

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50786
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT L. JONES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-94-CR-260-1)

June 21, 1995

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Robert L. Jones challenges his sentence for carjacking, for which the district court departed upward from the Sentencing Guidelines. We **AFFIRM**.

I.

Jones and Keenan Brown encountered Roger Keyserling's parked car on July 16, 1994, in San Antonio, Texas.² Jones "pistol

¹ Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

² Also present with Jones and Brown were two uncharged individuals, Allen Croft and Mark Franklin.

whipped" Keyserling, took his wallet, pointed a .357 magnum revolver at him and his passenger, Kenneth Kibler, and told them to run. Jones then shot at Keyserling, hitting him in the shoulder and neck. Brown drove Keyserling's car away; Jones followed.

Brown was apprehended, and identified Jones. Following his arrest, Jones pleaded guilty to carjacking (18 U.S.C. §§ 2, 2119); and the district court departed upward from the Guidelines, sentencing Jones, *inter alia*, to 145 months imprisonment and \$9,357.72 in restitution.

II.

Jones contests the upward departure.³ The district court based it on his extreme conduct (pistol whipping Keyserling and shooting him while he was running away), and the existence of a second victim (Kibler). Jones disputes both bases. We review an upward departure for abuse of discretion, and will affirm if the district court gives acceptable reasons for the departure and it is reasonable. *E.g.*, ***United States v. Ashburn***, 38 F.3d 803, 807 (5th Cir. 1994)(en banc), *cert. denied* (U.S. May 15, 1995) (No. 94-8084).

A.

The Guidelines permit an upward departure for extreme conduct, and give "gratuitous infliction of injury" as an example. U.S.S.G. § 5K2.8, p.s. The district court referenced both the beating of Keyserling and the shooting of him as he was running away as

³ As part of his plea agreement, Jones waived his right to appeal except in the event the district court, *inter alia*, departed upward.

"extreme" conduct, and made a two-level upward departure on this basis. It emphasized that Jones shot Keyserling even though the purpose of the crime (taking his money and car) was already accomplished, and Keyserling posed no threat to Jones. On these facts, we do not agree with Jones that the guideline sentence, including the required increases for the discharge of a firearm and the victim's serious injury, contemplates fully Jones' conduct. The shooting of a carjacking victim while he is running away is a prime example of the "gratuitous infliction of injury" for which the Guidelines allow an upward departure.⁴

B.

Jones' next contests the upward departure based on the existence of the second victim, Kibler. Jones did not object on this basis in the district court; therefore, we review only for plain error. Fed. R. Crim. P. 52(b); **United States v. Calverley**, 37 F.3d 160, 162-64 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1266 (1995).

The district court found that the guideline sentence did not consider adequately that Kibler, who was made to witness Jones' extreme conduct and fear for his life, was also a victim of the crime. On this basis, the court made an additional two-level

⁴ Jones' suggestion that Keyserling may not have been running away at the time of the shooting is not well-taken. The Government's statement of facts and the Presentence Investigation Report, both of which Jones adopted, state that Jones shot Keyserling after telling him to run. Based on this evidence, the court's factual conclusion was not clearly erroneous. In any event, even assuming that Keyserling was not yet running away, Jones' conduct was no less extreme, because no evidence suggests that Keyserling posed a threat or was uncooperative.

upward departure. Jones' primary contention is that, although some offenses include sentencing adjustments for multiple victims, his does not. Jones, therefore, asserts that the guideline sentence for his offense contemplates the possibility of multiple victims, and departure is unwarranted. The Guidelines undermine this contention: "Simply because [an adjustment factor] was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing." U.S.S.G. § 5K2.0, p.s. Accordingly, we find no plain error. See *Calverley*, 37 F.3d at 162-63 (requiring, *inter alia*, that plain error be "obvious" under current law).

II.

For the foregoing reasons, Jones' sentence is

AFFIRMED.