

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOBI GEIBIG a/k/a TOBI GEIVIG,

Defendant-Appellant.

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UNPUBLISHED

June 14, 1996

No. 184993

LC No. 94-009956

Before: White, P.J., and Smolenski, and R.R. Lamb,\* JJ.

MEMORANDUM.

Defendant appeals as of right from his bench trial conviction of felonious assault, MCL 750.82; MSA 28.277. He was sentenced to two years' probation. We reverse.

Defendant challenges the sufficiency of the evidence with respect to: (1) the trial court's finding that he was armed with a dangerous weapon, and (2) the trial court's decision to reject defendant's self-defense claim.

The elements of felonious assault are: (1) assault, (2) with a dangerous weapon, and (3) with intent to injure or to place the victim in reasonable apprehension of immediate battery. *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993). In this case, the trial judge specifically found that the weapon defendant used in the incident was a starter pistol. In *People v Stevens*, 409 Mich 564, 566-567; 297 NW2d 120 (1980), our Supreme Court held that a starter pistol which is incapable of propelling a dangerous projectile is not a "dangerous weapon" as a matter of law, and an assault with such a weapon will not support a felonious assault conviction. While the prosecution concedes that a starter pistol cannot be construed as a dangerous weapon under most circumstances, it asserts "that defendant was, in fact, in possession of a pistol which could shoot live bullets." However, the trial court expressly found that defendant used a starter pistol. There being evidence to support, although not compel, this conclusion, we cannot assume, as the prosecutor urges, that the court "mispoke" itself. Based on the trial court's express

finding, we must reverse. Because this issue is dispositive, we do not address defendant's remaining argument.

Reversed.

/s/ Helene N. White  
/s/ Michael R. Smolenski  
/s/ Richard R. Lamb