

MAINS vs. STATE.

Where the statements of witnesses are contradictory, it is the province of the jury to determine which of them is entitled to credit, and to find accordingly; and this court will not review the evidence for the purpose of passing upon the correctness of their conclusion as to the weight of evidence. It is sufficient that there is not a total want of evidence to support the verdict.

Appeal from Ashley Circuit Court.

PIKE & CUMMINS, for appellant.

CLENDENIN, Attorney General, contra.

Mr. Justice WALKER delivered the opinion of the Court.

The defendant was indicted, tried and convicted of an assault with a deadly weapon with intent to inflict great bodily injury. A motion was made for a new trial upon the sole ground that the verdict of the jury was contrary to evidence.

The counsel contends that this is not a case in which there is a conflict of evidence, but where there is a total lack of evidence to prove that an assault was in fact committed. In this, we think the counsel mistaken. It is very true that most of the witnesses deposed that the gun was held in a position parallel with the defendant's body, but one of them stated that the defendant caught the rifle in both hands, and held it pointing in the direction to where Trammell (the person assaulted) stood. Witness could not say it was at Trammell, but in the direction to him, and he said that if Trammell did not immediately make him a deed to land, that he would make a hole through Trammell's body. The gun was cocked, with a cap on the tube.

Under this state of case, it was for the jury to say, to which of these witnesses they would give credit, and to determine whether

an assault was or not committed. And we have looked into the evidence, not to compare opinions with them as to the weight of evidence, but to see whether there was such total lack of evidence as was supposed to exist by the counsel; and finding this not to be the case, we do not hesitate to affirm the decision of the circuit court in refusing a new trial.

Let the judgment of the circuit court be affirmed.

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