

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAL I. WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
November 2, 1999

No. 201877
Recorder's Court
LC No. 96-502131

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced, as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to six months to six years' imprisonment consecutive to a term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first argues that there was insufficient credible evidence that he possessed a weapon or firearm capable of inflicting injury to support the felonious assault and felony-firearm convictions. We disagree. "In reviewing the sufficiency of the evidence presented at trial in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational factfinder could conclude that the essential elements of the crime were proved beyond a reasonable doubt." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In order to prove the crime of felonious assault, the prosecution must demonstrate that the defendant committed an assault with a dangerous weapon with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). In order to prove the crime of felony-firearm, the prosecution must prove that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Defendant contends that the prosecution failed to demonstrate, with credible evidence, that defendant possessed a firearm. However, four witnesses testified that it appeared that defendant pulled a gun on the victim, Richard Jackson, following a discussion or argument between the two men. Specifically, Jackson and his friend, Walter Hollis,

testified that defendant pulled a gun and pointed it at Jackson. Two other impartial witnesses, Dreana Cook and Shannon Hengstebeck, also testified that defendant pulled a gun during his confrontation with Jackson. The trial court found that this testimony was credible. An offense which requires proof beyond a reasonable doubt that a defendant possessed a firearm may be proven without actual admission of the weapon into evidence. *People v Hayden*, 132 Mich App 273, 296; 348 NW2d 672 (1984).

Defendant contends that the prosecution must also demonstrate that the firearm or weapon was capable of propelling a dangerous projectile, relying on *People v Stevens*, 409 Mich 564, 567; 297 NW2d 120 (1980). In *Stevens*, the defendant was charged with felonious assault. However, the prosecution *stipulated* that the “dangerous weapon” used to commit the assault was a starter pistol which was filed down to the point that it was impossible to fire the pistol. Therefore, the charge of felonious assault was dismissed because the starter pistol did not satisfy the dangerous weapon element, and the victim’s apprehension of an object cannot transform it into a dangerous weapon. *Id.*

The *Stevens* decision is not controlling in the present case because there was no stipulation that the gun handled by defendant was inoperable. *People v Broach*, 126 Mich App 711, 714-716; 337 NW2d 642 (1983); *People v Prather*, 121 Mich App 324, 329-330; 328 NW2d 556 (1982). Furthermore, the gun used to assault Jackson was not a starter pistol, but rather was identified by Hollis as a small caliber .25 automatic, which is a weapon capable of propelling a dangerous projectile according to the felonious assault statute. *Broach, supra*. Furthermore, the manner of an instrumentality’s use and the nature of the act determines whether an instrumentality is dangerous. *People v Kay*, 121 Mich App 438, 444; 328 NW2d 424 (1982). The prosecutor need not present proof of operability as an element of a prima facie case in a felonious assault conviction. *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998). Proof of operability of the weapon is also unnecessary to include it within the prohibitions of the felony-firearm statute. *Broach, supra*. Jackson testified that defendant pointed the gun directly at Jackson’s head with his hand on the trigger and threatened to kill Jackson. Hollis also testified that defendant pointed the gun at Jackson. After being reminded that they were under oath, Hengstebeck and Cook testified that defendant pointed a gun at Jackson. Viewing this evidence in the light most favorable to the prosecution, there was sufficient evidence to support the felonious assault and felony-firearm convictions. *Terry, supra*.

Defendant next argues that he was denied procedural due process when his motion for new trial was heard and decided by successor Judge Vera Massey Jones rather than Judge Cynthia Stephens, who presided over his bench trial. We disagree. Defendant did not object at the hearing regarding the motion for a new trial to Judge Jones’ conducting the hearing, and there is no rule of law requiring that postconviction motions be *heard* by the convicting judge. *People v Montrose*, 201 Mich App 378, 380; 506 NW2d 565 (1993). Furthermore, the court rules permit reassignment of cases. MCR 8.110(C)(3)(b); MCR 8.111(C). Defendant further argues that he was denied procedural due process because Judge Jones was unfamiliar with the evidence presented at trial and applied an improper standard of review in deciding the motion. Review of the record reveals that Judge Jones located her notes concerning defendant’s motion, had reviewed the transcript, and applied the appropriate standard of review to Judge Stephens’ findings of fact. Accordingly, defendant’s claim is without merit.

Defendant next argues that the trial court abused its discretion in denying defendant's motion for a new trial where the verdict was against the great weight of the evidence. We disagree. A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Defendant asserts that the testimony of various witnesses demonstrated that defendant was not in possession of a gun, and any action taken on the part of defendant was in self-defense. While the evidence regarding possession of a gun conflicted, the trial court found that the testimony of the prosecution's witnesses, Jackson, Hollis, Hengstebeck, and Cook, was credible. Where the resolution of an issue involves the credibility of two diametrically opposed versions of events, the test of credibility rests in the trier of fact. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998). Furthermore, in order to establish lawful self-defense, the circumstances, as they appeared to the defendant, must result in a reasonable belief that the defendant was in danger of death or serious bodily harm. *People v Green*, 113 Mich App 699, 704; 318 NW2d 547 (1982). There is no evidence in the record which addressed defendant's subjective belief of harm. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial based on the great weight of the evidence. *Gadomski, supra*.

Defendant next argues that the trial court considered impermissible factors in assessing the credibility of the witnesses. We disagree. The trial court's superior ability to assess the credibility of witnesses is given deference. *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997); MCR 2.613(C). There is no evidence in the record that the trial court based its decision on impermissible factors. The trial court found the testimony of the prosecution's witnesses to be credible. Accordingly, defendant's contention is without merit.

Lastly, defendant contends that the trial court rendered an inconsistent verdict when it vacated defendant's conviction for felonious assault, but did not set aside defendant's felony-firearm conviction. We disagree. Review of the amended judgment of sentence reveals that defendant's *conviction* for felonious assault was not vacated. Rather, the sentence for felonious assault was vacated, and defendant was sentenced as an habitual offender. Once a defendant's habitual offender status is established, the sentence for an underlying conviction is vacated, and the defendant is resentenced. *People v Hardin*, 173 Mich App 774, 777; 434 NW2d 243 (1988). The trial court followed the proper procedure when sentencing defendant and did not render an inconsistent verdict. *Id.*

Affirmed.

/s/ Helene N. White
/s/ Harold Hood
/s/ Kathleen Jansen