

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN M. CHURCH,

Defendant-Appellant.

UNPUBLISHED

June 24, 1997

No. 186837

Recorder's Court

LC No. 94-12578

Before: Gage, P.J., and Reilly and Hoekstra, JJ.

MEMORANDUM.

Defendant appeals by right from his bench trial conviction of felonious assault. In making findings of fact at the conclusion of the bench trial, the trial judge acquitted defendant of the second count in the information charging him with possession of a firearm during commission of a felony, stating for the record that she had a reasonable doubt as to whether defendant possessed a firearm.

Nonetheless, the trial court proceeded to find defendant guilty of the felonious assault charge, finding "that either defendant did actually possess the gun or something fashioned to lead these officers to reasonably believe defendant was armed. We have a barricade situation, we have officers hiding behind cars and we have all of these activities going on and defendant standing in the window and the child shouting and everything. I believe that there was something; it may or may not have been a gun."

In light of the predicate finding that defendant was not shown, beyond a reasonable doubt, to have possessed a gun, the evidence fails to suffice to support defendant's conviction for felonious assault. The only testimony of an assault was that by one of the police officers involved that defendant was seen standing at the window of his home with what the officer thought was a rifle, and that defendant pointed the rifle at the officers. Since, however, defendant's possession of a rifle or other firearm was not proved beyond a reasonable doubt, the record shows only that defendant, possessing something other than a firearm, "pointed" that object at the police officers from a distance well beyond arm's length. Under these circumstances, defendant could not have had the present ability to carry out any intention to do corporal hurt to the police officers. Although he did create a reasonable apprehension of immediate injury, he did so without actually

putting any unlawful physical force partly or fully into motion. *People v Jones*, 443 Mich 88, 92; 504 NW2d 158 (1993). As there was no evidence to indicate that defendant possessed any kind of dangerous weapon other than a firearm, the other element of felonious assault, use of a dangerous weapon, is also absent. *People v Jones, supra*, 443 Mich at 101. Any other result would require this Court to impermissibly approve inconsistent factual findings by a trial judge in a bench trial. *Wayne Prosecutor v Recorder's Court Judge*, 177 Mich App 762, 764-765; 442 NW2d 771 (1989); *People v Burgess*, 419 Mich 305, 310-311; 353 NW2d 444 (1984). As the elements of neither felonious assault nor attempted felonious assault were proved beyond a reasonable doubt, defendant's conviction must be reversed and defendant discharged.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Maureen Pulte Reilly
/s/ Joel P. Hoekstra