

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID BRYAN BROWN,

Defendant-Appellant.

UNPUBLISHED

November 26, 1996

No. 183264

LC No. 94-134472-FH

Before: Michael J. Kelly, P.J., and Hood and H.D. Soet,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6); felonious assault, MCL 750.82; MSA 28.277; and possession of a firearm during the commission of a felony, second offense, MCL 750.227b(b); MSA 28.424(2)(b). Defendant pleaded guilty to two counts of habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to six months to ten years for his habitual offender conviction with possession of a firearm by a felon as the underlying offense; six months to eight years for his habitual offender conviction with felonious assault as the underlying conviction; and the mandatory, consecutive five-year sentence for his felony firearm, second, conviction. We affirm.

Defendant first claims that the trial court gave conflicting and erroneous instructions to the jury on the elements of felonious assault. Specifically defendant argues that the trial court failed to instruct the jury that one of the elements of felonious assault is that a dangerous weapon was used to commit the assault. We disagree. Jury instructions are reviewed in their entirety to determine if reversal is required. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). Reversal is not required if the instructions as a whole sufficiently protected the defendant's rights. *Id.* Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

The elements which must be proven to support a conviction for felonious assault are (1) that the defendant either attempted to commit a battery or did an illegal act that caused the victim to reasonably

* Circuit judge, sitting on the Court of Appeals by assignment.

fear an immediate battery; (2) the defendant intended either to injure the victim or to make the victim reasonably fear an immediate battery; (3) at the time, the defendant had the ability to commit a battery or appeared to have the ability or thought he had the ability to do so; and (4) that the defendant committed the assault with a dangerous weapon. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Our review of the trial court's instructions reveals that the trial court did instruct the jury that it must find that defendant committed the assault with a pistol in order to convict him of felonious assault. We conclude that the trial court's instructions as a whole sufficiently protected defendant's rights.

Defendant next argues that MCL 768.7a(2); MSA 28.1030(1)(2), the consecutive sentence provision for reoffending parolees, is contrary to the Legislature's intent expressed in MCL 791.234(2); MSA 28.2304(2). Defendant urges this Court to convene a special panel under Administrative Order No. 1994-4 to disagree with the opinion issued in *People v Young*, 206 Mich App 144; 521 NW2d 340 (1994). However, there is no need for us to convene such a panel in light of our Supreme Court's recent holding in *Wayne County Prosecutor v Department of Corrections*, 451 Mich 569; ___ NW2d ___ (1996). In that case, the court held that the "remaining portion" clause of MCL 768.7a(2); MSA 28.1030(2), requires the offender to serve at least the combined minimum terms of his sentences, plus whatever portion, between the minimum and the maximum, of the earlier sentence that the parole board may, because the parolee violated the terms of parole, require him to serve¹. We therefore agree that defendant need not serve the fifteen-year maximum term of his armed robbery conviction sentence before commencing his sentence for the instant offense. Defendant must only serve the combined minimum terms of the offenses, plus whatever amount of time the parole board requires him to serve additionally.

Defendant's final claim of error is that the trial court abused its discretion when it reserved its ruling on the admission of MRE 404(b) evidence until defendant indicated to the court that he decided to testify. Defendant argues that he was essentially denied his constitutional right to testify because he did not know whether the prosecution would be allowed to impeach him with his prior armed robbery conviction. We find that defendant's claim is without merit.

Before trial, the trial court indicated that it would reserve its ruling on the admissibility of defendant's prior armed robbery conviction for impeachment purposes until such time that defendant indicated to the court, in private, that he desired to testify. Defendant has not provided this Court with any legal authority for his contention that he is entitled to a ruling on the admissibility of MRE 404(b) evidence prior to trial. It is a well-settled principle of law that a party who fails to support his argument with legal authority has abandoned that issue on appeal. *People v Simpson*, 207 Mich App 560, 561; 526 NW2d 33 (1994). Moreover, defendant's policy argument that the trial court *should* make its ruling "in a timely fashion" in order for *People v Vandervliet*, 444 Mich 52; 508 NW2d 114 (1993), to be effective, is wholly contradicted by *Vandervliet* itself. The *Vandervliet* Court specifically recommended that trial courts employ a flexible approach to determining admissibility of other acts evidence. *Id.* at 90. The Court recommended that

where pretrial procedures . . . do not furnish a record basis to reliably determine the relevance and admissibility of other acts evidence, the trial court should employ its authority to control the order of proofs, require the prosecution to present its case in chief, and delay ruling on the proffered other acts evidence until after the examination and cross-examination of prosecution witnesses. [*People v Vandervliet, supra*, 444 Mich 90.]

It was within the trial court's discretion to reserve its ruling until such time that defendant decided to testify. The trial court did not deny defendant his right to testify. The trial court made special provisions for defendant to alert the court privately if defendant decided to testify. We find that defendant's argument is without merit.

Affirmed.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ H. David Soet

¹ The Parole Board may revoke an offender's parole for violation of parole under MCL 791.240a (6); MSA 28.2310(1)(6) and it may forfeit good time. MSA 791.238(4); MSA 28.2308(4).