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KeyCite Yellow Flag - Negative Treatment
Review Granted May 17, 2005

2005 WL 525522
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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Chad Allen ROURKE, Appellant.

No. A03-1254.
|
March 8, 2005.
|
Review Granted May 17, 2005.

Stevens County District Court, File No. K3-03-17.

Attorneys and Law Firms

Mike Hatch, Attorney General, St. Paul, MN, and Charles C. Glasrud, Stevens County Attorney, Morris, MN, for respondent.

John M. Stuart, State Public Defender, Marie Wolf, Assistant Public Defender, Minneapolis, MN, for appellant.

Considered and decided by LANSING, Presiding Judge; WILLIS, Judge; and HUDSON, Judge.

UNPUBLISHED OPINION

HUDSON, Judge.

***1** This appeal is from a sentence for first-degree assault, in violation of Minn.Stat. § 609.221, subd. 1 (2002). The supreme court has remanded appellant Chad Rourke's appeal for reconsideration of his challenge to his sentence in light of *Blakely v. Washington,* --- U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Although we conclude that *Blakely* does not apply to custody-status-point determinations under the Minnesota Sentencing Guidelines, the durational departure violated appellant's right to a jury trial under *Blakely,* and, therefore, we reverse and remand.

FACTS

Appellant Chad Rourke pleaded guilty in May 2003 to first-degree assault for threatening to kill his girlfriend, Erica Boettcher, while she was a passenger in his vehicle and then deliberately smashing the vehicle into a pole. The complaint charged Rourke with first-, second-, and third-degree assault, first-degree criminal damage to property, domestic assault, reckless driving, and careless driving. The plea agreement provided that the other charges would be dismissed; the parties would jointly recommend a sentence of 128 months, an upward departure from the presumptive 98-month sentence; and the state would waive its right to seek a greater departure.

The presumptive sentence of 98 months was calculated based on one criminal-history point, which consisted of a custody-status point due to Rourke being on probation at the time of the offense for his prior conviction of fifth-degree assault against Boettcher.

The district court sentenced Rourke to the agreed-on 128 months, citing appellant's two prior gross-misdemeanor convictions involving the same victim, his abuse of his position of power and control over the victim, the particular cruelty of the offense, and the plea agreement.

DECISION

Rourke argues that the upward durational departure, and the use of a custody-status point to calculate the presumptive sentence, violated his right to a jury trial under the Supreme Court's holding in *Blakely v. Washington,* ---U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In reviewing a constitutional challenge to a statute, this court applies a de novo standard of review. *See State v. Wright,* 588 N.W.2d 166, 168 (Minn.App.1998), *review denied* (Minn. Feb. 24, 1999).

In *Blakely,* the Supreme Court held that the greatest sentence a judge can impose is "the maximum sentence [that may be imposed] solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington,* --- U.S. ----, ----, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004). A defendant, it held, has a Sixth Amendment right to a jury determination of any fact, except the fact of a prior conviction, that increases the sentence above this maximum. *Id.* at 2543.

This court has held that *Blakely* applies to upward durational departures imposed under the Minnesota Sentencing Guidelines. *State v. Conger,* 687 N.W.2d 639 (Minn.App.2004), *review granted* (Minn. Dec. 22, 2004)[1] (appeal stayed pending decision in *State v. Shattuck,* C6-03-362); *see also State v. Saue,* 688 N.W.2d 337, 345 (Minn.App.2004), *review granted* (Minn. Jan. 20, 2004). The supreme court in *Shattuck* has determined that the upward durational departure in that case violated the appellant's right to a jury trial under *Blakely. State v. Shattuck,* 689 N.W.2d 785, 786 (Minn.2004) (ordering supplemental briefing on the issue of the appropriate remedy).

***2** The state argues that Rourke has forfeited the *Blakely* challenge to the durational departure by failing to object to it in the district court. *See State v. Leja,* 684 N.W.2d 442, 447-48 n. 2 (Minn.2004). But in *Leja, Blakely* was not briefed on appeal, and the supreme court reversed the upward departure on other grounds, making the discussion of waiver dictum.

The rule in *Blakely* applies to all cases pending on direct review at the time the *Blakely* decision was released. *See State v. Petschl,* 688 N.W.2d 866, 874 (Minn.App.2004), *review denied* (Minn. Jan. 20, 2005). Rourke has briefed the *Blakely* issue on appeal. And in the past the supreme court has applied some new rules more narrowly to only those pending appeals in which the issue had been raised in the district court. *Friedman v. Comm'r of Pub. Safety,* 473 N.W.2d 828, 838 (Minn.1991). But the court did not announce any narrower application of *Blakely* in *Leja.*

The state also argues that because Rourke stipulated to the upward departure, he is not entitled to relief under *Blakely. See Blakely,* --- U.S. at ----, 124 S.Ct. at 2541 (noting that a sentence enhancement not based on jury findings would be proper "so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding"). But Rourke did not stipulate to the aggravating factors; he only stipulated to the departure. In any event, this court has recently held that a defendant cannot stipulate, or enter an "admission," to an aggravating factor under *Blakely* unless he waives his Sixth Amendment right to a jury trial on the issue. *State v. Hagen,* 690 N.W.2d 155, 159 (Minn.2004). Rourke did not waive his right to a jury trial on the aggravating factors.

Rourke also argues that the custody-status point used to determine his 98-month presumptive sentence violated *Blakely.* Rourke argues that because the determination that he was in a custody status when he committed the current offense increased his sentence (from a presumptive 86 months to a presumptive 98 months) was made by the court rather than by a jury and was not a finding as to a prior conviction, it violated his Sixth Amendment right to a jury trial.

This court has recently rejected the argument that *Blakely* applies to the determination of a custody-status point. *State v. Brooks,* 690 N.W.2d 160, 163 (Minn.App.2004), *pet. for review filed* (Minn. Jan. 26, 2005). That opinion concludes that the custody-status point need not be found by the jury. *Id.* (noting custody-status point is analogous to fact of prior conviction, which falls under *Blakely* exception, and is also established by court's own records). Under *Brooks,* Rourke can be assigned a custody-status point without a determination by a jury.

Because the upward durational departure violated appellant's right to a jury trial under *Blakely,* that departure must be reversed. The matter must be remanded to the district court for resentencing consistent with *Blakely.* But we reject appellant's argument that, if the appropriate remedy is imposition of the presumptive sentence, that presumptive sentence must be calculated without the use of the custody-status point.

***3 Reversed and remanded.**

All Citations

Not Reported in N.W.2d, 2005 WL 525522

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[1] The supreme court granted review in *Conger,* but stayed further processing of that matter pending a final decision in *State v. Shattuck,* No. C6-03-362 (Minn. argued Nov. 30, 2004). By order filed earlier, on December 16, the supreme court held that the imposition of an upward durational departure based on aggravating factors not considered by the jury violated the defendant's right to a jury trial under *Blakely. State v. Shattuck,* 689 N.W.2d 785, 786 (Minn.2004) (per curiam). The court indicated that a full opinion would follow and directed supplemental briefing addressing the appropriate remedy. *Id.*

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Steven John KONRARDY, Appellant.

No. CX-88-1867.
|
Feb. 28, 1989.

Appeal from District Court, Ramsey County; Hon. Joseph Salland, Judge.

Attorneys and Law Firms

Hubert H. Humphrey, III, Attorney General, Tom Foley, Ramsey County Attorney, Steven C. DeCoster, Asst. County Attorney, St. Paul, for respondent.

C. Paul Jones, Minnesota State Public Defender, Elizabeth B. Davies, Deputy State Public Defender, Minneapolis, for appellant.

Considered and decided by PARKER, P.J., and SCHUMACHER and SCHULTZ,[*] JJ., without oral argument.

UNPUBLISHED OPINION

SCHUMACHER, Judge.

FACTS

***1** Complainant in the present case, E.K., was employed by appellant as an elf in appellant's Santa Claus company. E.K.'s father worked for appellant and got E.K. the elf job.

The first incident of sexual contact between appellant, then age 30, and E.K. occurred in late December, 1984 at appellant's St. Paul apartment. During that night, appellant gave E.K., then 14, 3-4 beers and showed him an X-rated film. E.K. fell asleep and awakened when appellant began to touch E.K.'s genitals. Appellant also took nude, suggestive pictures of E.K.

E.K. stated that appellant made E.K. have relations with him about once a week throughout the summer of 1985. Beginning the summer of 1986, appellant allegedly attempted anal penetration whenever he was alone with E.K.

A second boy, P.K., was also employed by appellant as an elf. P.K., then age 13, had accompanied appellant and E.K. on a trip to appellant's cabin in October, 1987. P.K. stated that during one evening of the weekend, appellant had relations with both boys.

Appellant was subsequently charged by Ramsey County with violating section 609.344, subd. 1(b) of the Minnesota Statutes for having sexually penetrated E.K. Appellant was charged in Kanabec County, Minnesota under section 609.344, subd. 1(e) for sexual penetration with E.K. while he was at appellant's cabin during the period of October 15-18, 1987.

Appellant pleaded guilty to the Kanabec County charge on March 1, 1988. Appellant was sentenced to 36 months which was the presumptive sentence. Violation of this statute is a severity level V offense. Appellant had a criminal history score of one having been convicted in July, 1977 of criminal sexual conduct in the first degree.

Appellant pleaded guilty to the charge in Ramsey County on March 14, 1988 and was sentenced to 72 months to run consecutively to the Kanabec sentence. The Ramsey County trial court filed a departure report giving the following reasons for its upward departure:

1. appellant lacks remorse for his actions

2. appellant blamed E.K. for initiating the sexual relations

3. appellant repeatedly penetrated E.K. over a two year period

4. appellant engaged in group sex with E.K. and P.K.

5. appellant admitted to having sexual contact with 30 young boys within the previous 10 years

6. appellant participated in volunteer work to gain access to young children

7. treatment had no effect on appellant's behavior

Further, from the bench the court stated:

You are a menace to any boy that is walking the streets that is thirteen years old or younger, and basically I think you ought to be taken off the streets, and that is one of the reasons why I think this thirty-six month law was passed, and that is one reason why I am departing.

It is not for the confidential part of this, (PSI), it's for the factual. I think factually you earned the seventy-two months in jail and it will be consecutive to the thirty-six months you are doing now; it will not be concurrent.

DECISION

Appellant pleaded guilty in both counties to charges of criminal sexual conduct in the third degree which is defined as:

Subdivision 1. Crime defined. A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists:

***2** (b) the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant.

(e) the complainant is at least 16 but less than 18 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant, and uses this authority to cause the complainant to submit.

Subdivision 2. Penalty. A person convicted under subdivision 1 may be sentenced to imprisonment for not more than ten years or to a payment of a fine of not more than $20,000 or both.

Minn.Stat. § 609.344, subd. 1(b), (e), subd. 2 (1986).

Subdivision 2 of § 609.344 notwithstanding, appellant's prior conviction for criminal sexual conduct requires that he be given a minimum 36-month sentence.

Subd. 2. Subsequent offense; penalty

If a person is convicted of a second or subsequent offense under sections 609.342 to 609.345 within 15 years of the prior conviction, the court shall commit the defendant to the commissioner of corrections for imprisonment for a term of not less than three years * * *.

Minn.Stat. § 609.346, subd. 2 (1986).

The decision whether to depart from the Guidelines is a discretionary one for the trial court and will not be reversed absent an abuse of that discretion. *State v. Garcia,* 302 N.W.2d 643, 647 (Minn.1981). Appellant has the burden of "establishing on appeal that the record does not support the trial court's decision to depart." *State v. Elkins,* 346 N.W.2d 116, 117 (Minn.1984).

Departure from the presumptive sentence is permitted only when the "individual case involves substantial and compelling circumstances." *Garcia,* 302 N.W.2d at 647 (quoting Part II-D of the Guidelines). Additionally, if an upward departure in a case is justified, generally "the upper limit will be double the presumptive sentence length." *State v. Evans,* 311 N.W.2d 481, 483 (Minn.1981).

In the present case, appellant's sentence for an ongoing offense against a single victim was effectively tripled. However, in *State v. Wellman,* 341 N.W.2d 561 (Minn.1983), the court did uphold a departure greater than double the presumptive sentence because severe aggravating circumstances were present. These circumstances included breaking a three-year-old child's nose, breaking the child's arm on another occasion and in a third incident, breaking the child's leg.

The court acknowledged the principle expressed in *Evans* limiting the departure to double the presumptive sentence length, but then held that "the presence of severe aggravating circumstances * * * justified the use of both a durational departure and a departure with respect to consecutive service * * *." *Wellman,* 341 N.W.2d at 566.

Severe aggravating circumstances exist in the present case. Appellant's course of conduct is particularly appalling.

> [G]enerally it is proper for the sentencing court to consider the course of conduct underlying the charge for which the defendant is being sentenced.

***3** *State v. Back,* 341 N.W.2d 273, 276 (Minn.1983).

Appellant's PSI indicates that appellant admitted to having sexual contact with 30 young boys within the previous 10 years. There having been no trial, no transcript of testimony exists. This court must then rely on documents in the record including the PSI which has been expressly permitted as part of the record on appeal. *Elkins,* 346 N.W.2d at 117.

In his pro se brief, appellant now denies making the statement and labels it as false. Appellant had the opportunity to object to the PSI at the sentencing hearing and did not do so. He has waived objection to any disagreement over statements made in the PSI.

In the present case, appellant's statement that he has had relations with 30 other boys in ten years and activities with two boys in the present case supports an upward departure.

Appellant's multiple types of penetration of E.K., both oral and anal, supports the trial court's departure. Multiple types of penetration has been found, in combination with other factors, to support an upward departure. *See Ture v. State,* 353 N.W.2d 518, 523 (Minn.1984).

Finally, appellant used his position as employer to use E.K. for appellant's gratification. According to E.K.'s statement, when he tried to avoid going with appellant, his parents forced him to go, presumably for the income. The Minnesota Supreme Court has cited the offender's position of authority as a factor supporting an upward departure. *State v. Cermak,* 344 N.W.2d 833, 839 (Minn.1984).

We find sufficient aggravating circumstances to support the trial court's sentence.

Affirmed.

All Citations

Not Reported in N.W.2d, 1989 WL 14919

Footnotes

* Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
George Edward BENNETT, Appellant.

No. C9-96-2506.
|
Aug. 26, 1997.
|
Review Denied October 14, 1997.

Ramsey County District Court File No. K6-96-417

Attorneys and Law Firms

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Susan Gaertner, Ramsey County Attorney, Mark N. Lystig, Assistant Ramsey County Attorney, 50 Kellogg Blvd., Suite 315, St. Paul, MN 55102 (for Respondent)

John M. Stuart, Minnesota State Public Defender, Susan J. Andrews, Assistant State Public Defender, 2829 University Avenue, S.E., Suite 600, Minneapolis, MN 55414 (for Appellant)

Considered and decided by LANSING, Presiding Judge, RANDALL, Judge, and HARTEN, Judge.

UNPUBLISHED OPINION

LANSING, Judge.

***1** This appeal from conviction and sentence for intentional second degree murder challenges the district court's denial of a motion to suppress evidence obtained from DNA testing and the imposition of an upward sentencing departure. We conclude that the DNA evidence resulted from a lawful arrest and that the district court did not abuse its discretion by imposing the maximum statutory sentence.

FACTS

A jury convicted George Bennett of shooting cab driver James Wildenauer. Wildenauer died from two gunshots in the back of his head and was found a short time later in his burning cab. The fire apparently started when the cab skidded out of control and the cooling line ruptured.

An investigating St. Paul police officer, Catherine Janssen, obtained the address for Wildenauer's last dispatch and the destination given by the caller. At the address where the call originated, Janssen learned that it had been made by Bennett and Terrance Price between 1:30 and 2:00 a.m. that morning. The destination address was determined to be fictitious, but Janssen ascertained that Bennett lived in a house located approximately three blocks from where the burning cab had been found. Janssen, accompanied by Sergeants Tim McNeely and Keith Mortenson, went to that address to find Bennett. Bennett's mother told them that Bennett had come home at approximately 2:45 a.m., but left to return a red Grand Prix automobile to a friend named Jesse Jackson. Bennett's mother gave the officers a description of Bennett.

When the officers arrived at Jackson's apartment complex, they observed a red Grand Prix parked outside the complex. Mortenson saw the name "Jackson" on the mailbox. McNeely and Mortenson went to the back door of Jackson's apartment, while Janssen remained by the front door. McNeely and Mortenson knocked on Jackson's back door for approximately five minutes. Mortenson heard movement within the apartment and saw someone inside approach the door, but then turn back. Jackson ultimately opened the door and admitted the officers.

At about the same time, Janssen saw a man who matched Bennett's description walking down the front stairs carrying two full plastic grocery bags. Janssen asked the man his name, and the man replied, "George Bennett." Janssen told Bennett to drop the bags and to put his hands above his head. She then searched him and radioed for assistance from McNeely and Mortenson. McNeely and Mortenson returned to the front of the apartment, and the officers placed Bennett under arrest.

Janssen observed that the grocery bags contained wet clothes. She felt the bags for weapons or other hard objects, but found nothing. The clothing was later sent to the Bureau of Criminal Apprehension (BCA) for testing. The testing showed that a blood specimen extracted from the clothing had a pattern consistent with the profile obtained from Wildenauer's blood, but inconsistent with Bennett's.

At trial, Jackson testified that Bennett arrived at his apartment after first calling and telling him that he had killed a cab driver. Jackson saw blood on Bennett's clothing and shoes. Bennett removed his clothing, washed it in Jackson's bathtub, and put it into the two grocery bags.

***2** The district court sentenced Bennett to the statutory maximum of forty years in prison, an upward durational departure of 134 months (more than eleven years) from the presumptive sentence of 346 months (more than twenty-eight years). The district court found that Bennett acted gratuitously and egregiously by shooting the victim twice in the back of the head. The court also found that Wildenauer was vulnerable because he was facing the opposite direction from Bennett when Bennett shot him and that Wildenauer was vulnerable because, as a cab driver, he was required to pick up Bennett. Bennett appeals (1) the denial of his motion to suppress the DNA evidence and (2) the upward sentencing departure.

DECISION

I

Bennett challenges the court's decision to allow the DNA testing into evidence. He maintains that the blood specimen was obtained as the result of an unlawful arrest made without probable cause. In determining whether probable cause exists, this court asks

> whether the officers in the particular circumstances, conditioned by their own observations and information and guided by the whole of their police experience, reasonably could have believed that a crime had been committed by the person to be arrested.

State v. Moorman, 505 N.W.2d 593, 598 (Minn.1993) (citation omitted). The reasonableness of the officer's actions at the time of arrest is an objective inquiry. *Id.* The existence of probable cause is dependent on the facts of each case. *State v. Cox,* 294 Minn. 252, 256, 200 N.W.2d 305, 308 (1972). Because the decision of whether the arresting officers had probable cause affects constitutional rights, this court makes an independent review of the facts to determine the reasonableness of the police officer's actions. *Moorman,* 505 N.W.2d at 599 (quoting *State v. Olson,* 436 N.W.2d 92, 96 (Minn.1989)).

The supreme court affirmed a probable cause finding based on comparable facts in *State v. Carlson,* 267 N.W.2d 170 (Minn.1978). In *Carlson,* a twelve-year-old girl who was murdered was last seen in the company of the defendant. When the police interviewed the defendant shortly after the crime was committed, the defendant gave evasive answers to questions about a dark-colored stain on his jacket. The answers aroused the suspicions of the interviewing officers. When the defendant refused to accompany the officers to the station voluntarily, the officers placed him under arrest. The supreme court, commenting that it was a close case, held that there was sufficient probable cause to arrest the defendant. *Id.* at 174.

The officers investigating Wildenauer's death knew that Bennett was the last fare that he had picked up; that the drop-off address was fictitious; that, despite the early morning hour, Bennett was not at home; that a man matching Bennett's description was exiting through the front door while officers were seeking him in the rear of the building; that the man was carrying two large plastic grocery bags; and that the man acknowledged that he was Bennett. Based on Janssen's police experience and training, it was not unreasonable for her to conclude that Bennett was involved in the murder of Wildenauer. Janssen had probable cause to arrest Bennett, and the blood sample extracted from the clothes in the grocery bag was not the product of an unlawful arrest.

II

***3** Bennett argues the district court erred in departing from the sentencing guidelines. The court imposed the forty-year maximum permitted for second degree murder.

A sentencing court may depart from the presumptive sentence under the guidelines only if the case involves substantial and compelling circumstances. Minn. Sent. Guidelines II.D. Substantial and compelling circumstances are those that make a defendant's conduct "more or less serious than that typically involved in the commission of the crime in question." *State v. Back,* 341 N.W.2d 273, 276 (Minn.1983). If substantial and compelling aggravating or mitigating factors are present, a sentencing court has broad discretion to depart from the sentencing guidelines. *State v. Best,* 449 N.W.2d 426, 427

(Minn.1989). Absent such circumstances, the sentencing court has no discretion to depart. *Id.* When substantial and compelling circumstances are present, the sentencing court's decision to depart will be reversed only if the sentencing court abused its discretion. *State v. Garcia,* 302 N.W.2d 643, 647 (Minn.1981), *overruled in part on other grounds by State v. Givens,* 544 N.W.2d 774, 777 (Minn.1996).

The district court found that an upward durational departure was justified given Wildenauer's vulnerability because of his occupation as a taxi cab driver and because he was shot in the back of the head. On appeal, the state argues that the court's upward departure is justified when Wildenauer was "vulnerable due to his occupation," he was treated with particular cruelty because he was shot twice in the back of the head, and his murder was a random act of violence. Bennett, on the other hand, argues that the crime was not committed in a manner more serious than the typical case of second degree intentional murder.

The sentencing guidelines recognize that vulnerability due to age, infirmity, or reduced mental or physical capacity is an aggravating factor sufficient to justify an upward departure. Minn. Sent. Guidelines II.D.2(b)(1). The list of aggravating factors set forth in the sentencing guidelines is not exclusive. *See State v. Givens,* 544 N.W.2d 774, 776 (Minn.1996) (noting that the sentencing guidelines provide "a nonexclusive list of appropriate aggravating and mitigating factors to assist a trial court considering departure.")

We agree with the district court's focus on the circumstances of Wildenauer's employment as a basis for the departure, but we would describe it more as a violation of a trust relationship than as a special vulnerability. Wildenauer's occupation and duties as a cab driver allowed Bennett to create and take advantage of a defined relationship with Wildenauer. By retaining Wildenauer to transport him, Bennett was in a position to dominate and control Wildenauer; Bennett and Wildenauer were in a confined area with Bennett directing the activity. Bennett determined where Wildenauer would go and had authority to tell Wildenauer, whose driving responsibilities required him to keep his back turned to Bennett, to stop the cab at any point. This position of control gives rise to a trust relationship. Bennett relied on this trust position to manipulate the circumstances and commit the crime. Because Bennett abused his position of trust and commercial authority over Wildenauer, it was not reversible error for the district court to impose an upward departure. *See State v. Lee,* 494 N.W.2d 475, 482 (Minn.1992) (holding that defendant's abuse of authority as victims' instructor and leader in the community to maneuver victims into positions where he could sexually assault them constituted aggravating factor sufficient to justify upward departure).

***4** The district court imposed a departure that is less than fifty percent of the original sentence and does not exceed the statutory maximum. Under these circumstances we conclude that the departure was not an abuse of discretion.

Affirmed.

RANDALL, Judge (dissenting).

***4** I respectfully dissent. The intentional second-degree murder at issue is composed of facts, simply put, that place this case squarely within the rebuttable presumption of a presumptive sentence under the guidelines, here 346 months. The presumptive sentence in Minnesota for intentional second-degree murder already results in the longest number of years in the United States of America before a defendant becomes eligible for release. *See* Minn. Sent. Guidelines IV (based on a criminal history score of 2, intentional second-degree murder carries a presumptive sentence guidelines range of 339-353 months). The mandatory behind bars portion of two-thirds of 346 months is 221 months, or 18-1/2 years. That is far and away as lengthy a mandatory sentence behind bars for second-degree murder as will be found anywhere.

The trial court's departure reasons are nothing more than a reiteration of the facts that surround every crime:

> This offense has had a dramatic impact on the victim's family as well as the community. This was a totally random act of violence. It was a-you acted gratuitously and egregiously. You shot the victim twice, even though the first shot had caused the victim's death. And you picked on somebody who was facing the opposite direction of you and shot him in the back.
>
> This man was vulnerable. He was a cab driver who put himself out on the line and was in a position of having to just pick up everybody. Yes, he was vulnerable and he was in a vulnerable position, and the court finds that to be an aggravating factor.

All homicides have dramatic impacts on the victim's family and on the community. If those were grounds for upward