

FLEMING v. STATE.

Opinion delivered January 16, 1904.

NEW TRIAL—SURPRISE.—A party who is surprised by the testimony of a witness, but fails to move for a continuance, cannot complain of the surprise on appeal.

Appeal from Miller Circuit Court.

JOEL D. CONWAY, Judge.

Affirmed.

J. O. A. Bush, for appellant.

G. W. Murphy, Attorney General, for appellee.

BATTLE, J. Will Fleming was indicted for an assault with intent to kill. He was tried before a jury, and convicted, and appealed to this court.

There was evidence to sustain the verdict of the jury. It is unsatisfactory, as it appears to us. But the judge of the trial court and the jury, who heard it, had better opportunities than we have to know the weight to which it was entitled, and they evidently considered it sufficient. We will not, therefore, disturb the verdict on account of it.

Appellant says that he was surprised by the testimony of a witness who testified in behalf of the state. But he made no "application for a postponement of the trial, in order that he might repair the damage done him by the unexpected testimony." He took his "chance of a verdict in his favor in spite of the surprise, without an effort to repair the injury while yet he may," and "must abide his election to stand the hazard of the verdict." *Nickens v. State*, 55 Ark. 567, 18 S. W. 1045; *Overton v. State*, 57 Ark. 60, 20 S. W. 590.

Affirmed.
