IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00658 COA

MARK NOBLE WALKER 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. GEORGE B. READY

COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: KATHLEEN L. CALDWELL

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: ROBERT L. WILLIAMS

NATURE OF THE CASE: CRIMINAL - FELONY

TRIAL COURT DISPOSITION: COUNT II MALICIOUS TRESPASS: COUNT III GRAND LARCENY: COUNT IV CONSPIRACY TO COMMIT ARSON: COUNT V ARSON OF SCHOOL BUILDING. CT II=6 MONTHS DESOTO COUNTY JAIL, CONCURRENT COUNT III; COUNT III=5 YEARS CONCURRENT TO COUNT IV; COUNT IV=5 YEARS CONCURRENT TO COUNT V; COUNT V=20 YEARS, 7 YEARS SUSPENDED

MANDATE ISSUED: 9/30/97

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

HINKEBEIN, J., FOR THE COURT:

Mark Noble Walker [Walker] was convicted in the Desoto County Circuit Court of several crimes based upon the jury's finding that he participated in the arson of a state-supported school building. Aggrieved by his conviction Walker raises the following assignments of error:

I. WHETHER THE TRIAL COURT ERRED IN DENYING WALKER'S MOTION FOR CHANGE OF VENUE?

II. WHETHER THE TRIAL COURT ERRED IN DENYING WALKER'S MOTION TO SUPPRESS EVIDENCE SEIZED?

III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATEMENT OF WALKER INTO EVIDENCE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS WELL AS ARTICLE THREE, SECTIONS 14 AND 26 OF THE MISSISSIPPI CONSTITUTION?

IV. WHETHER THE TRIAL COURT ERRED IN DENYING WALKER'S MOTION TO STRIKE A PORTION OF THE STATE'S FINAL ARGUMENT AND FOR CURATIVE INSTRUCTION?

V. WHETHER THE TRIAL COURT ERRED IN DENYING WALKER'S MOTION FOR NEW TRIAL, ON GROUNDS THAT VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE?

Holding Walker's assignments of error to be without merit, we affirm the verdict of the lower court.

FACTS

At approximately 7:00 a.m. on August 12, 1994 firefighters responded to a fire at the historic "old

Hernando High School" in Desoto County. It was not until sometime around 10:30-11:00 that morning that the firefighters brought the blaze under control and succeeded in extinguishing it. As a result of the blaze the two-story antebellum structure suffered tremendous damage, amounting to a total loss. Cause and origin experts who investigated the fire scene concluded that the blaze was not an accident. The experts' investigation revealed that at least six distinct areas of the structure, on the first and second floors, showed evidence of suspicious burn patterns. From these burn patterns the experts concluded that a liquid accelerant had been poured onto the floor, to fuel the fire. An expert in the field of forensic chemistry subsequently analyzed fire debris samples sent to him by the cause and origin experts. The chemist concluded that several of the samples contained "components identifiable as a kerosene-type distillate," or "evaporated gasoline." One of the cause and origin experts stated that during his investigation he found an open container containing a small amount of a liquid that smelled like kerosene, in an unburned area of the school building.

On August 16, 1994 the Desoto County Sheriff's Department received an anonymous tip to its "Crime Stoppers" telephone number. The Crime Stoppers confidential informant identified the persons allegedly responsible for the fire, provided the suspects' residential address, provided descriptions of the suspects, and even provided a description of the shoes one suspect allegedly wore during the commission of the crime. Acting upon this tip two officers went to the suspects' apartment and told the individuals residing there that they would like to speak to the lessees of the apartment. After two of the individuals stepped forward and identified themselves as the lessees, the officers explained that they were conducting an investigation into the arson of the old Hernando High School and requested the lessees' consent to search the apartment for evidence. The lessees agreed to the request and signed a written consent form provided by the officers. Although only the lessees signed the consent form, none of the other persons residing in the apartment objected to the officers' search.

As the officers began their search, one of them looked into the bedroom through an open door and observed a pair of black tennis shoes with paint on them, lying on the floor. These shoes matched the description of the shoes that the Crime Stoppers confidential informant stated were worn by Walker during the commission of the crime. According to the Crime Stoppers confidential informant, the paint on Walker's shoes came from a can of paint Walker poured onto the school's floor while he was allegedly perpetrating the events in question. Walker admitted to the officers that the shoes were his. After Walker acknowledged that the shoes were his, the officers asked him and the other suspect, Tommy Wolfe [Wolfe] if they would accompany the officers to the sheriff's department for

questioning. The two suspects consented to the officers' request and were handcuffed and placed into the back seats of separate squad cars for transportation to the Desoto County Jail.

After reaching the sheriff's department both Walker and Wolfe were advised of their *Miranda* rights and asked to sign a written acknowledgment of such. Both suspects signed the acknowledgment form. After having been advised of their *Miranda* rights, both suspects gave separate statements to the officers, describing their respective involvement (or alleged lack thereof) in the vandalizing and burning of the old high school. Neither of the suspects requested an attorney, either before, during, or after any of the events at issue in this case. The defendants were subsequently indicted and convicted for various criminal offenses arising out of the events surrounding the burning of the old Hernando High School. It is from his conviction for these crimes that Walker brings the instant appeal.

ANALYSIS

I. WHETHER THE TRIAL COURT ERRED IN DENYING WALKER'S MOTION FOR CHANGE OF VENUE?

Walker argues that because of the "inordinate amount of media coverage" given to the crime for which he was accused, the trial court erred in denying his motion for a change of venue. Walker contends that because the burning of the old Hernando High School was publicized in both the local and regional news media, he could not receive a fair trial in Desoto County. Walker focuses his argument on the fact that a local newspaper ran several articles about the fire, one of which carried his photograph as that of a defendant charged with the crime. Walker concludes that the media coverage of the fire contained a "tremendous amount of emotional content, the stories were not typical or objective, and the [amount] and duration of the coverage was tremendous."

The State responds that although the media coverage of the fire was substantial, it was objective and "the content was not of the sort to drum up public animosity toward a certain defendant." According to the State the content of the coverage "probably would have been the same had the structure been destroyed by an act of God," because the "focus of the reporting was more nostalgic, with emphasis on personal memories of the old building." The State argues that the media coverage did not "saturate" the jury venire with inflammatory prejudicial information so as to make it impossible for the trial court to draw an impartial jury from Desoto County. According to the State the trial court did not abuse its discretion in denying Walker's motion for change of venue.

In reviewing this assignment of error we are aided by the Mississippi Supreme Court's opinion in *Weeks v. State*. In *Weeks* the court held that:

The accused has a right to a change of venue when it is doubtful that an impartial jury can be obtained; upon proper application [motion supported by the affidavits of two witnesses with knowledge], there arises a presumption that such sentiment exists; and, the [S]tate then bears the burden of rebutting that presumption.

Weeks v. State, 493 So. 2d 1280, 1286 (Miss. 1986) (quoting *Johnson v. State*, 476 So. 2d 1195, 1210-11 (Miss. 1985)). The court stated that this presumption can normally be rebutted during voir dire, although "there may be some circumstances when the pretrial publicity is so damaging, the presumption [of prejudice] so great, that no voir dire can rebut it." *Weeks*, 493 So. 2d at 1286. The court then reaffirmed the time-honored rule that the decision to grant a motion for change of venue rests largely within the sound discretion of the trial judge, but cautioned that this discretion may be abused. *Id.*; *see also Harris v. State*, 537 So. 2d 1325, 1328 (Miss. 1989) (holding that "[o]n the issue of venue change, this [c]ourt will not disturb the ruling of the lower court where the sound discretion of the trial judge in denying change of venue was not abused"). In determining if a judge has abused his discretion in denying a change of venue, "we look to the completed trial, particularly including the voir dire examination of the prospective jurors, to determine whether the accused received a fair trial." *Winters v. State*, 473 So. 2d 452, 457 (Miss. 1985); *see also Fisher v. State*, 481 So. 2d 203, 220 (Miss. 1985) (holding that motion for change of venue should be granted where

"under the totality of the circumstances it appears reasonably likely that, in the absence of such relief, the accused's right to a fair trial may be lost").

At the hearing on Walker's motion for change of venue the State put on four witnesses, all of whom were allegedly selected at random from a group of individuals who had served on a previous jury panel in Desoto County. All of the State's witnesses testified that despite having been exposed to various media reports concerning the fire, they had developed no bias against the defendant and did not know of any bias against Walker held by other members of the local community. Walker's sole witness who offered to counter the State's argument was the editor of a local newspaper, who testified as to the amount and content of the media coverage pertaining to the fire. Although the editor indicated that his paper, other local papers, and an out-of-state regional paper had given considerable coverage to the fire story, he did not indicate that he perceived any bias against Walker among the members of the local community. The trial judge did not issue a ruling on Walker's motion at the conclusion of the hearing, but rather held his decision until after the voir dire process. At voir dire, after the parties "weeded out" numerous jurors for various reasons, the trial court ruled that it was satisfied that an unbiased jury had been selected. The trial court held that because the voir dire process was able to yield a neutral panel, Walker's motion for change of venue would have to be denied. The trial court stated that it had "bent over backwards to assure that Mr. Walker g[ot] a neutral panel, and ha[d] struck a lot of people that may not have normally been struck in order to assure that [objective] . . . ."

We agree with the State's argument and the trial court's ruling. Walker put on no evidence at the motion hearing to demonstrate a community bias against him as a defendant charged with the arson of the old Hernando High School. The only evidence put on by Walker concerned the amount of media coverage of this event, rather than how such coverage actually prejudiced the potential jurors drawn from Desoto County. Additionally, our review of the transcript of the jury voir dire reveals that any potential jurors who might have been biased against Walker were in fact "weeded out," without compromising the quality of the jury pool.

We understand the essence of Walker's assignment of error to be that merely because there was substantial media coverage of the criminal act of which he was accused of perpetrating, he was unable to receive a fair trial. We decline to adopt such a proposition. It is this Court's understanding that the law of this State requires a change of venue only where the evidence shows that prejudicial or inflammatory publicity about the defendant's case has so saturated the community from which the jury is to be drawn, that it would be virtually impossible to obtain an impartial jury. *Harris*, 537 So. 2d at 1328-29 (citing *United States v. Harrelson*, 754 F.2d 1153, 1159 (5th Cir. 1985)). We believe that the record of this case makes it clear that Walker failed in his duty of persuading the lower court that the jury pool was saturated with prejudicial publicity so as to taint prospective jurors from Desoto County, despite the affidavits submitted in support of his motion and the single witness he called. We are convinced that not only was the trial judge's denial of Walker's motion free from any abuse of discretion, it was a correct application of the controlling law. This assignment of error is without merit.

II. WHETHER THE TRIAL COURT ERRED IN DENYING WALKER'S MOTION TO SUPPRESS EVIDENCE SEIZED?

With this assignment of error Walker argues that the trial court erred in denying his motion to dismiss the charges of arson and conspiracy to commit arson that were brought against him pursuant to Section 97-17-3(1) of the Mississippi Code. Walker also assigns error to the trial court's denial of his motion to suppress the evidence seized from the apartment in which he was residing at the time of his arrest. Walker contends that his motion to dismiss should have been granted because Section 97-17-3(1), which prescribes punishment for the arson of a state-supported school building, was "unconstitutionally vague and over-broad." The essence of Walker's argument is that because the structure was no longer in use as a classroom, and due to its age and dilapidated condition was not fit for use as a classroom, it was not a "school building" within the scope of Section 97-17-3(1). Walker asserts that his motion to suppress should have been granted because he did not consent to the search of the apartment from which the items in question were seized, and that the items seized were not in plain view.

The State responds that the structure in question was a "school building" within the plain meaning of Section 97-17-3(1). The State notes that under this statute the building need not have been occupied or in use at the time of the arson. It is the State's position that because the building in question was owned by a school district that received financial assistance from the State of Mississippi, it was a "state-supported school building" as contemplated by Section 97-17-3(1). The State contends that the use (or lack thereof) to which the school district choose to put their building was irrelevant under Section 97-17-3(1). Regarding Walker's motion to suppress, the State contends that Walker's consent was not necessary to the validity of the search, as the valid consent of the lessees was all that was required.

A. Motion to Dismiss

In considering a statute passed by our legislature the first question a court should decide is whether the statute is ambiguous. *Pinkton v. State*, 481 So. 2d 306, 309 (Miss. 1985). If the statute in question is not ambiguous the court should simply apply the statute according to the statute's own words and need not employ the principles of statutory construction. *Pinkton*, 481 So. 2d at 309. We conclude that Section 97-17-3(1) of the Mississippi Code is not ambiguous and will be applied in accordance with its "plain meaning." Considering Walker's motion to dismiss the arson and conspiracy to commit arson charges, this Court holds that the structure in question was in fact a "state-supported school building" within the plain meaning of that term as contemplated by Section 97-17-3(1). Section 97-17-3(1) provides that "[a]ny person who wilfully and maliciously sets fire to . . . any state-supported school building in this state, *whether in use or vacant*, shall be guilty of arson in the first degree . . . ." Miss. Code Ann. § 97-17-3(1) (Rev. 1994) (emphasis added). It seems clear from even a cursory reading of this statute that it prescribes punishment for the unlawful destruction by fire of any building owned by a school in this state, which receives financial assistance from our legislature. The statute does not purport to limit its application to only those school-owned buildings in use as a classroom or other activity directly related to conducting educational activities; the statute applies to all buildings that are owned by state-supported schools. We hold that the trial judge was correct in his interpretation of Section 97-17-3(1). Based upon our reading of the plain meaning of this statute, we hold Walker's claim that it is "unconstitutionally vague and over-broad" to be completely without merit.

B. Motion to Suppress

Regarding Walker's assertion that the trial court was in error for denying his motion to suppress, we hold it also to be without merit. Under the facts at bar Walker was living in an apartment leased by two of his friends. Although it may be that Walker had some sort of contractual arrangement with his friends that entitled him to reside in the apartment, from the facts contained in the transcript it appears that he was more or less a guest, residing in the apartment at the discretion of the lessees. However, in order to properly resolve this issue we must consider whether Walker shared any common authority, mutual use, or joint control over the premises, rather than focusing exclusively upon who had a property interest in the apartment. *Loper v. State*, 330 So. 2d 265, 267 (Miss. 1976) (citing *U.S. v. Matlock*, 415 U.S. 164, 172 (1974) for proposition that "common authority is not based upon the mere property interest of a third person, but upon mutual use of the property by persons generally having joint access or control for most purposes").

While the general rule is that a warrantless search by law enforcement officers is per se unreasonable, "[t]here are exceptions to the rule, and one of the recognized exceptions is a consensual search." *Loper*, 330 So. 2d at 266 (citing *Davis v. United States*, 328 U.S. 582, 593 (1946)). The Mississippi Supreme Court has held that "consent to search voluntarily given without coercion may be given by a third party who possessed common authority, mutual use and joint control over property not in the exclusive control or possession of the defendant and where the defendant had no reasonable expectation of privacy." *Shaw v. State*, 476 So. 2d 22, 24 (Miss. 1985) (citing *Matlock*, 415 U.S. at 172)); *see also Waldrop v. State*, 544 So. 2d 834, 837 (Miss. 1989) (citing *Shaw* for proposition that "[i]t is well settled under the law of this state that a person who possesses common authority with another over premises to be searched may validly give consent for a search as against the other").

In the case at bar it is questionable as to whether Walker actually had any "common authority" or "joint control" over the apartment, because it appears that he was little more than a guest whose presence in the apartment was at the sole discretion of the lessees. For purposes of this appeal, however, we will assume that Walker did have common authority or joint control over the apartment. This assumption, however, has no effect upon the resolution of this issue. Even if Walker did have common authority or joint control over the apartment, his consent to the search was not necessary, as voluntary consent given by one person who shares in common control over property is sufficient to satisfy the rights protected by the constitutions of both Mississippi and the United States. *See Loper*, 330 So. 2d at 267 (holding consent by defendant's brother as to search of their family home

valid and not violative of guarantees of Fourth or Fourteenth Amendments to United States Constitution, or Section 23 of the Mississippi Constitution, against unreasonable search and seizure).

Regarding any expectation of privacy Walker may have had as to the bedroom area where the seized items originated, we hold that Walker could not reasonably have expected privacy in this (or any other) area of the apartment. *Id.* (holding that defendant had no reasonable expectation of privacy in area of home that was for common use of every occupant and was not his exclusive personal domain) . The testimony contained in the record indicates that Walker and four other persons shared a two bedroom apartment, with one of the bedrooms being full of musical equipment. This left only a single bedroom, living room, bathroom, and kitchen area for five persons to make their home in. According to Walker's own testimony none of the occupants had designated areas of the apartment in which

they were to sleep, but rather it was more or less a first-in-time, first-in-right arrangement as to who slept in the bed, on the couch, or was relegated to the floor. It also appears that, other than possibly a bag of clothes in the bedroom closet, Walker had no area of the apartment which was designated exclusively for his personal possessions.

Given the communal nature of this living arrangement we hold that Walker had no reasonable expectation of privacy. Because Walker could have no reasonable expectation of privacy in the apartment and the persons with whom he shared joint control over it validly consented to the search, Walker's consent was not required. This assignment of error is without merit.

III. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATEMENT OF WALKER INTO EVIDENCE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS WELL AS ARTICLE THREE, SECTIONS 14 AND 26 OF THE MISSISSIPPI CONSTITUTION?

Walker contends that the trial court commited reversible error when it denied a motion to suppress his confession. Although unclear and somewhat confusing, Walker's assignment of error appears to be two-fold. The first portion of Walker's argument concerns certain statements he made at the apartment before being taken taken into custody and transported to the Desoto County Jail. The second portion pertains to statements he made in response to questions he was asked by law enforcement officers at the jail, while he was in custody, but before he had been given a *Miranda* warning. Walker contends that both of these instances were improper custodial interrrogations conducted in violation of his *Miranda* rights. The essence of Walker's argument for the suppression of his confession appears to be that because certain pre-*Miranda* statements he made were allegedly the product of an improper custodial interrogation, his subsequent confession (made after[(1)] a *Miranda* warning had been given) was somehow "tainted" and should have been excluded from evidence.

The State responds to the first incident of alleged improper questioning by arguing that because Walker had not been taken into custody and was free to leave the apartment, his *Miranda* rights had not yet atttached. Regarding the second incident, the State contends that although Walker was in custody, any pre-*Miranda* questions asked by the officers were limited to matters extraneous to the criminal incident for which he was in custody. The State contends that the in-custody, pre-*Miranda* questioning pertained only to trivial matters such as whether Walker would like a Coke, glass of water, cigarettes, or needed to use the restroom. It is the State's position that any questions asked of Walker while he was in custody, but prior to his reading and signing the *Miranda* rights form, was not an "interrogation" within the scope of the *Miranda* rule. The State maintains that Walker's confession was given only after he read and signed a form acknowledging that he had been advised of his *Miranda* rights, that he understood them, was not under any duress or coercion, and knew that by agreeing to answer questions he was waiving these rights. The State also points out that at no time before, during, or after the events in question did Walker ask to have an attorney present or indicate that he wished to remain silent. Accordingly, the State contends that the trial court was correct in denying Walker's motion to suppress his confession.

A. Questioning at the Apartment

Regarding the first incident of questioning complained of by Walker, this Court notes that it was not raised in either his motion to suppress or at the hearing on this motion. Because the issue of alleged improper questioning conducted at the apartment was not presented for the trial court's consideration, Walker is procedurally barred from raising it for the first time on appeal. *Read v. State*, 430 So. 2d 832, 838 (Miss. 1983) (holding that issues not presented before trial court are procedurally barred from being argued for first time on appeal). However, this Court notes that it could be argued that the statements made by Walker at the apartment were, by implication, addressed by the trial court in its ruling on the admissibility of Walker's confession. This inference would be premised upon the assumption that all of Walker's statements were part of the same transaction being addressed by the trial court at the motion hearing. Because of this ambiguity we have elected to address this issue on appeal.

Despite the potential for confusion as to whether Walker's first point of error was properly raised below, it is clear from our review of the record that any questions the officers asked Walker at the apartment were merely of an on-the-scene investigatory nature. Our review of the evidence reveals that the questioning of Walker at the apartment, before he was requested to accompany the officers to the station, was conducted at a point in time when Walker was free to simply walk out of the apartment and leave the law enforcement officers' presence. Because Walker was not in custody, any questions he was asked were not part of a "custodial interrogation" within the scope of *Miranda* protections. *See Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966) (holding that whether defendant's constitutional rights were violated depends on whether he was 1.) in custody, and 2.) being interrogated; that general on-the-scene questioning as to facts surrounding crime does not require *Miranda* warning); *see also Porter v. State*, 616 So. 2d 899, 907 (Miss. 1993) (holding that "[i]n a non-custodial setting where interrogation is investigatory in nature, *Miranda* warnings are not required in order that a defendant's statements be admissible."). Whether a person is in "custody" for purposes of *Miranda* is a factual inquiry, based upon the totality of the circumstances, and considers the following factors:

(a) the place of interrogation; (b) the time of interrogation; (c) the people present; (d) the amount of force or physical restraint used by the officers; (e) the length and form of the questions; (f) whether the defendant comes to the authorities voluntarily; and (g) what the defendant is told about the situation.

Hunt v. State, 689 So. 2d 1154, 1160 (Miss. 1996).

Under the facts at bar both Walker and the officers testified that while at the apartment and before being asked to come to the police station, Walker was free to leave. The few questions the officers did ask of Walker were simply whether he was in fact Mark Walker and if he had a tattoo on his arm. Walker was not asked directly, but rather voluntarily responded to the officers' question as to who was the owner of the black tennis shoes with paint on them. After hearing Walker's response to these questions, the officers asked him and his co-defendant if they would mind coming down to the station for questioning. Although Walker consented to go to the station, at least one of the officers later testified that at the point when Walker was requested to go to the station he would not have been free to go elsewhere had he so desired. Accordingly, it was at this point in time, and not before, that Walker was taken into "custody" within the context of *Miranda* warnings. Applying the previously cited authority to the facts of this case, it is clear that the questions asked of Walker were of an

investigatory nature in a non-custodial setting; therefore, no *Miranda* warning was necessary. This portion of Walker's assignment of error is clearly without merit.

B. In-custody, pre-Miranda questioning.

In reviewing the trial court's ruling on the admissibility of Walker's confession, we are mindful that "[d]etermining 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." *Lee v. State*, 631 So. 2d 824, 826 (Miss. 1994) (quoting *Balfour v. State*, 598 So. 2d 731, 742 (Miss. 1992)). Accordingly, "[s]uch findings are treated as findings of fact made by a trial judge sitting without a jury as in any other context." *Foster v. State*, 639 So. 2d 1263, 1281 (Miss. 1994).

After reviewing the record of the motion hearing, this Court is not persuaded that the trial court committed manifest error in denying Walker's motion to suppress his confession. *See Sills v. State*, 634 So. 2d 124, 126 (Miss. 1994) (holding 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"). At the motion hearing the trial court received the testimony of both of the officers who were involved in the interrogation and that of the defendant Walker. The officers' testimony boiled down to essentially the same story, i.e., that Walker was in custody at the police station for a period of time prior to being advised of his *Miranda* rights. The officers, however, were adamant that Walker was not questioned regarding the fire at the old Hernando High School until ***after*** he read and signed a document titled "Your Rights," which detailed his *Miranda* rights. The officers stressed that Walker placed his initials beside each of the *Miranda* rights which was delineated in the "Your Rights" document and that Walker signed an acknowledgment at the bottom of the document stating that he understood the delineated rights, was not under duress or coercion, and knew that by agreeing to answer questions he was waiving these rights. While Walker alleged that the officers asked him some questions relating to the fire prior to giving him a *Miranda* warning, he did not contend that the admissions contained in his subsequent confession were of pre-*Miranda* origin. According to Walker the pre-*Miranda* questions he was allegedly asked were along the lines of whether he was involved in the fire, and why his friend (and subsequent co-defendant) would have implicated him (Walker) in the fire.

It is the opinion of this Court that regardless of any pre-*Miranda* questions that may or may not have been asked of Walker, the bottom line in disposing of this assignment of error is the fact that all of the statements contained in Walker's confession were adopted by him ***after*** the *Miranda* warning had been given. *See Houston v. State*, 531 So. 2d 598, 601 (Miss. 1988) (holding that where defendant's right to counsel had attached at time of confession, but evidence convincingly established that defendant knowingly, intelligently, and voluntarily waived his rights, he was denied no right secured by federal or state constitution); s*ee also McCarty v. State*, 554 So. 2d 909, 911 (Miss. 1989) (holding that in determining whether a confession was freely and voluntarily given circuit court judge sits as finder of fact). Although Walker did not actually draft the confession (this was done by one of the interrogating officers), all of the witnesses testified that Walker reviewed the proposed confession before signing it. After "looking over" the proposed confession, Walker signed the document so as to adopt it as his own statement, although at the motion hearing he claimed that he "did not understand his rights" at of the time he signed the document, in spite of the *Miranda* warning that he had been

given prior to signing.

Notwithstanding the allegation contained in Walker's appellate brief (see note one, *supra*), the record of the motion hearing makes it clear that the admissions from which his confession was derived were made only ***after*** Walker received a *Miranda* warning. While this Court acknowledges it is possible that some of the officers' pre-*Miranda* questions may have been inappropriate, these are not the statements that Walker's motion sought to suppress; rather, it was the written confession that he sought to exclude from evidence. Walker's assignment of error seems to be premised on a theory that improper pre-*Miranda* questioning would automatically "taint" any subsequent admissions, even if they were made after a *Miranda* warning had been given. This Court declines to adopt such a proposition. Accordingly, the trial court's admission of Walker's confession is affirmed. This assignment of error is without merit.

IV. WHETHER THE TRIAL COURT ERRED IN DENYING WALKER'S MOTION TO STRIKE A PORTION OF THE STATE'S FINAL ARGUMENT AND FOR CURATIVE INSTRUCTION?

Walker contends that various portions of the State's closing argument were improper. Walker argues that part of the State's argument was an attempt to "all[y] the State with the judge, and with the community against this defendant." Walker further contends some of the State's remarks were "an effort to try to enrage the jury, primarily against young persons accused of crimes, young persons who refuse to accept responsibility, and the lack of accountability in general." The State responds by apparently contending that Walker failed to make a contemporaneous objection to the offensive remarks and, therefore, the trial court should not have ruled on the merits of Walker's objection. In the alternative, the State contends that the prosecutor's remarks were within the wide range of discretion afforded to both sides in closing argument, and did not serve to portray the State/judge/community as "allies" who were on the same side of the case, or to enrage or inflame the jury.

In addressing this assignment of error we must first dispose of the State's rather novel contention that the lower court should not have addressed the merits of Walker's objection. In the context of objections to allegedly improper closing argument, "[t]he reasoning behind the requirement of contemporaneous objections is to allow the trial court to correct the error with proper jury instructions." *Monk v. State*, 532 So. 2d 592, 600-01 (Miss. 1988). In the case at bar, although Walker did not instantaneously object to each of the allegedly improper closing remarks as they came out of the prosecutor's mouth, he did object to them immediately after the close of the State's argument. As such, Walker's objection was made prior to the jury having retired to the jury room and while the trial was still on-going. We consider this to be a contemporaneous objection, thereby providing the trial court with an opportunity to admonish the jury regarding any error, had it concluded that such action was warranted. Because the objection was made contemporaneous to the complained-of remarks, the objection was not waived and the trial court had no choice but to rule on the its merits.

Importantly, however, we believe that the State's argument exhibits a lack of understanding as to the theory behind the concept of waiver for having failed to make a contemporaneous objection. Simply stated, a trial court is not precluded from addressing the merits of a belatedly made objection should

it so desire. While it is true that a trial court is not bound to address the substantive merits of an objection that was not made contemporaneous to the offensive remarks, no authority this Court is aware of precludes the trial court from doing so of its own volition. This Court would like to make it clear that the purpose of the contemporaneous objection rule is not to empower a party opposite to an objection to tell a trial court that it is powerless to rule on the merits of an objection, simply because the objection may have been belatedly made. Accordingly, even if Walker's objection had been waived for failure to make a contemporaneous objection, the trial court was not barred from addressing its substantive merits. The State's claim of "waiver" with this assignment of error is grossly misplaced.

Addressing the merits of Walker's assignment of error, we conclude that the State did not exceed the wide latitude afforded to both parties in making closing arguments. *See Ahmad v. State*, 603 So. 2d 843, 846 (Miss. 1992) (holding that "attorneys on both sides in a criminal prosecution are given broad latitude during closing arguments"). The Mississippi Supreme Court has stated that "not only should the State and defense counsel be given wide latitude in their arguments to the jury, but the court should also be very careful in limiting [the] free play of ideas, imagery, and personalities of counsel in their argument to the jury." *Ahmad*, 603 So. 2d at 846. In sum, the prosecuting attorney is "entitled to great latitude in framing the closing argument as long as no impermissible factor is argued, such as the defendant's failure to take the stand." *Neal v. State*, 451 So. 2d 743, 762 (Miss. 1984). The test for determining if improper argument by the prosecutor to the jury requires reversal is "whether the natural and probable effect of the improper argument is to create an unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Davis v. State*, 530 So. 2d 694, 701 (Miss. 1988).

Walker points to several portions of the State's closing argument that he feels were improper. One such incident was where the prosecutor told the jury that it should not find the defendant guilty of the lesser-included offense because "what he did wasn't less than what these other boys did and it's not warranted by this law." Another incident pointed to was where the State suggested that the defendant "needs to go before this judge," so that "the judge can hear [the defendant's] excuses and he can weigh those excuses." The State also asserted that "[y]oung people and people who are rebelling against authority, they don't need excuses, they don't need excuses by us . . . they don't need our help." Walker contends that these comments were an attempt by the prosecution to "all[y] the State with the judge, and with the community against this defendant," and was "an effort to try to enrage the jury, primarily against young persons accused of crimes, young persons who refuse to accept responsibility, and the lack of accountability in general."

We hold Walker's argument to be without merit. While the prosecutor's apparent attempt to link the lesser-included offense to Walker's degree of culpability relative to his co-defendants was an incorrect statement of the law, Walker has failed to demonstrate that the jury's decision was influenced by any unjust prejudice flowing from this remark. Even more importantly, Walker has failed to cite this Court with any authority indicating that such a statement would necessitate a reversal of his conviction. Regarding the other complained-of prosecutorial remarks, we hold Walker's contention that they were an attempt to somehow "ally" the court and the community with the prosecution, and to otherwise "inflame the jury," to be totally without merit. Because of the absence of any authority compelling a reversal based upon the lesser-included offense remarks, coupled with the lack of any indication that the jury's verdict was tainted by prejudice flowing from the other complained-of

remarks, we must reject Walker's assignment of error.

V. WHETHER THE TRIAL COURT ERRED IN DENYING WALKER'S MOTION FOR NEW TRIAL, ON GROUNDS THAT VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE?

With his final assignment of error Walker purports to challenge the weight of the evidence supporting the jury's verdict of guilty. The body of Walker's argument, however, addresses the sufficiency of the evidence, rather than its weight. Apparently Walker has failed to appreciate the distinction between a challenge to the legal sufficiency of the evidence from a challenge to the weight of the evidence, having commingled both issues into his assignment of error. For purposes of clarity we have elected to address both issues. The State has also noted this inconsistency and, as might be expected, contends that the evidence was both sufficient to satisfy all of the elements of the crimes for which Walker was convicted and, was of such weight that a verdict of not guilty would have been against the overwhelming weight of the evidence.

Motions for new trial challenge the weight of the evidence and "[i]mplicate the trial court's sound discretion." *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). A new trial motion should only be granted when the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice. *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987). This Court will reverse and order a new trial only upon a determination that the trial court abused its discretion, accepting as true all evidence favorable to the State. *McClain*, 625 So. 2d at 781.

Directed verdict and JNOV motions challenge the legal sufficiency of the evidence. *Id.* at 778. With regard to the legal sufficiency of the evidence, all credible evidence consistent with the defendant's guilt must be accepted as true and the prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Id.* This Court is authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. *Wetz*, 503 So. 2d at 808.

In light of this precedent it should be readily apparent that Walker faces an "uphill battle" in proving that the trial court erred regarding either the weight or the sufficiency of the evidence. The trial record clearly shows that the jury had before it significant evidence of the defendant's guilt. In fact, considering the defendant's confession and the various expert and lay person testimony received into evidence, the jury was faced not merely with "sufficient" evidence, but rather something more along the lines of overwhelming evidence of Walker's guilt. Due to the quality and quantity of the evidence before the trial court it was correct in denying both Walker's directed verdict/JNOV, and new trial motions. This assignment of error is totally without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF DESOTO COUNTY OF CONVICTION ON COUNT II OF MALICIOUS TRESPASS AND SENTENCE OF SIX MONTHS IN THE DESOTO COUNTY JAIL, CONCURRENT TO COUNT III; COUNT III OF GRAND LARCENY AND SENTENCE OF FIVE YEARS, CONCURRENT TO COUNT IV; COUNT IV OF CONSPIRACY TO COMMIT ARSON AND SENTENCE OF FIVE (5) YEARS,

CONCURRENT TO COUNT V; AND COUNT V OF ARSON OF A SCHOOL BUILDING AND SENTENCE OF TWENTY (20) YEARS, SEVEN (7) YEARS SUSPENDED, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., CONCURS WITH SEPARATE OPINION JOINED BY HERRING, PAYNE, AND SOUTHWICK, JJ.

1. It should be noted that in his brief on this appeal Walker alleges that "he was not advised of his rights until after interrogation." We assume that by "interrogation" Walker is referring to the questioning which resulted in his confession. This allegation would be in direct conflict with his testimony at the hearing on his motion to suppress. The record indicates that, at the motion hearing, Walker alleged that he was asked some questions by law enforcement officers prior to being given a *Miranda* warning. Walker, however, did not allege that his confession was made before he received a *Miranda* warning. Accordingly, for purposes of this appeal we will assume that the reference in Walker's appellate brief to an "interrogation" was actually intended to be a reference to the pre-*Miranda* questioning conducted at the Desoto County Jail, rather than the post-*Miranda* questioning from which his confession was derived.

IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00658 COA

MARK NOBLE WALKER 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

THOMAS, P.J., CONCURRING:

I concur with the majority in the bulk of its opinion except for its finding in assignment of error number IV, that the defense was not procedurally barred for failure to contemporaneously object.

The Mississippi Supreme Court has a longstanding rule that a contemporaneous objection is necessary to preserve an issue for appeal. *Box v. State*, 610 So. 2d 1148, 1154 (Miss. 1992); *McCaine v. State*, 591 So. 2d 833, 835 (Miss. 1991); *Handley v. State*, 574 So. 2d 671, 682 (Miss. 1990); *Dunaway v. State*, 551 So. 2d 162, 164 (Miss. 1989); *Johnson v. State*, 477 So. 2d 196, 209-10 (Miss. 1985); *Temple v. State*, 498 So. 2d 379, 381 (Miss. 1986); *Sand v. State*, 467 So. 2d 907, 910 (Miss. 1985); *Blackwell v. State*, 44 So. 2d 409, 410 (Miss. 1950).

The State argues that since defense counsel did not contemporaneously object to this allegedly prejudicial closing argument, Walker is procedurally barred. I must agree with the State and the long held precedent set out for this Court. "Procedurally, contemporaneous objections 'must be made to allegedly prejudicial comments during closing argument or the point is waived.'" *Dunaway v. State*, 551 So. 2d 162, 164 (Miss. 1989) (quoting *Monk v. State*, 532 So. 2d 592, 600 (Miss. 1988)) (citing *Marks v. State*, 532 So. 2d 976, 984 (Miss. 1988); *Crawford v. State*, 515 So. 2d 936 (Miss. 1987)).

In *May v. State*, 569 So. 2d 1188 (Miss. 1990), the Mississippi Supreme Court stated that:

it is the duty of trial counsel, if he deems opposing counsel overstepping the wide range of authorized argument to promptly make objections and insist upon a ruling by the trial court. The trial judge first determines if the objection should be sustained or overruled. If the argument is improper and the objection is sustained, it is the further duty of trial court to move for a mistrial. The circuit judge is in the best position to weigh the consequences of the objectionable argument, and unless serious and irreparable damage has been done, admonish the jury then and there to disregard the improper comment.

Id. at 1190 (quoting *Johnson v. State*, 477 So. 2d 196, 209-10 (Miss. 1985)).

"The reasoning behind the requirements of contemporaneous objections is to allow the trial court to correct the error with proper jury instructions." *Dunaway*, 551 So. 2d at 164 (citations omitted). Therefore, based on precedent, I would hold that Walker failed to contemporaneously object and is procedurally barred. Without waiving procedural bar, I agree with the majority that the complained of comments by the State do not constitute error in any event.

HERRING, PAYNE AND SOUTHWICK, JJ., JOIN THIS SEPARATE WRITTEN OPINION.