

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8768
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALEJANDRO MENA ROJAS,

Defendant-Appellant.

Appeal from the United States District Court for
the Western District of Texas
(SA-93-CR-58(1))

(June 21, 1994)

Before REAVLEY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Alejandro Mena Rojas entered into a plea agreement with the government and pleaded guilty to aiding and abetting a kidnapping in violation of 18 U.S.C. § 1203. The plea agreement gave Rojas a base offense level of 34, but the court made an upward departure of 3 levels, resulting in a sentence of 262 months. The court gave the following reasons for its departure:

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The Court made an upward departure because there was more than one victim and the kidnapping guideline does not deal with injury to more than one victim. In the instant offense, the victim's wife was also restrained and suffered serious emotional problems as a result of her ordeal. Another aggravating circumstance is that the defendant's conduct was unusually heinous, cruel, brutal and degrading to the victim. The victim was blindfolded and tied down to a cot, arms above his shoulders, with one hand handcuffed and another hand tied with a nylon cord for 13 days.

Later, the court reduced Rojas' base offense level to 35 because of his cooperation with the government, resulting in a sentence of 180 months. Rojas now contests the initial upward departure in hopes that his 2 level downward departure will result in a base offense level of 32. We affirm.

"A departure from the guidelines will be affirmed if the district court offers 'acceptable reasons' for the departure and the departure is 'reasonable.'" *United States v. Velasquez-Mercado*, 872 F.2d 632, 635 (5th Cir.), cert. denied, 493 U.S. 866 (1989). The court's reasons for its upward departure are findings of fact, which we review for clear error. *United States v. Pennington*, 9 F.3d 1116, 1118 (5th Cir. 1993).

The court was entitled to consider the harm to Mrs. Garza as relevant conduct under § 1B1.3 for an upward departure. *United States v. Roberson*, 872 F.2d 597, 603 (5th Cir.), cert. denied, 493 U.S. 861 (1989). The court did not clearly err in its decision that Mrs. Garza was a victim of the kidnapping. The PSI shows that Rojas and his compadres pointed a gun at Mrs. Garza's head, pushed her to the floor of the vehicle, tied her there, and left her six miles from her residence. Rojas did not offer any

evidence showing that this factual account was unreliable. See *United States v. Angulo*, 927 F.2d 202, 205 (5th Cir. 1991) (stating that a defendant can prevent consideration of information at sentencing only after he has shown that the information is "materially untrue, inaccurate or unreliable"). Because § 2A4.1 does not consider an injury to more than one victim, it was within the court's discretion to make an upward departure. Cf. *United States v. Moore*, 997 F.2d 30, 36-37 (5th Cir. 1993) (allowing an upward departure for an injury to a third-party because § 2A2.2(b)(3) did not account for an injury to more than one "victim").

Given the egregious facts of this case, the court was also justified in departing upward under § 5K2.8. During Garza's thirteen days of captivity, he was tied down to a cot at all times; he was not fed for three days and given only meager amounts of food after that; he was not allowed to go to the bathroom and was forced to use a soiled container on three occasions; his underwear and clothing became soiled but he was not allowed a change of clothing; and an elastic band was rapped tightly across his eyes and ears, causing his ears and the bridge of his nose and to bleed daily, resulting in permanent scarring on his nose.

Lastly, the court's departure was reasonable. The greatest possible sentence for kidnapping is life in prison; thus, we review the departure for a "gross abuse of discretion." *United States v. Huddleston*, 929 F.2d 1030, 1031 (5th Cir. 1991)

(holding that when the court's sentence falls within the statutory limits, the court reviews the sentence for a "gross abuse of discretion"). Here, we find no gross abuse of discretion.

AFFIRMED.