

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-KA-00631 COA**

**DAVID LEE FLUKER**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

**PER CURIAM AFFIRMANCE MEMORANDUM OPINION**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,  
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	5/31/96
TRIAL JUDGE:	HON. ROBERT WALTER BAILEY
COURT FROM WHICH APPEALED:	LAUDERDALE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	GARY B. JONES
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	BILBO MITCHELL
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF DRIVE-BY SHOOTING; SENTENCED TO 30 YEARS AS RECIDIVIST
DISPOSITION:	AFFIRMED 2/10/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

BEFORE BRIDGES, C.J., COLEMAN, AND DIAZ, JJ.

PER CURIAM:

David Lee Fluker was convicted of drive-by shooting and sentenced to a term of thirty years as a habitual offender in the custody of the Mississippi Department of Corrections. He appeals his conviction and sentence arguing that the trial court erred in failing to grant his motion for directed verdict, motion for judgment notwithstanding the verdict, and his motion for new trial because the verdict was not supported by sufficient evidence to convince a reasonable person of guilty beyond a reasonable doubt. Finding no error, we affirm.

On July 12, 1995, a man driving a dark car drove by the residence of Gloria Cole and fired several shots in the direction of the house. Several witnesses heard the shots, and one witness testified that the fragments of one of the bullets were found in his garage. Two additional shell casings were found in the street the next day by the police. These shell casings were similar to one found in Fluker's car. One of the witnesses, Yvette Overby, positively identified Fluker as the drive-by shooter, and testified that she had seen him in the area earlier that evening. Other witnesses also testified that they had seen Fluker driving in the neighborhood earlier that evening. Overby stated that the third time Fluker drove down the street, he was driving very slow with his headlights turned off. She heard five shots and saw that the driver was Fluker.

According to Debbie Warren, Fluker's girlfriend and mother of his child, he was driving by her aunt's house in an attempt to see her. Warren testified that Fluker had seen "hickies" on her neck and was upset. Warren testified that she heard the shots, but did not see the shooter. Warren's aunt, Gloria Cole, testified that when she left the house earlier that evening, Fluker was parked in front of the house. Cole stated that she had an altercation with Fluker a week or so ago and that he had threatened to "shoot up" her car. Fluker did not testify and offered no witnesses in opposition to the testimony identifying him as the drive-by shooter. The jury found him guilty of the crime of drive-by shooting, and he was sentenced as a habitual offender to serve a term of thirty years in the custody of the Mississippi Department of Corrections.

Fluker's post trial motions challenged both the legal sufficiency and weight of the evidence. In reviewing the legal sufficiency of the evidence, our authority to disturb the jury's verdict is quite limited. *Clayton v. State*, 652 So. 2d 720, 724 (Miss. 1995). In *Noe v. State*, 616 So. 2d 298, 302 (Miss. 1993), the Mississippi Supreme Court held:

In judging the sufficiency of the evidence . . . the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant.

The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of the witnesses, and determining whose testimony should be believed. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993). Further, in *Doby v. State*, 532 So. 2d 584, 590 (Miss. 1988), the court held that the testimony of a single witness is sufficient to support a conviction. As stated above, there was direct testimony from Overby that Fluker was the drive-by shooter. Overby testified, "[H]e looked directly at my door and I seen him, his face."

In *Williams v. State*, 427 So. 2d 100, 104 (Miss. 1983), our supreme court held that jurors may accept or refuse testimony of witnesses stating, "It is not for this Court to pass upon the credibility of witnesses and where the evidence justifies the verdict it must be accepted as having been found worthy of belief." Here, the jury weighed the evidence, believed the State's witnesses, and convicted Fluker.

This assignment of error must also be reviewed in a light most favorable to the State. *Williams v. State*, 463 So. 2d 1064, 1068 (Miss. 1985). The evidence which is consistent with the verdict must be accepted as true. *Glass v. State*, 278 So. 2d 384, 386 (Miss. 1973). The jury was provided sufficient testimony, and it was the province of the jury to weigh the credibility of the witnesses.

Considered as such, we cannot say that the trial court was in error by refusing to grant Fluker a directed verdict or JNOV/new trial.

Finding that the lower court did not err in refusing the motions requested by the defense, we affirm the decision of the lower court.

**THE JUDGMENT OF THE LAUDERDALE COUNTY CIRCUIT COURT OF CONVICTION OF DRIVE-BY SHOOTING AND SENTENCE OF THIRTY YEARS AS A HABITUAL OFFENDER IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LAUDERDALE COUNTY.**

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