IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-KA-00998 COA

EMEILIO EPTING A/K/A EMEILIO ALAHUNDRA EPTING **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF JUDGMENT:	08/30/96
TRIAL JUDGE:	HON. ROBERT G. EVANS
COURT FROM WHICH APPEALED:	JASPER COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	R. K. HOUSTON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS, JR.
DISTRICT ATTORNEY:	DEWITT L. FORTENBERRY, JR.
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	DRIVE-BY SHOOTING: SENTENCED TO SERVE A TERM OF 5 YRS IN THE MDOC;
DISPOSITION:	AFFIRMED - 7/21/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	10/5/98
MANDATE ISSUED:	12/28/98

BEFORE THOMAS, P.J., DIAZ, AND HERRING, JJ.

DIAZ, J., FOR THE COURT:

¶1. Emeilio Epting was convicted of a drive-by shooting and sentenced to five years in prison. From this conviction, he perfects his appeal to this Court and argues that the trial court erred (1) in refusing to accept his guilty plea, (2) in denying his "aggravated assault" jury instruction, and (3) in refusing to grant a mistrial based upon a witness's prejudicial statement. Finding his arguments without merit, we affirm.

FACTS

¶2. On May 22, 1995, Emeilio Epting and James Lindsey became involved in an argument. As the two were fighting, Epting's friends, Germane Strickland and Tony Keeton, approached--both carrying guns. According to Lindsey, Strickland and Keeton pointed their guns at him while Epting encouraged them to shoot Lindsey. Lindsey then pulled Epting in front of him to shield himself in case gunfire erupted. While still using Epting as a shield, Lindsey backed away from Strickland and Keeton, then freed Epting, then ran to his car, with Epting, Strickland, and Keeton in pursuit. A car chase ensued, with Epting's group following Lindsey's group. According to eyewitness testimony, gunshots were fired from Epting's car in the direction of Lindsey's car. Epting testified at trial in his own defense and claimed that while Strickland did fire a gun from Epting's car, that he (Epting) did not. Furthermore, Epting maintains that he was completely unaware of Strickland's plan to shoot at Lindsey's car. Nevertheless, the jury found Epting guilty of a drive-by shooting. Feeling aggrieved by the jury's decision, Epting appeals his conviction to this Court.

DISCUSSION

I. DID THE TRIAL COURT ERR IN REFUSING TO ACCEPT EPTING'S GUILTY PLEA?

¶3. Immediately preceding the commencement of trial in this case, Epting moved to withdraw his prior plea of not guilty and enter a plea of guilty. While in chambers, the trial judge questioned Epting regarding his understanding of the consequences of pleading guilty. In doing so, the judge asked Epting if he participated in the commission of the crime. Epting replied that he was driving the automobile from which Germane Strickland was shooting, but that he had no malicious intent. The testimony in the case then proceeded as follows:

> THE COURT: [T]he theory of the State's case [is] that you were an accessory before the fact, which means that you participated in the crime and helped it be committed by driving the car, and if you say you did that, then I will further consider accepting your guilty plea. If you tell me that you did not, then I will not give it anymore consideration, and we'll commence the trial. So, did you participate as an accessory before the fact to the commission of the crime as I've explained it to you?
>
> THE DEFENDANT: I was driving the car, sir.
>
> THE COURT: Well, that doesn't answer my question. Okay. Let's go try the case.

Epting argues that had the trial judge accepted his guilty plea, then he would have been able to take the district attorney's sentencing offer of five years with four years suspended. Instead, Epting was tried and convicted of a drive-by shooting and sentenced to a term of five years in prison.

¶4. "There is, of course, no absolute right to have a guilty plea accepted. A court may reject a plea in [the] exercise of sound judicial discretion." ***Santobello v. New York*, 404 U.S. 257, 262 (1971).** Furthermore, in ***Beard v. State*, 392 So. 2d 1143, 1144 (Miss. 1981)**, where the defendant persisted in saying that he was not guilty of the crime with which he was charged, our supreme court held that "[t]he trial court committed no error in declining to accept a plea of guilty from a defendant who adamantly maintained that he was innocent."

¶5. The trial judge in the present case concluded that Epting's response regarding his participation in the crime was insufficient to accept as an admission of guilt, and in the final analysis, such decision rests within the sound discretion of the trial judge. We are of the opinion that the judge did not abuse his discretion in declining to accept Epting's guilty plea; therefore, his first assignment of error is dismissed as lacking in merit.

II. DID THE TRIAL COURT ERR IN DENYING EPTING'S "AGGRAVATED ASSAULT" JURY INSTRUCTION?

¶6. Epting next argues that the trial court committed reversible error in granting the State's "drive-by shooting" jury instruction while refusing his instruction on the lesser-included offense of aggravated assault.[(1)] He maintains that a drive-by shooting is, in fact, an aggravated assault committed from a vehicle, and that the court's refusal to present the jury with the choice between the two offenses constituted error.

¶7. The supreme court has stated that lesser-included offense instructions should only be given when there is an evidentiary basis in the record which would allow the jury to rationally find the accused guilty of the lesser offense, while acquitting him of the greater offense. ***Underwood v. State*, 708 So. 2d 18, 36 (Miss. 1998).** Therefore, if the jury in the present case could have found Epting guilty of the crime of aggravated assault but not guilty of the crime of drive-by shooting, then an aggravated assault instruction would have been warranted.

¶8. We agree with Epting that the primary additional element in the drive-by shooting statute, which is not contained in the aggravated assault statute, is the requirement that the attempted bodily injury be caused "by discharging a firearm while in or on a vehicle . . . ." **Miss. Code Ann. § 97-3-109 (Rev. 1994).** In the case at bar, no dispute exists regarding the fact that the shooting occurred from a vehicle driven by Epting. Accordingly, the jury could not have acquitted Epting on the drive-by shooting charge and yet convict him for aggravated assault. The trial court, therefore, did not commit error in refusing to grant the requested instruction.

III. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A MISTRIAL BASED UPON A WITNESS'S PREJUDICIAL STATEMENT?

¶9. On direct examination, State witness James Mack testified that when he saw Strickland, Keeton, and Epting chasing James Lindsey, that he, too, began running because, "I heard that they was out to get me, too." Epting, through his attorney, asked that the jury be excused and then moved for a mistrial based upon the prejudicial nature of Mack's statement. The trial judge overruled Epting's motion for a mistrial and, instead, directed the jury to totally disregard Mack's statement. The judge instructed the jurors that the comment should have no place in their consideration and then asked the jury to promise to disregard the remark.

¶10. The supreme court has repeatedly held that the trial judge "is in the best position for determining the prejudicial effect of an objectionable comment." ***Alexander v. State*, 602 So. 2d 1180, 1182 (Miss. 1992).** Where the judge instructs the jury to disregard the impropriety, prejudicial error does not result. ***Shelson v. State*, 704 So. 2d 452, 456 (Miss. 1997).** In applying the law to the facts in this case, we conclude that the trial judge did not abuse his discretion by overruling Epting's motion for a mistrial. The prejudicial effect, if any, of Mack's statement was cured by the judge's admonition

that it be disregarded. Finding no reversible error in the trial of this case, we affirm.

THE JUDGMENT OF THE JASPER COUNTY CIRCUIT COURT OF CONVICTION OF DRIVE-BY SHOOTING AND SENTENCE OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO JASPER COUNTY.

BRIDGES, C.J., AND THOMAS, P.J., HERRING, HINKEBEIN, AND KING, JJ., CONCUR.

SOUTHWICK, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN, P.J., COLEMAN AND PAYNE, JJ.

SOUTHWICK, J., DISSENTING:

¶11. With deference to the majority and to the court below, I find that the trial court abused its discretion in rejecting the guilty plea because Epting would not admit to wilful involvement in the offense. Epting wished to plead guilty because he made an informed, voluntary decision that the jury would likely infer knowing participation in the crime. The trial court itself later advised the jury they could make that inference based on the same facts that Epting admitted in his plea. I dissent.

¶12. The starting point for determining the obligation of the trial court is the court rule that structures the taking of guilty pleas:

> 3. *Voluntariness.*
>
> Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea. . . .
>
> 4. *Advice to the Defendant.*
>
> When the defendant is arraigned and wishes to plead guilty to the offense charged, it is the duty of the trial court to address the defendant personally and to inquire and determine:
>
> a. that the accused is competent to understand the nature of the charge;
>
> b. that the accused understands the nature and consequences of the plea. . . ;
>
> c. that the accused understands that by pleading guilty [that he is waiving the rights to a trial].

URCCC 8.04 A. The trial court followed this procedure but was unsatisfied with the answers.

¶13. My reading of the court's questioning and Epting's response does not indicate that the defendant's plea was involuntary or that there was not a factual basis for it. Those two grounds are the ones upon which the trial court's discretion can be exercised. The assistant district attorney explained in open court what the State would attempt to prove and by whose testimony. When the

assistant district attorney finished his review of the evidence, the Court asked Epting "Do you disagree with anything he said?" The answer was "No, sir." Then the Court asked if he wished to add anything, and the answer was "not that it makes any difference, but it wasn't a knowing action." He elaborated in brief answers to further questions that he did not know someone else was going to start shooting. He admitted that the gun that was used was his gun, and that he always kept it in the automobile. When the shooting was over, he took everyone else in the vehicle home. The questions then continued this way:

> THE COURT: Did you participate in the commission of this crime?
>
> EPTING: Sir I really -- I honestly don't know how to answer that because I was driving the car. I was driving the car.
>
> THE COURT: Well, unless you answer yes, I can't take your plea . . .
>
> [A request by defense counsel to talk with Epting was granted; then the inquiry resumed.]
>
> EPTING: I do admit to driving the car -- the vehicle when this crime took place, but I honestly had no malicious intent.
>
> THE COURT: Well, that doesn't matter.
>
> EPTING: I know.
>
> THE COURT: If you knew it was going on and you participated in it, then under the law, you are just as -- if the evidence proved you guilty, then you would be sentenced just as if you pulled the trigger and shot at them.
>
> EPTING: I understand.
>
> THE COURT: Now, if that's the way Mr. Webb explained it, that's the theory of the State's case that you were an accessory before the fact, which means that you participated in the crime and helped it be committed by driving the car, and if you say you did that, then I will further consider accepting your guilty plea. If you tell me that you did not, then I will not give it anymore consideration, and we'll commence the trial. So, did you participate as an accessory before the fact to the commission of the crime as I've explained it to you?
>
> EPTING: I was driving the car, sir.
>
> THE COURT: Well, that doesn't answer my question. Okay. Let's go try the case.

The Court later explained in the hearing on the Motion for New Trial why he rejected the plea.

> Maintaining his innocence and pleading guilty under the recognition of likelihood of conviction is in a sense a form of coercion. . . . And acceptance of a guilty plea is discretionary with the court as the law in our state currently stands, and if the trial judge who's listening doesn't feel like its a free and voluntarily made [plea] or made for some reason other than admitting guilt, then I think the judge is free to refuse to accept it. . . .

Thus the trial court was imposing an obligation that Defendant confess to each element of the offense before the plea could be considered voluntary or to have a factual basis. It is necessary, in other words, for the defendant to say that he is guilty before the plea can be accepted. On the other hand, if the court believes that the plea is being offered, as quoted above, "for some reason other than admitting guilt, then . . . the judge is free to refuse to accept it."

¶14. Ironically, the trial court rejected the plea because the court found that it was being offered due to Epting's fear that at trial he would not be able to convince the jury of his innocence and would receive a higher sentence at that time. That is exactly what happened after the trial court rejected the plea. Had the trial judge accepted his guilty plea, then apparently he would have been sentenced under the district attorney's offer of five years with four years suspended. Instead, Epting was tried, convicted, and sentenced to a term of five years in prison. What the majority holds is that a reasonable analysis of risks, much less an accurate analysis as proved the case here, is not a basis to permit a defendant to plead guilty.

¶15. I disagree. First, the trial court did not make an adequate voluntariness inquiry. The question that led the court to reject the plea asked for a legal conclusion of whether the defendant was an accessory before the fact. In the question the court explained that being an accessory before the fact "means that you participated in the crime and helped it be committed *by driving the car,* and if you say you did that, then I will further accept your guilty plea." When the Judge gave the defendant a chance to answer, it was to the specific question "did you participate as an accessory before the fact . . . as I have explained it to you?" The defendant's answer was "I was driving the car, sir," which in my view is exactly what the court has just told him was required for him to be an accessory. That was apparently not the answer the Judge wanted, and he ordered the trial to be held. To the contrary, I find that Epting agreed that he was an accessory.

¶16. Second, though there is discretion on the part of the Court, it must be "sound judicial discretion." ***Santobello v. New York*, 404 U.S. 257, 262 (1971).** Under the rules approved by the supreme court, I find that the discretion to reject the plea can be exercised only within the limits of a determination that the plea is involuntarily, non-intelligently made, or that there is no factual basis. **URCCC 8.04 A3**. Even though the trial judge stated that the plea was "involuntary" because he saw it as coerced, I find that the key actually is the meaning of the phrase "factual basis."

¶17. Very similar language is in Federal Rule of Criminal Procedure 11. For that rule it has been said that "[a]ll that is required is that the court be satisfied that there is a factual basis for the plea, and not necessarily that the defendant is guilty." **1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE, Section 174 at 616 (1982)**. A "factual basis" arises from the likelihood that the State can put on evidence sufficient to go to the jury on each element of the offense. The defendant may not agree that each necessary fact occurred, but the basis still can exist.

¶18. Here the question was whether Epting "wilfully, unlawfully and feloniously aid[ed]" another in committing a drive-by shooting. Wilfulness is a matter that can be presumed from action. Epting's actions would have allowed a jury to so infer. The court instructed the jury that it was "permitted to draw such reasonable inferences from the evidence as seems justified in the light of your own experience." That is exactly what the jury ultimately did infer.

¶19. The trial judge required too much in insisting on an admission of guilt. That is not part of the

rule for taking of pleas and is not required by any case law that has been discovered. A court has discretion to reject a plea, but under Rule 8.04 that can only occur if the court finds that the plea is involuntary or is not supported by a factual basis. Nothing in what Epting said during the hearing on the plea fit that description. I would hold that a plea cannot be rejected solely because it arises from a defendant's fear of worse consequences if he insists on a trial. It must be voluntary, and the testimony as far as it had gotten did not indicate otherwise. There must be a factual basis, and the assistant district attorney showed that there was a substantial factual basis.

¶20. Significantly, our affirming Epting's conviction also makes the factual basis point.

¶21. I would reverse and remand for the proceedings necessary to enter the guilty plea.

McMILLIN, P.J., AND COLEMAN AND PAYNE, JJ., JOIN THIS SEPARATE OPINION.

1. The maximum sentence for a conviction under the drive-by shooting statute is thirty years in prison with no opportunity for parole. **Miss. Code Ann. § 97-3-109 (Rev. 1994); Miss. Code Ann. § 47-7-3(d)(ii) (Supp. 1997).** The maximum sentence for a conviction under the aggravated assault statute is twenty years in prison. **Miss. Code Ann. § 97-3-7(2) (Rev. 1994).**