applying the experience and logic test. Moreover, just like courts have determined whether amendments to informations are substantive, as opposed as to form, over the years, courts can also determine whether arraignments on amended informations implicate the public trial right or not. Like the in chambers jury question discussions in Sublett and the non-litigious in chambers hearing in Rocha, open proceedings for the perfunctory entry of a not-guilty plea to an amended information would not have furthered the fairness of the trial or the appearance of fairness where all the litigation concerning the amendment had already occurred in open court.

2. Eagle has failed to meet his burden to establish that appellate counsel was ineffective in failing to assert a violation of the right to public trial and prejudice from the re-arraignment on the amended information in chambers.

Eagle asserts that under In re Morris he is entitled to reversal of his conviction and a new trial. He must demonstrate that if the right to public trial violation he now asserts had been raised on direct appeal, it would have been successful. Appellate counsel may have strategically chosen not to assert the issue believing it would not have been successful under the state of the law at the time the appeal brief was filed. At that time determining whether the right to trial was implicated was based on the “adversary proceeding” test outlined in State v. Rivera⁶. Given that there was no case that held the right to public trial was implicated by the type of hearing at issue here, Eagle has failed to demonstrate that appellate counsel was ineffective in failing to assert this right to public trial violation on appeal. In addition, Eagle has failed to identify any specific prejudice from the alleged violation here, which did not involve the trial itself nor a proceeding inextricably tied to the trial. Eagle has not shown that had appellate counsel raised the issue on appeal, it would have resulted in a new trial.

⁶ State v. Rivera, 108 Wn. App. 645, 32 P.2d 292 (2001), *overruled by* State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012).

In order to successfully raise an ineffective assistance of appellate counsel claim, the defendant, in addition to showing prejudice, must demonstrate the merit of the legal issue that appellate counsel was allegedly ineffective in failing to raise. In re Pers. Restraint of Netherton, 177 Wn.2d 798, 801, 306 P.3d 918 (2013). Appellate counsel's representation is presumed effective, and in fact review is particularly deferential when the alleged ineffectiveness is based on the failure to raise an issue on appeal. Charbonneau v. U.S., 702 F.3d 1132, 1136 (8th Cir. 2013). In order to demonstrate prejudice in an ineffective assistance of appellate counsel claim, the petitioner must show that the issue the petitioner claims should have been raised would have resulted in reversal of the conviction. *See, In re D'Allesandro*, 178 Wn. App. 457, 314 P.3d 744 (2013), *rev. den.* 182 Wn.2d 1021 (2015) (in order to establish prejudice from appellate counsel's failure to assert a right to public trial issue in the petition for review from the direct appeal, the petitioner must demonstrate that the Supreme Court would have granted review and reversed the conviction). Unless Eagle can provide specific, contrary evidence, this Court should presume that appellate counsel's failure to raise an issue was sound appellate strategy. *See, Charbonneau*, 702 F.3d at 1136-37.

At the time appellate counsel filed the opening brief in the direct appeal in August 2010, In re Morris, relied upon by Eagle, and many of the right to public trial cases outlining the parameters of the right, had not been decided, and most importantly Sublett which adopted the experience and logic test. A number of the Court of Appeals opinions that addressed right to public trial claims not involving voir dire of jurors in chambers relied upon the “adversary proceeding” test originally announced in State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001). *See, e.g., State v. Koss*, 158 Wn. App. 8, 16-17, 241 P.3d 415 (2010) (applying “adversary proceeding” test court concludes that right to public trial not violated by in chambers discussion of jury instructions); State v. Sublett, 156 Wn. App. 160, 181-82, 231 P.3d 231 (2010) (under “adversary proceeding” test discussion of jury deliberation question in chambers did not violate right to public trial); State v. Sadler, 147 Wn. App. 97, 193 P.3d 1108 (2008) (applying “adversary proceeding” set forth in Rivera, court concludes that *Batson* hearing that occurred in chambers violated right to public trial). At the time Eagle’s reply brief was filed, the Court of Appeals was still using the adversary proceeding test. *See, In re Ticeson*, 159 Wn. App. 374, 384, 246 P.3d 550 (2011) (“public trial rights apply to ‘adversary proceedings’”). The adversary proceeding test was interpreted to mean that the right to public trial applied to hearings where evidence was

presented, including suppression hearings, and to jury selection, but not to hearings involving purely ministerial or legal issues which did not require resolution of disputed facts. In re Ticeson, 159 Wn. App. at 384. The Supreme Court opinion in Sublett, which rejected the “adversary proceeding” in favor of the “experience and logic” test, was not issued until 2012.

Eagle’s appellate counsel did raise a violation of the right to public trial regarding the discussion of jury instructions that occurred in chambers in the appeal. This Court rejected that claim applying the “adversary proceeding” test. As the in chambers taking of the not guilty plea was perfunctory, did not involve the taking of evidence, and was not an “adversary proceeding,” appellate counsel was not ineffective in failing to raise it on appeal.

Furthermore, Eagle must demonstrate prejudice from appellate counsel’s failure to raise this alleged right to public trial violation on appeal. Eagle may not rely upon In re Morris to avoid his obligation to show prejudice because that case is distinguishable. In re Morris involved appellate counsel’s failure to assert a violation of the right to public trial regarding in chambers voir dire of jurors, an issue the court determined would clearly have resulted in a new trial if it had been raised on appeal. In re Morris, 176 Wn.2d at 161, 166. It held that the second part of the

ineffective assistance of counsel test, the prejudice prong, was clearly met because “in-chambers questioning of potential jurors is structural error.”
Id. at 166.

Eagle’s claim does not involve jury selection, and therefore it is not clear that his claim would have prevailed on appeal, or that the alleged violation would be considered structural error. As argued in the response brief, “structural error” is error that occurs *within the framework of the trial* itself, and does not simply involve an error in the trial process. See State’s Response Brief at 24-25. Any public trial violation for failing to accept Eagle’s not guilty plea on the amended information in open court did not affect the trial itself. It occurred prior to jury selection and prior to the taking of any testimony. It did not affect the framework of the trial. As such, any violation was not structural error and does not warrant a new trial. If a violation of the right to public trial occurred here, it was separable from the trial, and remand for a new public hearing would be the only appropriate remedy. *See, In re Detention of Reyes*, 184 Wn.2d 340, 348, 358 P.3d 394 (2015) (new trial on civil commitment proceeding not appropriate remedy where pretrial hearing held in violation of open proceedings requirement was separable from the trial); *State v. Rainey*, 180 Wn. App. 830, 843, 327 P.3d 56 (2014) (remand for new motion for new trial was appropriate remedy for violation of public trial right where

post-trial hearing was separable from trial). Eagle must show actual and substantial prejudice from the specific right to public trial violation here, and he has failed to do so.

3. Eagle's assertion of a public trial violation is an improper attempt to relitigate the right to public trial violation he alleged on appeal.

As appellate counsel did raise a right to public trial violation on appeal, albeit regarding a different in chambers discussion, Eagle's claim in this collateral attack is an improper attempt at relitigation of an issue already decided on direct appeal. "Personal restraint petitions must raise new points of fact and law that were not or could not have been raised in the principal action." In re Becker, 143 Wn.2d 491, 496, 20 P.3d 409 (2001). A personal restraint petition is not meant to serve as a forum for relitigation of issues already considered on direct appeal. In re Lord, 123 Wn.2d 296, 329; 868 P.2d 835 (1994); In re Personal Restraint of Pirtle, 136 Wn.2d 467, 491, 965 P.2d 593 (1998). Simply revising a previously rejected legal argument neither creates a new claim nor constitutes good cause to reconsider the original claim. In re Personal Restraint of Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). Nor may a petitioner create a different ground for relief merely by alleging different facts, asserting different legal theories, or couching the argument in different language. In re Lord, 123 Wn.2d at 329; In re Pirtle, 136 Wn.2d at 491. Eagle's

assertion of a violation of his right to public trial regarding this in chambers hearing, is not a new claim, but relitigation of the same ground for relief, albeit on different facts and a slightly different legal theory. *See, In re Pirtle*, 136 Wn.2d at 491 (defendant's assertion in personal restraint petition of ineffective assistance of counsel regarding jury instructions was improper relitigation of same grounds where defendant challenged jury instructions on appeal).

E. CONCLUSION

Based on the foregoing, Eagle's personal restraint petition should be dismissed.

Respectfully submitted this 31st day of December, 2015.



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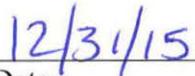
CERTIFICATE

I certify that on this date I placed in the mail with proper U.S. postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel, Jeffrey Ellis, addressed as follows:

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Date

APPENDIX

L

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 65098-0-1
)	
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
)	
CALVIN ARTIE EAGLE,)	
)	
Appellant.)	FILED: <u>May 31, 2011</u>

SPEARMAN, J. — A jury convicted Calvin Artie Eagle of first degree rape of a child and second degree rape of a child for raping his fiancée’s daughter. Among other things, he argues that the trial court violated his right to a unanimous jury verdict by failing to give a unanimity instruction, that the court violated his right to a public trial by discussing jury instructions in-chambers, and that defense counsel was ineffective for failing to object to evidence Eagle acted inappropriately toward other young girls. We reject his arguments and affirm.

FACTS

The State charged Calvin Artie Eagle with one count of first degree rape of a child and one count of second degree rape of a child for raping S.M., the daughter of his former fiancée.¹ The information alleged a pattern of child rape that occurred over several years:

¹ The jury also convicted Eagle of another count of second degree rape of a child based on conduct with S.M.'s younger cousin, B.B., but that conviction has not been challenged and is not at issue here.

RAPE OF A CHILD IN THE FIRST DEGREE, COUNT II

That during the time intervening between the 14th day of October, 2003, and the 13th day of October, 2005, the said defendant, CALVIN ARTIE EAGLE . . . did have sexual intercourse with S.M., who was less than twelve years old . . .

...

RAPE OF A CHILD IN THE SECOND DEGREE, COUNT IV

That during the time intervening between the 14th day of October, 2005, and the 14th day of June, 2008, the said defendant, CALVIN ARTIE EAGLE . . . did have sexual intercourse with S.M., who was at least twelve years old but less than fourteen years old . . .

At trial, S.M.'s testimony reflected a long pattern of abuse. She testified to what the State calls Eagle's grooming behavior: he would tickle her, poke her, wrestle with her, and give her massages, hugs, and kisses on the lips. She testified that at one point, Eagle came into her bedroom and asked to sleep with her because "he and my mom had a fight." She also testified that over the years, Eagle would punish her by taking away her ability to watch cable television if she complained about or was resistant to his sexual advances.

S.M. testified that Eagle committed several rapes during the charging periods alleged in each count. She described four different ways in which the rapes were committed: digital and penile penetration and oral sex committed by the defendant on S.M. and vice versa. S.M. testified that she had oral sex with the defendant on several occasions. In particular, she testified that when she was in sixth grade, Eagle bought her shoes in exchange for an act of oral sex and when she was in seventh or eighth grade, Eagle would perform oral sex on her "a few times a week." S.M. also testified that after her family moved in with Eagle, when she was in fifth grade, he would repeatedly find ways to be alone with her, fondle her and place his fingers inside of her vagina:

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- Q: What do you mean? Specifically how would he touch your vaginal area?
- A: He would use his finger and touch me down there.
- Q: Inside or outside of the clothing?
- A: Both.
- Q: Inside the clothing would he touch you on the inside or outside of your vagina?
- A: Both. It was like either one.
- Q: How long would he touch you on the inside of your vagina?
- A: Not for a long period but he would just do it like – I don't know how to explain it. Maybe not longer than 10 minutes straight.
- ...
- Q: When was the first time that he did that; do you recall?
- A: Um, I would say I would be 10 or 11.
- Q: Do you recall the first time that it happened?
- A: I can't recall the day or anything.
- Q: I'm not asking you to recall the date. I'm asking you if you can describe the event.
- A: I can't describe the event either. It happened too many times to remember the first one.

The remainder of S.M.'s testimony regarding the instances of rape by digital penetration was largely about *when* such incidents occurred. The following are representative samples of such testimony:

- Q: But you're pretty sure you got your bunk bed for the seventh grade birthday?
- A: Yes.
- Q: Did things happen in the beds that you had before that?
- A: Um, yes.
- Q: What I mean, I'm talking about him touching you inside of your vagina prior to you getting your bunk bed?

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A: Yes.

Q: Did he touch you inside of your vagina after you got your bunk bed?

A: Yes.

...

Q: Did the defendant touch you inside your vagina when you were under the age of 12?

A: Yes.

Q: Did the defendant touch you inside your vagina after you were the age of 12?

A: Yes.

S.M. also described an incident when she fell asleep watching a movie and awoke to find her pants down and Eagle on top of her attempting to “go all the way” by trying to insert his penis into her vagina:

Q: You mentioned your pants were down, his pants were down; what do you recall happening?

A: I remember he tried putting his penis in my vaginal area and I told him not to and he was just telling me he was making it easier for the first time with other guys.

The jury convicted Eagle of one count of first degree rape of a child and one count of second degree rape of a child for raping S.M. Eagle appeals.

DISCUSSION

Standard of Review

The question of whether Eagle’s right to a public trial was violated is a question of law this court reviews de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d (2005). Likewise, we review both Eagle’s allegations of ineffective assistance of counsel and his argument regarding lack of a unanimity instruction de novo. See State v. Cross,

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156 Wn.2d 580, 605, 132 P.3d 80 (2006) and State v. Furseth, 156 Wn. App. 516, 520, 233 P.3d 902, rev. denied, 170 Wn.2d 1007, 245 P.3d 277 (2010).

Right to a Public Trial

Eagle argues the trial court's conference with counsel in chambers regarding jury instructions violated his right to a public trial. Specifically, Eagle contends that the conference amounts to a courtroom closure, and that a retrial is necessary because the trial court closed the courtroom without first weighing the factors set forth in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). See State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) (Bone-Club factors must be weighed before courtroom closure).

Article I, section 22 of the Washington Constitution and the sixth amendment to the United States Constitution guarantee a criminal defendant the right to a public trial. Article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This provision guarantees the public and the press the right to open and accessible judicial proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). After the court weighs the Bone-Club factors, it must enter specific findings justifying its closure order. Easterling, 157 Wn.2d at 175.

Not all in-chambers conferences implicate the right to a public trial, however. Public trial rights apply only in "adversary proceedings," including presentation of evidence, suppression hearings, and jury selection." In re Det. of Ticeson, 159 Wn. App. 374, 384, 246 P.3d 550 (2011) (quoting State v. Koss, 158 Wn. App. 16, 241 P.3d 415

(2010)). Importantly, the right does not attach where the court resolves “purely ministerial or legal issues that do not require the resolution of disputed facts. . . .”

Ticeson, 159 Wn. App. at 384 (quoting Koss, 158 Wn. App. at 17.).

Here, Eagle claims the trial court “held an off-the-record conference in chambers to decide how the jury would be instructed.” This description, however, is not entirely accurate. From the transcript, it appears that the trial court and counsel spoke only briefly about instructions, but then decided to put their discussion about jury instructions on the record:

The Court: I have given the parties a copy of the court's proposed instructions. I will start with the State; do you have any objections or requested additional instructions?

Mr. Richey: Your Honor, I've not had an opportunity to review the Instructions but based on your comments that you made in chambers I'm going to ask that we just give the WPICs. I know you have talked about giving some instructions that were not WPICs; I'm asking that the court give the WPICs.

The Court: That's referring to the court's proposed instructions with regard to circumstantial evidence and expert witnesses. Okay, your objections or exceptions are noted.

Mr. Lustick, does the defense have any objections or requested additional instructions?

Mr. Lustick: Your Honor, we had noticed in the latest version of the WPICs that's published on the state bar home page and Westlaw home page that there's certain instructions that's proposed as to the jury, a certain way they might conduct themselves in the jury room. That was a WPIC and that was proposed by the Supreme Court's committee on pattern jury instructions. I know it's a new one, I don't know if it's ever been read in this court, but we thought it had merit. We felt it would give the jury some guideline and streamline things and actually move things along faster. So we had requested that instruction.

Other than that particular instruction, I don't see any issues from which I would raise to the level of objections.

The Court: Okay. Just for the record, a lot of judges communicated with each other after that WPIC came out and it was my recollection of the majority of those that were communicating said they would, and myself included, would not give that because I will not tell the jury how to conduct their deliberations, I won't tell them how they must conduct themselves in the deliberation room. It's not my function and role.

Mr. Lustick: In all candor, there's a discussion about how it's not mandatory instructions, there are certain instructions that the Supreme Court considers mandatory, but we'd ask that it be read. So we are just noting it for the record.

The Court: Okay. Let's bring the jury out.

Even if this amounts to a closure, however, this court has already resolved the question about jury instructions in Koss. There, we held that an in-chambers conference to discuss the removal of accomplice liability language from a proposed first degree burglary instruction did not violate the public trial right because it involved "a ministerial legal matter" that did not include the resolution of disputed facts. Koss, 158 Wn. App. at 17.

Eagle does not dispute that Koss is directly on point. Instead, Eagle urges this court to disagree with Division III: "this Court is not bound by Division Three's decision in Koss." But Eagle's only argument as to why Koss should not apply is to note that in two cases cited by Koss, Sadler, *supra* and In re Pers. Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994), "[n]either . . . addressed the type of conference at issue here." Eagle does not explain why a brief discussion of jury instructions that was later repeated on the

record is not purely “a ministerial legal matter[.]” Koss, 158 Wn. App. at 17, and we decline Eagle’s invitation to disagree with Koss on this issue.

Ineffective Assistance of Counsel

Eagle claims his trial attorney provided ineffective assistance of counsel. The purpose of the effective assistance of counsel guarantee of the sixth amendment to the United States Constitution is to ensure that a criminal defendant receives a fair trial. Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to prevail on a claim of ineffective assistance of counsel, Eagle must demonstrate (1) deficient performance, that his attorney’s representation fell below the standard of reasonableness, and (2) resulting prejudice, that but for the deficient performance, the result would have been different. Strickland, 466 U.S. at 687; State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990) (adopting the standards in Strickland). If a defendant fails to establish either prong, the Court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To establish deficient performance, Eagle has the heavy burden of showing that his attorney “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 466 U.S. at 687. There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). As the Supreme Court explained in Strickland:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Strickland, 466 U.S. at 689. Here, Eagle claims defense counsel was ineffective because he failed to object to four instances in which the State elicited evidence Eagle acted inappropriately toward other young girls.

The following are the four instances to which Eagle now objects. First, during the direct examination of S.M.:

Q: As far as your breasts go, did he talk to you about other people's breasts?

A: He talked about one other girl's breasts with me. He compared them.

Q: Tell us about that.

A: Like my friend [C] would be always over and he said [C] has the boobs and you have the bubble butt.

Q: Did he say these things to [C] directly about these things?

A: He told her she had big boobs for her age and stuff like that.

The second was during the direct examination of S.M.'s brother:

Q: Did you ever see anything inappropriate between Mr. Eagle and any of those miscellaneous friends that came over?

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A: Um, he slapped [C] on the bottom and chased her around the house.

Q: Did you see anybody else?

A: Her friend [A].

The third instance was also during the direct examination of S.M., about the other defendant B.B.'s younger sister:

Q: What happened?

A: He was in my bedroom with [B.B. and B.B.'s younger sister] and he's usually touching her hair telling her how pretty she's getting and her hair is nice and long and everything. He was just paying a lot of attention to her and stuff.

Q: What did you think about that? Did that have any impact on you?

A: I freaked out a little bit.

Q: What do you mean?

A: I was scared that he was going to go to her next and I wanted to stop it.

The fourth and final instance to which Eagle objects came during the direct examination of S.M.'s grandmother, when the prosecutor asked her about Eagle's attention to B.B.'s younger sister:

Q: Did you ever see the defendant pay any attention to [B.B.'s younger sister]?

A: Yes. I did see him paying attention to [B.B.'s younger sister] and in fact that was at that birthday party where the pajamas were given to [B.B.]

Q: What kind of things did you see?

A: He was talking about how she was growing up to be so pretty. What a pretty girl she was turning into.

Q: A birthday party you said for [B.B.]

A: Right.

Q: What age was she turning, do you remember?

A: I do. [B.B.] was turning eleven. So [B.B.'s younger sister] would have been nine.

Here, S.M. testified at length that, among other things, Eagle would punish her by taking away her ability to watch cable television if she complained about or was resistant to his sexual advances, that he bought her shoes in exchange for oral sex when she was in sixth grade. She also testified that over the years, starting when she was 10 or 11 years old, Eagle would repeatedly find a way to be alone with her, fondle her, and place his fingers inside of her vagina. Additionally, B.B. testified that Eagle raped her when she was under 12 years old by placing his fingers in her vagina. In light of this testimony, it is difficult to see how, had defense counsel objected to the above questions, “the result of the proceeding would have been different.” Strickland, 466 U.S. at 687. Even if counsel’s performance was deficient, we hold Eagle suffered no prejudice.

Failure to give Petrich Instruction

“A criminal defendant has the right to a unanimous jury verdict.” State v. York, 152 Wn. App. 92, 94, 216 P.3d 436 (2009). “When the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, either the State must elect which of such acts the State is relying on for a conviction or the court must instruct the jury to agree on a specific criminal act.” Id. “These precautions assure that the unanimous verdict is based on the same act proved beyond a reasonable doubt.” Id. (citing State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007) and State v. Camarillo, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990)). The failure to give a unanimity or Petrich² instruction is “presumed to be prejudicial and is

² State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

deemed harmless only if no rational juror could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt.” State v. Allen, 57 Wn. App. 134, 137-38, 787 P.2d 566 (1990) (citing State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)).

Here, the State failed to elect, and the trial court failed to give, a Petrich instruction as to the child rape counts involving S.M. Eagle argues this violated his constitutional right to a unanimous jury verdict. The State essentially concedes this was error, but responds the error was harmless under Camarillo and Allen. We agree.

In Camarillo, the victim testified to three different sexual abuse incidents. Camarillo, 115 Wn.2d at 66-68. The defendant did not dispute the specifics of any one incident, but instead offered only a general denial that he had abused the victim. The Supreme Court noted that the evidence showed there were “no factual differences between the incidents[,]” and as such, there was no basis for the jury to distinguish among the acts described. Id. at 70. The Court held the error was harmless, noting that the jury had to believe either the victim’s story or the defendant’s story. Id. at 72.

Similarly, in Allen, the defendant was convicted of indecent liberties based on the testimony of the child victim. The defendant did not challenge any specific incidents, but issued only a general denial. The State failed to elect which act it was relying upon, and the trial court did not give a unanimity instruction. This court held the failure to give the instruction was harmless, because again, the jury’s choice was to either believe the defendant or believe the victim:

In view of Dixon's general denial of any improper physical contact and C.P.'s testimony that substantially the same contact occurred during each visit, we find no rational basis for jurors to distinguish among the acts charged in Count I. The jurors had either to believe Dixon and acquit or believe C.P. and convict.

Allen, 57 Wn. App. at 139.

Likewise in this case, Eagle's evidence did not challenge any specific incidents but instead throughout his testimony, he offered only repeated and vigorous general denials that any of these incidents ever happened. For example, Eagle testified as follows:

Q: At any time when you were at the Lakeview house did you French kiss [S.M.]?

A: No, I'd never do that.

Q: Did you massage her breasts?

A: No. She didn't – I don't believe she had – no, she wasn't even developed at that time. No.

Q: Did you touch her thighs or legs?

A: Never.

Q: And, Mr. Eagle, did you put your finger in her vagina?

A: No. I would never do that. She's my daughter.

Q: Did you go into her room for the purposes of having sexual contact with her?

A: Absolutely not.

Q: Did you show her your body?

A: No, never.

...

Q: Did you use those occasions to touch the inside of her vagina?

A: Never.

Q: [S.M.] said that you were home alone one night and that you stuck two fingers inside of her vagina; did that happen?

A: No. That's the most disgusting thing that anybody has ever said about me.

Q: She said you kept your fingers inside of her vagina for 10 minutes; did you do that?

A: I would never do that. She's my daughter. And she would never allow that.

Q: Why do you say she would never allow that?

A: She wasn't that type of person.

Additionally, defense counsel specifically argued during closing that in this case, the jury had to choose between either believing Eagle or believing the girls:

When anyone looks at this case all they have to say is who do they believe. Do you believe the defendant, or do you believe the girls. Who do you believe? That's really the only outcome right there. That's the probabilities. You believe one or the other.

Eagle contends a harmless error analysis does not apply because, as was the case in York, there was conflicting evidence about whether specific instances of rape actually occurred from which the jury could choose. Specifically, Eagle contends S.M.'s answer of "not that I can recall" when asked about being touched in their first house in Blaine is at odds with S.M.'s testimony on cross-examination that Eagle *did* touch her in that house. But these two statements are not contradictory. A failure to recall an event is not an assertion that the event did not occur, thus a later statement affirming the event, although different, is not necessarily in conflict. Moreover, the conflicting evidence in York was markedly different. There, the victim testified the defendant raped her "[m]ost of the time" when she was staying at the defendant's aunt's house, which she alleged was "every Friday night[.]" York, 152 Wn. App. at 94. The aunt, however, flatly contradicted this testimony, claiming the victim "never stayed at her home during the

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relevant period[.]” Id. at 96. As such, this court held jurors could rationally distinguish between the alleged crimes.

Eagle’s reliance on the companion cases State v. Kitchen and State v. Coburn, 110 Wn.2d 403, 756 P.2d 105 (1988) is also misplaced. In Kitchen, the defendant was convicted of one count of second degree statutory rape. The victim testified in detail to the place and circumstances that surrounded each incident. But the defendant introduced evidence of several past contradictory statements made by the victim in which she stated that the allegations against the defendant were fabricated. In Coburn, the defendant was convicted of three counts of indecent liberties. But one victim’s testimony that the defendant also tried to touch her cousin was directly refuted by the cousin. And another victim’s testimony that the defendant touched her “private spot” was directly contradicted by other statements the victim had made about the incident. In those cases the Supreme Court concluded that the failure to give a unanimity instruction was not harmless because “[t]here was conflicting testimony as to each of those acts and a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred.” Id. at 412.

Here, by contrast, there is no conflicting testimony about the facts of each alleged incident from which the jury could choose. Instead, there is simply S.M.’s testimony, Eagle’s denials that the incidents occurred, and counsels’ argument to the jury that deciding the verdict was a matter of either believing Eagle or believing S.M. In short, there is no rational basis on which the jury could choose to believe one instance of rape, but not the other. As such, the failure of the trial court to give a Petrich instruction was harmless, and we affirm.

Statement of Additional Grounds

Eagle raises several additional arguments in his statement of additional grounds and in a separately filed supplemental brief. First, he contends he was denied his Sixth Amendment right to confrontation because he did not have the opportunity to cross-examine Sandra Sullivan, the court reporter who transcribed pre-trial statements of the victims. We reject this argument. It is currently unclear from the record why Eagle wanted to examine Ms. Sullivan, or whether the trial court precluded him from doing so.

Eagle also contends the prosecutor committed misconduct in a variety of ways, including soliciting “false” testimony from a detective in this case; obtaining “coerced testimonial statements” from the detective; violating United States v. Brady, 579 F.2d 1121, 1128 (9th Cir. 1978) by destroying evidence; and relieving the State of its burden of proof during argument. We reject these arguments. Eagle does not specifically identify which argument he claims is improper, and as such, his argument cannot be reviewed at this time. To the extent the other issues rely on matters outside the record, they should be addressed in a personal restraint petition.

Eagle next contends he did not receive a fair trial, because the counts involving S.M. should have been severed from the counts involving B.B. Severance is to be granted whenever the trial court “determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). To determine whether to sever charges to avoid prejudice to a defendant, a court consider:

“(1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.”

State v. Sutherby, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009). Where there is strong evidence on each charge, “there is no necessity for the jury to base its finding of guilt on any one count on the strength of the evidence of another.” State v. Bythrow, 114 Wn.2d 713, 721-22, 790 P.2d 154 (1990), quoting State v. Smith, 74 Wn.2d 744, 755, 466 P.2d 571 (1968)). Additionally, “[t]he fact that separate counts would not be cross admissible in separate proceedings does not necessarily represent a sufficient ground to sever as a matter of law.” State v. Kalakosky, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993). Indeed, severance is required only where the defendant can demonstrate that specific prejudice results from joinder. Bythrow, 114 Wn.2d at 720. Here, Eagle has not shown any specific prejudice in his statement of additional grounds.

Eagle also argues the evidence was insufficient to convict him of rape, because a DNA test on a blanket from S.M.’s room showed his DNA was not on the blanket. We reject this argument in light of S.M.’s testimony that Eagle digitally raped her.

Affirmed.

WE CONCUR:

Speerman, J.

Leach, a.c.j.

Cox, J.