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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0350**

State of Minnesota,  
Respondent,

vs.

Roy Ellsworth Gerber,  
Appellant.

**Filed March 17, 2014  
Affirmed  
Chutich, Judge**

Hennepin County District Court  
File No. 27-CR-11-17664

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Special Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Hudson, Judge; and Worke, Judge.

**UNPUBLISHED OPINION**

**CHUTICH**, Judge

This appeal is on remand from the Minnesota Supreme Court “for further proceedings consistent with” its decision in *Dereje v. State*, 837 N.W.2d 714 (Minn.

2013). Appellant Roy Ellsworth Gerber, who was convicted of second-degree criminal sexual conduct, argues that he is entitled to a new trial because (1) his stipulated facts trial was invalid under Minnesota Rule of Criminal Procedure 26.01, subdivision 3; and (2) his trial attorney was ineffective and “completely failed to subject the prosecution’s case to meaningful adversarial testing.” Consistent with *Dereje*, we conclude that Gerber is not entitled to a new trial and affirm his conviction.

### FACTS

In June 2011, Hennepin County charged Gerber with two counts of second-degree criminal sexual conduct. The charges arose after Gerber’s 11-year-old daughter (I.E.) disclosed to P.H., who was her stepmother and was married to Gerber, that Gerber had sexually abused her. The stepmother reported the matter to police.

On June 15, 2011, I.E. was interviewed at CornerHouse. I.E. indicated that Gerber had been sexually abusing her since she was approximately eight years old, with the last abuse occurring on June 13, 2011. I.E. reported that Gerber told her to get on top of him, that he then moved her up and down on top of his body in a grinding motion, with his penis touching her vagina and his chest touching her breasts. I.E. stated that Gerber moaned as he moved and said it “feels so good.” I.E. said that each instance ended when Gerber was “finished” and each lasted approximately 30 minutes.

Based on I.E.’s disclosures, Gerber was charged with two counts of second-degree criminal sexual conduct. *See* Minn. Stat. §§ 609.343, subds. 1(a), 2, .101, subd. 2, .3455 (2010). Count one alleged that Gerber engaged in sexual contact with I.E. on or about

June 13, 2011. Count two alleged that Gerber had engaged in sexual contact with I.E. between January 2007 and June 12, 2011.

On September 14, 2011, Gerber waived his rights to a jury trial and agreed to a stipulated-facts trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 3. He decided to do so because he hoped to avoid making his children testify at a trial and desired to put “[his] family back together if that’s at all possible.”

Accordingly, the parties submitted documents to the district court that included the criminal complaint; the police report with its supplements; and transcripts, synopses, and recordings of the CornerHouse interviews of I.E. and of her eight-year-old brother. The contents of these documents primarily support I.E.’s version of the events. But Gerber’s version is also included in the police report, which contains excerpts from Gerber’s custodial interview conducted on June 16, 2011.

During that interview, Gerber denied the allegations and claimed that his conduct was misconstrued. Gerber stated that he and P.H. had been dealing with long-term marital problems and that he knew that she was thinking about divorce. Gerber told police that he thought the divorce would be more amicable and that he did not think he would be “hailed in for abusing [his] children.” Gerber stated that his relationship with I.E. had not been good and that it was getting “worse,” that I.E. “hate[d]” him, and that they did not understand each other. Gerber acknowledged that he “snuggle[d]” with I.E. “maybe twice a year” and suggested that the allegations of sexual abuse were from P.H. When told that the allegations came from I.E., Gerber did not accuse I.E. of lying, but

explained that I.E. “could have taken it out of context.” Gerber maintained in the interview that he did not touch I.E. with sexual intent.

Neither attorney presented any argument to the district court. The prosecutor explained to the district court that the parties had “agreed to a 48 month stay of execution of sentence for five years should Your Honor find Mr. Gerber guilty of either Count 1 or Count 2.” The prosecutor further noted that the state would dismiss the remaining count at the time of sentencing if the court were to find Gerber guilty of one of the counts.

Based on its review of the documentary evidence, the district court found Gerber guilty of count two, for having sexual contact with I.E. between January 2007 and June 12, 2011. The court filed a written order with findings.

Sentencing took place on November 23, 2011. The prosecutor explained that the probation officer who prepared the presentence investigation report discovered that Gerber actually had two criminal history points, not the one point that the parties had contemplated. Based on this increase in Gerber’s criminal history score, the presumptive sentence for this second-degree criminal sexual conduct conviction increased from a 48-month stayed sentence for an offender with a criminal history score of one, to a 60-month executed prison sentence. The district court judge explained this increase to Gerber at length, explained that defense counsel had “done an outstanding job of advocating on [Gerber’s] behalf,” and explained that he could sentence Gerber to 60 months in prison, but that defense counsel had “successfully argued that we shouldn’t send [Gerber] to prison for five years.”

The district court then sentenced Gerber to 60 months, stayed for ten years, and dismissed the other count of the complaint. Gerber was ordered to spend 240 days in the workhouse, with credit for 130 days. The court further authorized an immediate furlough to chemical-dependency treatment once a bed became available. Several other probationary conditions were placed on Gerber, along with a ten-year conditional-release period. This appeal followed.

### DECISION

1. *Because Gerber's trial met the requirements for a bench trial under rule 26.01, subdivision 2, it was not procedurally defective.*

Consistent with *Dereje*, Gerber is not entitled to a new trial even though his trial was an invalid stipulated-facts trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 3. Rather, similar to the procedure followed by the parties in *Dereje*, the procedure followed here was not defective because it met the requirements for a bench trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 2. *See Dereje*, 837 N.W.2d at 720–21.

The procedure followed by the parties here was identical to the procedure followed by the parties in *Dereje*. In *Dereje*, the defendant waived all trial rights, and the parties “jointly submitted the complaint and police reports containing both *Dereje*'s and the victim's versions of events to the district court, which found *Dereje* guilty.” *Id.* at 718. Similarly, Gerber waived all trial rights, and the parties submitted to the district court the complaint and the police report containing both Gerber's and the victim's

versions of events, as well as documentary evidence of CornerHouse interviews of the victim and of her younger brother.

In *Dereje*, the supreme court held that “the submission of documentary evidence presenting contradictory versions of events cannot constitute a valid trial on stipulated facts under Minn. R. Crim. P. 26.01, subd. 3.” *Id.* at 721. But the court further held that

because the trial here met the requirements for a bench trial in Minn. R. Crim. P. 26.01, subd. 2, Dereje validly waived his jury-trial rights, and the district court made detailed and thorough findings of fact drawn from the stipulated evidence, we reject the demand for a new trial, concluding that Dereje’s bench trial was not procedurally defective.

*Id.*

Likewise, Gerber validly waived his trial rights, and the district court made detailed and thorough findings of fact drawn from the submitted documentary evidence. The court’s findings, similar to those in *Dereje*, adopted the victim’s version of the evidence and circumstances and, necessarily, rejected Gerber’s version. *See id.* We, therefore, conclude that while Gerber’s trial was an invalid stipulated-facts trial, it met the requirements for a valid bench trial under rule 26.01, subdivision 2, was not procedurally defective, and does not entitle Gerber to a new trial. *See id.*

2. *Gerber’s counsel did not commit structural error and was not ineffective where Gerber’s version of the events was included in the documentation submitted to the district court and where the format for the presentation of evidence was part of a negotiated plan to secure a more favorable sentence for Gerber.*

In *Dereje*, the supreme court held that structural error for an ineffective-assistance-of-counsel claim is not shown unless counsel “entirely fails to subject the prosecution’s

case to meaningful adversarial testing.” *Id.* at 722 (quotation omitted). The court concluded that an ineffective-assistance claim will fail where the record demonstrates that counsel engaged in reasonable strategic calculation throughout the representation and secured a favorable outcome for the defendant in the face of multiple felony charges and considerable evidence of guilt. *See id.* at 722–24.

Gerber first argues that he did not receive effective assistance of counsel at his trial because the record demonstrates that his attorney “completely failed to subject the prosecution’s case to meaningful adversarial testing.” Gerber asserts that “[n]otably absent from the exhibits [presented to the district court] is any evidence of Gerber’s version of events.” But Gerber’s version of the events was included in the evidence submitted to the district court. Specifically, the police report included excerpts from Gerber’s custodial interview with police. During that interview, Gerber maintained that his actions were misconstrued. He offered several possible motives for the allegations, including that he thought his marital problems might be fueling the accusations, that I.E. hated him, and that he and I.E. were not getting along. By ensuring that her client’s version of events was included in the documentation, Gerber’s attorney did challenge the state’s case. *See id.* at 723.

Gerber further asserts that his case is different than *Dereje* because, while the police report contains a summary of his statement to police, the video of the interview was not offered into evidence. Gerber notes that the state offered video, transcripts, and summaries of the CornerHouse interviews of I.E. and her younger brother. Gerber asserts that his attorney should have insured that the video of his custodial interview was also

presented. But the decision to submit a summary of Gerber's statement instead of a video is a matter of trial strategy and cannot be the basis for a claim of ineffective assistance of counsel. *See State v. Andersen*, 830 N.W.2d 1, 10 (Minn. 2013) (holding that a reviewing court "will generally not review an ineffective-assistance-of-counsel claim that is based on trial strategy"). In addition, Gerber does not assert that a video is more persuasive evidence or how a video would have changed the outcome in this case.

Gerber also argues that the state's evidence was not adequately tested by the short summary of his custodial interview, a conclusion that he claims is bolstered by the district court's order, which does not even mention Gerber's denial of the incident. But the supreme court affirmed the district court's decision in *Dereje* to adopt the victim's "version of the events and circumstances and, necessarily, [to reject] Dereje's version." *Dereje*, 837 N.W.2d at 721.

Gerber finally argues that he did not receive a benefit at sentencing for agreeing to the procedure because the parties' original agreement called for a 48-month stayed sentence, which was the presumptive guidelines sentence for an offender with a criminal history score of one. And he asserts that even if he did receive a benefit at sentencing, he was entitled to effective assistance of counsel at every stage of his trial, not just at sentencing.

But Gerber's arguments are unavailing under *Dereje*. In *Dereje*, the supreme court noted that "the presentation of evidence was part of a negotiated plan, which Dereje consented to, whereby Dereje's counsel secured a favorable sentence for his client." *Id.*

at 723. Due to the efforts of his counsel, one felony sentence was stayed, another felony charge was dropped, and Dereje was released immediately after sentencing. *Id.*

Similarly, here, as a result of the efforts of his attorney, one of the counts against Gerber was dismissed and he received a stayed, rather than a presumptive, executed sentence. The district court commented on the “outstanding job” that Gerber’s lawyer had done “advocating on [his] behalf.” Gerber has not shown that his attorney committed error or was ineffective so as to entitle him to a new trial.

**Affirmed.**