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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1059**

State of Minnesota,
Respondent,

vs.

Ronald Belter,
Appellant.

**Filed March 30, 2010
Reversed and remanded
Klaphake, Judge**

Hennepin County District Court
File No. 06050750

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Charles F. Clippert, Special Assistant State Public Defender, Caplan Law Firm, Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Worke, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

This matter comes before us on a remand from the Minnesota Supreme Court. Appellant Ronald Belter appealed his convictions and sentence for second-degree

criminal sexual conduct and second-degree assault, which this court affirmed. *See State v. Belter*, A07-1059 (Minn. App. Sep. 16, 2008). The supreme court affirmed appellant's convictions but remanded the question of appellant's aggravated sentence to us in light of its recent opinion, *State v. Rourke*, 773 N.W.2d 913 (2009).

Because the district court erred by instructing the sentencing jury to determine whether the victim was particularly vulnerable due to age, a reason for departure that the district court must decide, rather than limiting the sentencing jury's duty to determining facts concerning the victim's vulnerability due to age, we reverse appellant's sentence and remand this matter to the district court for further proceedings.

D E C I S I O N

Jury instructions must fairly and adequately explain the law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

The supreme court's decision in *Rourke* provides the framework for this remand. In *Rourke*, the state sought an upward departure based on the aggravating factors of particular cruelty and particular vulnerability. 773 N.W.2d at 916. The sentencing jury found that the victim was not particularly vulnerable but that she had been treated with particular cruelty. *Id.* at 916-17. In reversing *Rourke*'s sentence, the supreme court reasoned that the sentencing jury must find facts that are necessary to support an enhanced sentence, but the district court must explain why those facts or circumstances "create a substantial and compelling reason to impose a sentence outside the range on the [Sentencing Guidelines] grid." *Id.* at 919. Thus, "a district court must afford the accused

an opportunity to have a jury trial on the *additional facts* that support the departure and to have the facts proved beyond a reasonable doubt[,]” but “[i]f the State proves the additional facts beyond a reasonable doubt, the district court may exercise its discretion to depart from the presumptive sentence.” *Id.* (quotations omitted; emphasis in original). The *Rourke* opinion carefully distinguishes between facts and reasons, the first being the province of the jury and the second, the province of the district court. *Id.* at 920. The supreme court concluded that as applied specifically to the aggravating factor of particular cruelty, the sentencing jury must find additional *facts* not admitted by the defendant or proved as part of the conviction, but the district court must determine whether those additional facts provide a *reason* for departing. *Id.*

Like the aggravating factor of particular cruelty, particular vulnerability due to age presents a complex fact question that requires the factfinder to make factual determinations about vulnerabilities inherent in the age of the victim and the circumstances surrounding the offense. Once these facts are determined, the district court may impose an aggravated sentence, if the facts found provide a reason for a departure.

We conclude that the district court erred by instructing the sentencing jury to determine whether the victim was particularly vulnerable due to age. We therefore reverse appellant’s sentence and remand this matter to the district court for further proceedings consistent with this opinion and with *Rourke*.

Reversed and remanded.