IN THE COURT OF APPEALS

8/26/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01012 COA

OSHA MUHAMMAD BAKR A/K/A LEON JOHN MASON, JR. A/K/A OSHA MUHAMMAD BAKER A/K/A OSHA MUHAMMAD BAKA

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES W. BACKSTROM

COURT FROM WHICH APPEALED: CIRCUIT COURT OF JACKSON COUNTY

ATTORNEY FOR APPELLANT:

RICHARD C. CONANT

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.DISTRICT ATTORNEY: DALE HARKEY

NATURE OF THE CASE: CRIMINAL--AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: APPELLANT FOUND GUILTY OF AGGRAVATED ASSAULT AND SENTENCED TO SERVE TWELVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

MANDATE ISSUED: 9/16/97

EN BANC

COLEMAN, J., FOR THE COURT:

A jury in the Circuit Court of Jackson County found Osha Muhammud Bakr guilty of aggravated assault.(1) Although Bakr had originally been indicted as a habitual offender pursuant to Section 99-19-81 of the Mississippi Code of 1972 (Rev. 1994), the State moved to delete that aspect of the indictment because one of the convictions, which had occurred in the State of Indiana, was only a misdemeanor. Thus, the trial court sentenced Bakr to serve twelve years in the custody of the Mississippi Department of Corrections. Bakr has appealed from the trial court's final judgment of guilt to present three issues for our review, analysis, and resolution. We resolve all three issues against Bakr and affirm the trial court's judgment of Bakr's guilt.

I. FACTS

Around 8:00 p.m. on Sunday, May 9, 1993, which was also Mother's Day, Charles Thornton, the maintenance man at College Villa Apartments in Gautier, Jackson County, stopped to check his mail at the apartment complex. As Thornton returned from his mail box to enter his truck to drive to his apartment, he heard "a lot of loud, vulgar language." Then he heard glass breaking. When he looked in the direction from whence he heard glass breaking, he saw Bakr "busting [sic] out windshields of a car." As Thornton walked toward Bakr, he saw that Bakr was arguing with a resident of the apartments who owned the car. Thornton advised Bakr that he "needed to leave the property . . . before he [Thornton] went and called the police on him." Bakr ignored Thornton's advice and continued to argue with the female resident who owned the car, the back windshield and side windows of which he had just knocked out, and the front windshield of which he had damaged with a hammer.

Thornton then "just walked down beside the passenger's car . . . to get the tag number," which was the procedure Thornton always took when there was a disturbance at the apartments. When Thornton looked down to get the tag number of the vehicle, "the next thing [he knew, he] was laying on the ground." Because Thornton was looking down at the license plate of the vehicle in which Bakr had arrived at the apartment, he did not see with what he had been struck. As the result of the blow

which felled him, Thornton sustained "one tooth busted out, one tooth broke off at the root, and the rest of them [his teeth] were loose." The next day a surgeon removed the tooth that had broken at its roots. Other of his teeth were pulled, and Thornton got a partial bridge on both the top and bottom gums of his mouth. Immediately after he had been struck, Thornton had gone to the emergency room at the Ocean Springs Hospital, where a physician put two stitches on the side of his lip.

Bakr and his two companions, who had accompanied him to the College Villa Apartments, fled, and Gautier Police Officer John Day was dispatched by radio to the scene of the attack on Thornton. Thornton identified Bakr as his assailant to Officer Day, who then conveyed his description and name to both the Gautier and the Pascagoula Police Departments. Day notified the Pascagoula Police Department because Bakr lived in that city. Later that same night, the Pascagoula police arrested Bakr and returned him to the custody of Officer Day, who then handcuffed Bakr and advised him of his rights against self-incrimination. Bakr then acknowledged and waived his *Miranda* rights.

The next day, May 10, 1993, Bakr was sitting in the patrol room located in the back of the Gautier Police Station, when Gautier Police Officer Don Jones walked into the room. As Jones walked past Bakr, Bakr asked Jones how much his bond was going to be. Jones, who did not know who Bakr was at the time, replied by asking Bakr with what had he been charged. Bakr replied, "Assault." Because Jones did not know whether Bakr meant aggravated assault or simple assault, Jones then asked Bakr what had he done. Bakr replied that he hit a guy with a hammer. Jones had not advised Bakr of his *Miranda* rights against self-incrimination before the colloquy between Bakr and him occurred.

II. Trial

On May 6, 1994, prior to Bakr's trial on the indictment for aggravated assault on Charles Thornton, Bakr's counsel filed a motion to suppress the statement which he had made to Officer Don Jones that he had hit a guy on the head. The trial court conducted a pre-trial hearing on Bakr's motion to suppress the statement, at which Bakr's counsel announced to the trial judge that "we will stipulate that the waiver of *Miranda* rights were given and read on May 9th [by Officer John Day] and were acknowledged and waived [by Bakr] at 9:10 [p.m.]." At no time did Officer Don Jones advise Bakr of his *Miranda* rights against self-incrimination.

Jones prepared a supplementary investigation report about his conversation with Bakr in the patrol room in the back of the Gautier Police Department. At two different places on the report, he dated it "05-17-93." In the report he wrote, *inter alia*: "I (Don Jones of the Gautier Police Dept.) talked to a B/M subject by the name of Osha M. Baker [sic] in the back of the police depart. Subject asked me what the bond would be for him to get out of jail Date 05-10-93 time approx[.] 1830 hrs . . . ." Bakr did not testify during the hearing on his motion to suppress his statement to Officer Jones.

After the hearing, the trial judge found the following:

[Officer Don Jones] did not advise the defendant of his *Miranda* rights prior to this particular statement which was made while the defendant was in custody, even though he had been given such rights at time of arrest some days earlier. Rule 1.03 of the Uniform Criminal Rules of Circuit Court Practice requires that these warnings be given prior to any subsequent interrogation session with the

person in custody even though the warnings were previously given. See *Johnson v. State,* 475 So.2d 1136 (Miss. 1985). An exception to this would be where the defendant initiates further communication. See *Edwards v. Arizona, 451* U. S. 477, 68 L. Ed.2d 378, 101 S. Ct. 1880 (1981); *Leatherwood V. State, 548* So.2d 389 (Miss. 1989). In this case the defendant initiated this conversation with the officer about the amount of his bond. This officer, who was not the investigating officer, was simply trying to answer the question about defendant's bond, and the statement made by the defendant that he hit the guy in the head with a hammer was, beyond a reasonable doubt, freely and voluntarily made, without coercion or threat on the part of the officer. For what it is worth, the statement may be admitted in evidence upon the trial of this cause, and the motion to suppress is hereby denied.

On August 18, 1994, Bakr's trial on the indictment for aggravated assault began. The trial judge, the State, and Bakr's defense counsel began their conference to select the twelve venirepersons who would serve on the jury by entertaining both sides' challenges of those persons for cause. When they had completed this phase of selecting the jury, the trial judge instructed the prosecutor and Bakr's counsel to "start with number 7, Priddy, and go down and then work through that. Okay, we'll recess." After the recess, the State informed the trial judge of the identity of the twelve jurors whom it and Bakr had selected, and he reviewed the list of the twelve to be certain that no error had occurred in their selection. When the trial judge inquired if counsel were ready to bring in the jury, Bakr's counsel replied, "Yes, Sir."

No sooner had the trial judge directed that the jury be brought in, Bakr's counsel advised him that Bakr was "disturbed over the fact that there were not, the jury is not very racially balanced. That the potential jurors indicated, I mean, were mainly not of the black race." With this announcement, the State called the Jackson County Circuit Clerk, Joe Martin, Jr., to testify about the manner in which the jury who had been impaneled for service that week of court had been drawn. Mr. Martin testified that the jury had been "drawn the same way we draw every jury in Jackson County." The circuit clerk then described the process by which his deputies drew at random the names of 225 persons, from which ultimately fifty four jurors remained for jury service that week of court. He further testified that when the names were drawn, he did not know whether the persons whose names had been drawn were black or white.

After the circuit clerk testified, Bakr personally objected, "If there's blacks on here, how come they're not on my jury? . . . This has got to be racism in some sort. This can't be honest. This can't be just." Bakr's counsel then stated to the trial judge that "starting [the jury selection] at Mr. Priddy did cause two blacks not to be considered." The trial judge responded to Bakr's complaint and his counsel's comment as follows:

Well, we started from Mr. Priddy not because of any racial reason. It was simply because the first part of the jury had previously served on a case yesterday and the last part of the jury was on a case today in the other courtroom. So, by starting with number 7 on 2, it was my choice to do that simply to allow other people who had not served on a jury to be considered for jury service and simply to kind of share the, for this week, to share that, that responsibility. So, it wasn't, it wasn't any decision based on race or color or for any other reason other than what I just said.

The jury as they were originally selected were seated, and Bakr's trial began.

To facilitate our review of Bakr's third issue -- that the jury's verdict was against the overwhelming weight of the evidence, specifically Bakr's use of the hammer to strike Charles Thornton -- we review the testimony of the witnesses whom both the State and Bakr called.

Charles Thornton was the State's first witness. His testimony was consistent with the facts as we have recited them. He testified that after Bakr struck the windows of the car with a hammer, Bakr put the hammer back in the vehicle in which he had ridden to the apartments. Thornton also acknowledged that because he was struck when he was looking down at the license plate of that vehicle to record its number, he did not see with what he was struck.

The State's second witness was Gautier Officer John Day who testified about what he saw when he arrived at the College Villa Apartments per his dispatch to investigate what had been reported to the Gautier Police Department to have happened. His testimony is reflected in the statement of facts.

The State's third witness was Petronia Harris, a resident of the College Villa Apartments. She testified that when she drove up to her apartment, there were "quite a few people standing out in the yard." When she got out of her car, Bakr was walking between two cars. Her next-door neighbor, whom she identified only as "Harold," and Charles Thornton came from the office of the apartments toward Bakr. When Thornton walked to the rear of the vehicle to record its license plate number, Bakr walked up to him and said, "If you got any . . . thing to do with it, I'll beat your ass, too." She saw Bakr draw back with the hammer, which he held in his right hand, and swing it towards Thornton. She admitted that she could not "actually say that [she saw] the hammer strike Mr. Thornton;" instead, "All I seen [sic] was him [Bakr] go back with the hammer and Charlie fell and hit the ground." She further testified that when Thornton got off the ground, "[h]e had blood coming from his mouth." Harris added that she saw "another guy kick him [Thornton]," when Thornton was getting up. She described Thornton as "upset." On cross-examination, Harris stated that she was standing in the parking lot "three or four cars down from where all this was taking place . . . ." Harris also testified on cross-examination that it was still daylight, "Dusk dark, I would say."

The State's fourth witness was Gautier Officer Don Jones who testified that Bakr had told him that he had struck some guy with a hammer. We have related the circumstances under which Bakr made that statement to Officer Jones.

After the State rested, Bakr called as his first witness Jerome Carroll, who had known Bakr when Bakr stayed with Carroll's grandmother. Carroll testified that Bakr struck Thornton one time with his fist. Carroll then testified that after Bakr struck Thornton, he saw Thornton with a "little pocket knife," which had a "five, six inch" blade. Carroll denied that Bakr had struck Thornton with a hammer. On cross-examination by the State, Carroll testified that he was with Bakr when the Pascagoula police arrested him but that he never told the Pascagoula police that Bakr had struck Thornton only with his fist. On redirect examination, Carroll explained that he never told the police about what he had seen because they never asked him.

Bakr called Johnny Green as his second witness. Green testified that he saw Bakr strike Thornton with his fist. Green explained that Bakr could not have hit Thornton with a hammer because he had already put the hammer in the car when Thornton walked up and began to record the license plate

number. As did Carroll, Green saw Thornton with a "little knife" when Thornton got up from where he had fallen. Green claimed that when Thornton approached Bakr, Carroll, and him, Thornton put his hand into his pocket. On cross-examination, Green acknowledged that Bakr and he once lived together and that he also was with Bakr when the Pascagoula police arrested Bakr. Green also admitted that he had never told the police that Bakr had hit Thornton only with his fist instead of a hammer. On redirect examination, Green, as had Carroll, explained that he never told the police that Bakr struck Thornton with his fist instead of a hammer because the police never inquired.

III. REVIEW AND RESOLUTION OF THE ISSUES

We quote Bakr's three issues verbatim from his brief:

ISSUE I:

The trial court erred in denying Bakr's pre-trial motion to suppress the statement of police officer Don Jones. Thus allowing prejudicial testimony to be presented to the jury creating a fundamentally unfair trial, in violation of the Fifth and Sixth Amendments of the United States Constitution; Article III, Section 26 of the Mississippi Constitution; and Rule 103, Miss. Unif. Crim. R. Cir. Ct. Prac.

ISSUE II:

The trial court erred in overruling Mr. Bakr's objection to the Court's arbitrary decision regarding the jury selection process[,] thus violating his constitutional right of the fair cross-section requirement for an impartial jury, his constitutional right to equal protection under the law, and his constitutional right to due process as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article III, Sections 14 and 26 of the Mississippi Constitution.

ISSUE III:

The trial court erred in denying Mr. Bakr's motion for a new trial, in that the verdict was contrary to the overwhelming weight of the evidence regarding an essential element of the crime of aggravated assault, the use of a deadly weapon.

A. First Issue: The trial court erred in denying Bakr's pre-trial motion to suppress the statement of police officer Don Jones.

Bakr contends that this issue "rests squarely on whether the purported defendant-initiated communication provided an exception to the mandate of *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)] and Rule 1.03, Mississippi Uniform Criminal Rules of Circuit Court Practice . . . under *Edwards* [*v. Arizona*, 451 U.S. 477 (1981)] guidelines." Rule 1.03 of the Mississippi Uniform Criminal Rules of Circuit Court Practice requires that the *Miranda* warnings "be given prior to any subsequent interrogation session with the person in custody even though the warnings were previously given." Bakr argues that the second question which officer Jones asked him and to which he replied that he

had hit some guy in the head with a hammer did not fall within the *Edwards* exception guidelines as interpreted by the Supreme Court of Mississippi. The State correctly emphasizes that Bakr never attempted to invoke either his right to remain silent or his right to counsel. The State then argues that "cases such as *Minnick v. Mississippi*, 498 U.S. 146 (1990), and *Edwards v. Arizona*, 451 U.S. 477 (1981), which involve situations in which prisoners had invoked their rights, are simply inapposite."

In *Hunt v. State*, 687 So.2d 1154, 1160 (1996), the Mississippi Supreme Court explained that "[o] nce the trial judge has determined at a preliminary hearing that a confession is admissible, the defendant/appellant has a heavy burden in attempting to reverse that decision on appeal. Such findings are treated as findings of fact made by a trial judge sitting without a jury as in any other context." (citations omitted). In *Balfour v. State*, 598 So. 2d 731, 742 (Miss. 1992), the Mississippi Supreme Court reiterated the following standard of review for determining whether it was error for the trial judge to admit the accused's confession: "Determining whether a confession is admissible is a finding of fact which is not disturbed unless the trial judge applied an incorrect legal standard, committed manifest error, or the decision was contrary to the overwhelming weight of the evidence."

Cognizant of Bakr's burden and the foregoing standard of review, this Court begins its analysis of this issue by the observation that *Miranda v. Arizona*, 384 U.S. 436 (1966) did not abolish confessions *per se*. In *Miranda*, the United States Supreme Court opined:

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. *Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.* The fundamental import of the privilege [against self-incrimination] while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. *Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.*

Miranda, 384 U.S. at 478 (emphasis added). Instead, *Miranda* asserted that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. The Supreme Court then defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* Because it is the law officer's initiation of questioning a suspect who is in custody that triggers the need for the *Miranda* warnings, the statement of a suspect, who is in custody and who initiated the conversation or communication with the law officer, may yet be admissible, even if the suspect has not received the *Miranda* warnings. If the suspect initiated the conversation or communication with the law enforcement officers, the statement which he made and which the prosecution proposes to use against him must still be free and voluntary.

The United States Supreme Court dealt with just such a situation in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). In *Bradshaw*, the respondent, James Edward Bradshaw, had been convicted of first-degree manslaughter, driving while under the influence of intoxicants, and driving while his license

was revoked. *Id.* at 1040-41. The convictions arose from the death of one Lowell Reynolds, whose body had been discovered in his wrecked pickup truck, in which it appeared that he had been riding as a passenger when the truck left the roadway, struck a tree and an embankment, and finally came to rest on its side in a shallow creek. *Id.* at 1041. After Bradshaw had been arrested and advised of his rights against self-incrimination, or *Mirandized*, he denied that he had been involved in the wreck. However, he then stated that he wanted an attorney "before it goes very much further." With that statement, the officer who had been interrogating Bradshaw "immediately terminated the conversation." *Id.* at 1042.

Sometime later while an officer was transferring Bradshaw from the police station, where he had been interrogated, to the county jail, Bradshaw inquired of the officer who was transporting him, "Well, what is going to happen to me now?" The officer replied that he could not talk to Bradshaw because he had earlier requested an attorney. Bradshaw replied that he understood, but nevertheless Bradshaw discussed with the officer where he was being taken and the offense with which he would be charged. During the trip, the officer suggested that Bradshaw might help himself if he took a polygraph examination. Before Bradshaw took the polygraph examination the next day, he was again read his Miranda rights, after which he signed a written waiver of those rights. When the polygraph examination was finished, the examiner told Bradshaw that he did not believe that Bradshaw was telling the truth; whereupon Bradshaw admitted that he was driving the pickup truck when it left the road and claimed Reynolds' life. *Id.* at 1042. The Oregon Court of Appeals reversed Bradshaw's conviction because it found pursuant to *Edwards v. Arizona* that Bradshaw's statement had been obtained in violation of his Fifth Amendment rights. *Id.* at 1043.

The United States Supreme Court reversed the judgment of the Oregon Court of Appeals and remanded the case for further proceedings. *Id.* at 1047. The Supreme Court opined:

But even if a conversation taking place after the accused has "expressed his desire to deal with the police only through counsel," is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation. This is made clear in the following footnote to our Edwards opinion:

"If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be 'interrogation.' In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, *whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances*, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." 451 U.S., at 486 n.9. . . (emphasis added).

Bradshaw, 462 U.S. at 1044-45. The Supreme Court next noted that the Oregon Court of Appeals had erred when it concluded that "an 'initiation' of a conversation or discussion by an accused not only satisfied the Edwards rule, but *ex proprio vigore* sufficed to show a waiver of the previously asserted right to counsel." *Id.* at 1045. The Supreme Court noted: "The inquiries are separate, and clarity of application is not gained by melding them together." *Id.* Thus, "the next inquiry was

'whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.' *Edwards v. Arizona*, 451 U.S., at 486, n.9, ..." *Id.* at 1046. The Supreme Court explicated that the determination of this inquiry must be made "upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *Id.* (citations omitted).

The similarities between the facts in *Bradshaw* and the case *sub judice* are apparent. Bakr, as Bradshaw, initiated a conversation with an officer while Bakr was in custody.[(2)] Whereas Bradshaw was concerned about what was going to happen to him, Bakr was concerned about the amount of his bail. The trial judge's task in the case *sub judice* was to determine "whether a valid waiver of the right to counsel and the right to silence had occurred" when Bakr responded to Jones' inquiry by saying that he had hit some guy in the head with a hammer. *See Bradshaw*, 462 U.S. at 1046. Bakr did not testify during the motion to suppress the statement which he had made to Jones, so the trial judge had no evidence from which he might conclude that Bakr's statement was involuntary or that Bakr earlier had requested counsel or invoked his right to remain silent. Instead, the trial judge had Bakr's stipulation that "the waiver of *Miranda* rights were given and read on May 9th [by Officer John Day] and were acknowledged and waived [by Bakr] at 9:10 [p.m.]."[(3)]

The standard of review requires that this Court affirm the trial judge's ruling on the admissibility of a confession, which is a "finding of fact," unless the trial judge "applied an incorrect legal standard, committed manifest error, or the decision was contrary to the overwhelming weight of the evidence." *Balfour*, 598 So. 2d at 742. In the case *sub judice* the trial judge found that Bakr had initiated his colloquy with Officer Jones, which was clearly supported by the overwhelming weight of the evidence, and that Bakr's statement "was beyond a reasonable doubt, freely and voluntarily made, without coercion or threat on the part of the officer." Bakr stipulated that he had acknowledged and waived his *Miranda* rights the night of May 9, 1993, and he presented no evidence that he had subsequently attempted to invoke his right to remain silent or to have an attorney present before he spoke further with officers about the attack on Charles Thornton.

This Court concludes that the trial judge's adjudication that Bakr's statement was admissible must be affirmed because the trial judge applied the correct legal standard, *i. e.*, Bakr's statement was the result of Bakr's initiation of a conversation with Jones, and his statement was free and voluntary. The trial judge's findings on these issues were not contrary to the overwhelming weight of the evidence. Had the trial judge found otherwise, his findings would have had no evidence in this record to support them. Thus, the trial judge did not commit manifest error when he admitted Bakr's statement. This Court therefore resolves this issue against Bakr and affirms the trial judge's admitting Bakr's statement into evidence.

B. Second Issue: The trial court erred in overruling Mr. Bakr's objection to the Court's arbitrary decision regarding the jury selection process[,] thus violating his constitutional right of the fair cross-section requirement for an impartial jury, his constitutional right to equal protection under the law, and his constitutional right to due process as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article III, Sections 14 and 26 of the Mississippi Constitution.

In his brief, Bakr states his complaint as follows:

Bakr objected to [the trial court's announcement that the petit jury selection process would begin at juror number 7 of petit jury number 2 in selecting the petit jury for Bakr's trial because] the trial court's decision eliminated this group of eighteen from consideration for his petit jury as surely as if they had not been in the venire at all, and that this group was the only section of the venire which contained members of Bakr's combined race and sex, specifically, black males.

This Court initiates its review of this issue by noting that the record fails to include any foundation on which to rest the basis of Bakr's complaint in this issue. The record contains only a list of the five petit juries, each of which contained twelve names, except the fifth, or last one, which contained only five names. Appropriately, this list identifies the fifty three jurors by their names only -- and not by their race or gender. This Court previously recited the events which transpired in the course of jury selection, including the State's calling the circuit clerk to testify about the manner in which the names for jury service had been selected. Relevant to our review of this issue was the circuit clerk's testimony, unrebutted by Bakr, that when the names of potential jurors were drawn, he did not know whether they were black or white.

We also explained that before the trial judge began his voir dire of the venire, he announced that the petit jury selection would begin at the seventh juror of the second panel of twelve venirepersons because "most of these on the first part have served already," and because "[t]here are some on the second part that have served." Bakr did not object to the trial judge's place of initiation of the selection of the jury until after the jury and one alternate had been selected, and the judge was ready to seat the jury preparatory to beginning the trial of the case.

Pursuant to Bakr's objection to the elimination from consideration of the black males who were among the names on the petit jury number 1 and the first six names of petit jury number 2, the trial judge again explained that he started from Mr. Priddy, who was the seventh name on the list of petit jury number 2, "because the first part of the jury had previously served on a case yesterday and the last part of the jury was on a case today in the other courtroom." The trial judge opined that he had chosen to start with juror number 7 on petit jury number 2 "to allow other people who had not served on a jury to be considered for jury service and simply to kind of share the, for this week, to share that, that responsibility." The trial judge concluded by stating that his decision was not racially motivated because he did not know the racial and gender identity of the names of the lists of the five petit juries when he had made that decision in his chambers earlier that morning before he called the case for trial.

Bakr cites but one case to support his position on his second issue, *Peters v. Kiff*, 407 U.S. 493 (1972), from which he quotes the following: "Accordingly, . . . whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies his due process of law." *Id.* at 504. The issue in *Peters* was whether the petitioner, who was not black, could challenge the systematic exclusion of blacks from the grand jury that had indicted him and the petit jury that convicted him of burglary. *Id*. at 494. The source of the discrimination in *Peters* was the procedure for selecting names of potential jurors -- not the action taken by the trial judge during the

selection of the grand or petit jurors after their names had been chosen. *Id.* at 496. We conclude that Bakr's quotation, while specifically correct as applied to the facts in *Peters,* is inapplicable to this issue, especially in view of the testimony of the circuit clerk about the manner in which the names for the venire of potential jurors were selected.[(4)]

Section 13-5-26 of the Mississippi Code of 1972 (Supp. 1996) provides that "[a] judge . . . may direct the circuit clerk to draw and assign to that court . . . the number of jurors he deems necessary for one or more jury panels . . . ." Once that list has been compiled, there seems to be neither rule nor statute which directs a procedure for the trial judge to follow in deciding where on the list he should begin with selecting the jury. The Mississippi Supreme Court addressed an issue similar to this issue in *Hunter v. State*, 684 So. 2d 625, 631 (Miss. 1996). In *Hunter*, there were seven prospective jury panels when voir dire began. The trial judge moved some venirepersons to different jury panels, so that more prospective jurors would be considered before they were. He also moved some of the prospective jury panels to the end of the list for consideration. The trial judge rearranged the venirepersons in part to accommodate the personal problems of certain jurors. In the course of this shuffling of the venirepersons by the trial judge, one black vernireman was moved farther down the list for consideration without explanation. Akin to Bakr in the case *sub judice*, Hunter complained that the judicial reshuffling of the lists of panels violated his rights. *Id* at 631. However, the Mississippi Supreme Court opined:

Generally, the direction in jury selection is within the discretion of the trial judge. However, trial judges should avoid any actions that might suggest that the juror pool is being manipulated for racial or other improper reasons. Therefore, if a trial judge employs this practice of rearranging the venirepersons to accommodate the personal problems of prospective jurors (thereby maintaining a larger juror pool), he should be certain to give explicit reasons for moving each venireman to the end of the list.

Id. (citations omitted).

As is apparent from our recitation of the events which led to the selection and seating of the jury in the case *sub judice,* the trial judge gave explicit reasons for beginning with juror number 7 on petit jury number 2. His reason, to allow more jurors to serve that week, is consistent with Section 13-5-2 of the Mississippi Code of 1972 (Supp. 1996), which reads in relevant part:

It is the policy of this state that . . . all qualified citizens have the opportunity in accordance with this chapter to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose.

Unless it can be determined that the trial judge denied Bakr a right of constitutional proportions by not allowing the black male jurors to be considered for jury service on Bakr's case, the trial judge did not err when he began the selection of the jury where he did.

In *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975), the United States Supreme Court stated that there is no constitutional requirement that petit juries "actually reflect the various distinctive groups in the population" and that "[d]efendants are not entitled to a jury of any particular composition." *See Avery*

v. State, 555 So. 2d 1039, 1045 (Miss. 1990) (observing that no one is entitled to any particular person as a juror). This Court rejects Bakr's argument that the trial judge's initiating the selection of the jury at a place on the list of petit juries which skipped all black males was error. Bakr failed to demonstrate any discrimination against black males in the procedure which the circuit clerk followed to obtain the names for jury service. The trial judge explained his reason for starting where he did on the jury lists with the selection of Bakr's jury. There is no evidence to impeach the trial judge's explanation about why his decision was not racially motivated. Thus, we hold that the trial judge acted well within his discretion to begin the selection of the jury with juror number 7 on list number 2, and we affirm the trial judge's decision to begin there.

C. Third Issue The trial court erred in denying Mr. Bakr's motion for a new trial, in that the verdict was contrary to the overwhelming weight of the evidence regarding an essential element of the crime of aggravated assault, the use of a deadly weapon.

With respect to a motion for a new trial, the Mississippi Supreme Court has stated that a trial judge should set aside the jury's verdict only when, in the exercise of his sound discretion, he is convinced the verdict is contrary to the substantial weight of the evidence. *Leflore v. State*, 535 So. 2d 68, 70 (Miss. 1988). A verdict of a trial court will be overturned only if it so contrary to the overwhelming weight of the evidence that allowing it to stand would be to sanction an unconscionable injustice. *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983). In reviewing such a claim, "[t]his Court . . . must accept as true the evidence which supports the verdict." *Jackson v. State*, 551 So. 2d 132, 148 (Miss. 1989).

We earlier reviewed in some detail the testimony of the witnesses for both the State and Bakr at Bakr's trial in anticipation of our review and resolution of this issue. To support his position on this his third issue, Bakr focuses his argument on the following aspects of the evidence in this case:

1. Charles Thornton's testimony that he saw Bakr put the hammer back in his vehicle and that he did not know with what Bakr had struck him.

2. Doubts about Petronia Harris' ability to have seen Bakr swing at Thornton with the hammer based upon where Harris testified she was standing when she observed Bakr attack Thornton and her testimony that she did not see the hammer wielded by Bakr actually strike Thornton.

3. The error of the trial judge in allowing Officer Don Jones to testify that Bakr told him that he had struck some guy in the head with a hammer, which, of course, we have held was not error. Thus, the jury was entitled to consider the statement "for whatever it was worth," to use the trial judge's evaluation of that statement.

4. Jones' apparent errors in dating his memorandum, which we found to be reconcilable.

5. The testimony of James Carroll and Johnny Green, both of whom Bakr called to testify in his

behalf, that Bakr struck Thornton with his fist rather than a hammer.

The State counters Bakr's emphasis on the foregoing aspects of the evidence by emphasizing:

1. The nature and extent of Charles Thornton's injuries to his mouth, which we previously detailed, from which the State argues that only a hammer -- and not a fist -- could have caused them.

2. Petronia Harris' testimony to which we have already alluded.

3. Bakr's statement to Officer Don Jones that he had hit some guy in the head with a hammer.

As the Mississippi Supreme Court observed in *Gandy v. State*, 373 So. 2d 1042, 1045 (Miss. 1979):

Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject, the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into findings of fact sufficient to support their verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution.

In the case *sub judice*, the jury resolved the conflicts in the testimony of the witnesses favorably to the State and adversely to Bakr. The severity of Thornton's injuries, Petronia Harris' testimony that she saw Bakr swing at Thornton with a hammer, even if she did not actually see the hammer strike Thornton, after which Thornton fell to the ground, and Bakr's admission to Officer Don Jones that he struck some guy in the head with a hammer were ample to allow the jury's verdict of Bakr's guilt of aggravated assault to stand without that verdict's being "an unconscionable injustice." We affirm the trial judge's denial of Bakr's motion for a new trial in which Bakr presented this issue to him.

IV. SUMMARY

Because Bakr initiated the conversation with Officer Don Jones from which his admission emanated, and because his statement was voluntary, as the trial court correctly found in the absence of any evidence that Bakr's statement was not voluntary, the trial judge did not err when he denied Bakr's motion to suppress his statement. The admission of Bakr's statement did not violate *Miranda*. Bakr had no constitutional right to have any particular juror sit on his jury. The trial judge's beginning with juror number 7 on petit jury number 2 for the reasons that he explained, even though some black male jurors may consequently have not come within the possibility of inclusion on the jury, was not error. The jury's verdict of Bakr's guilt of aggravated assault was not against the overwhelming weight of evidence, and the trial judge did not err when he denied Bakr's motion for a new trial on that ground. Thus, this Court affirms the trial court's judgment of Bakr's guilt of aggravated assault

and its sentence of Bakr to serve twelve years in the custody of the Mississippi Department of Corrections.

THE JACKSON COUNTY CIRCUIT COURT'S JUDGMENT OF THE APPELLANT'S GUILT OF AGGRAVATED ASSAULT AND ITS SENTENCE OF THE APPELLANT TO SERVE A TERM OF TWELVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ARE AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO JACKSON COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

1. As the style of this appeal indicates, the appellant was indicted under various aliases. However, on appellant's motion, in which the State acquiesced, the indictment of the appellant for the crime of aggravated assault was amended by order of the trial court to reflect "the correct name of the Defendant from OSHA MUHAMMAD BAKR to OSHA MUHAMMUD BAKR."

2. But for Bakr's counsel's leading questions which he propounded when he cross-examined Officer Don Jones, the record would hardly support the fact that Bakr was in custody. Otherwise, it would appear that Bakr was present in the police headquarters awaiting the opening of municipal court for trials on misdemeanor charges associated with his conduct on Mother's Day evening, 1993, if not a preliminary hearing on the assault charge which apparently had been lodged against him.

3. In his brief, Bakr stresses certain apparent conflicts in officer Jones' use of dates in the memorandum of his conversation with Bakr, which apparent conflicts we have noted in this opinion. However, this Court opines that there is no conflict because the memorandum is subject to an interpretation that while Jones dated it May 17, 1993, the date of his conversation with Bakr occurred on May 10, 1993. May 10, 1993, was the day after Bakr had been arrested.

4. Section 13-5-6 of the Mississippi Code of 1972, effective from and after January 1, 1975, established a jury commission "to manage the jury selection process under the supervision and control of the court." Miss. Code Ann. § 13-5-6 (Supp. 1996). Bakr in no way contends that any error occurred in the process of selection of the members of the five petit jurors from whom his jury was drawn. His complaint rests exclusively with the trial judge's starting with juror number 7 of petit jury number 2.