

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALPHONSO SCOTT,

Defendant-Appellant.

UNPUBLISHED

August 11, 1998

No. 202904

Recorder's Court

LC No. 95-004682

Before: Markman, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of two counts of first-degree criminal sexual conduct.¹ The court sentenced defendant to two concurrent terms of thirty to seventy years and we affirm.

Defendant argues that the trial court committed reversible error when it granted his persistent request to make a statement before the jury.² Defendant mischaracterizes the court's action as permitting him to act in propria persona without following the proper procedures for a waiver of counsel. Defendant's request to make a statement to the jury did not constitute a request to represent himself, and he did not, in fact, assume his own representation when he made the statement (which was not incriminating). Rather, we see this as an evidentiary issue.

The trial court's decision to admit evidence will not be disturbed on appeal absent an abuse of discretion. *People v Hoffman*, 225 Mich App 103, 104; 570 NW2d 146 (1997); *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). MRE 611(a) grants the court "reasonable control over the mode and order of interrogating witnesses," without specifying rules to govern the mode and order of interrogation, and without mandating a particular format for presenting evidence. *People v Wilson*, 119 Mich App 606 616-617; 326 NW2d 576 (1982). The trial court has discretion to admit narrative testimony in a form other than question and answer. *Id.* The trial court did not abuse its broad discretion when it permitted defendant to address the jury without the aid of counsel's questions.

Defendant also contends that he was denied a fair trial because the trial court allowed the prosecutor to ask defendant questions regarding his familiarity with guns and his possession of a gun when he was arrested. Defendant argues that these questions elicited testimony which should have been ruled inadmissible "other acts" evidence. We disagree. Relevant other acts evidence does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994). "Rule 404(b) permits the trial court to admit other acts evidence *whenever* it is relevant on a noncharacter theory." *VanderVliet, supra*, 444 Mich 65. Evidence of another crime may be admitted if (1) it is offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime, (2) it is relevant to an issue or fact of consequence at trial, and (3) it is sufficiently probative to prevail under the balancing test of MRE 403. *VanderVliet, supra*, 444 Mich 65; *Hoffman, supra*, 225 Mich App 99.

The charge of first-degree sexual conduct was predicated on the allegation that defendant was armed with a weapon or any article which the victim would reasonably believe was a weapon. MCL 750.520b(1)(e); MSA 28.788(2)(1)(e); *People v Proveaux*, 157 Mich App 357, 360-361; 403 NW2d 135 (1987). Consequently, evidence that defendant was armed with a weapon or apparent weapon was an essential element of the crime that the prosecution had to prove beyond a reasonable doubt. *Id.* Therefore, the prosecutor's line of questioning is clearly admissible to establish an element of the crime with which defendant was charged. *Id.* Defendant himself put this matter at issue by testifying that the difference between a starter pistol (which he was carrying at the time of his arrest) and a real gun should be apparent. Furthermore, the prosecutor's particular question as to defendant's familiarity with guns was prompted by defendant's own detailed descriptions of guns. The trial court did not abuse its discretion in allowing the testimony. *Hoffman, supra*, 225 Mich App 99.

Defendant further claims that the trial court gave erroneous instructions with respect to the "armed with a weapon" element of first-degree criminal sexual conduct. Specifically, defendant says that the trial court improperly deviated from the exact language in *People v Proveaux, supra*, and *People v Davis*, 101 Mich App 198, 203; 300 NW2d 497 (1980), by instructing the jury that the weapon had to be "readily accessible" instead of "reasonably accessible". We disagree. When read as a whole, the jury instructions fairly presented all of the essential elements of the crime and sufficiently protected defendant's rights. *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996).

This Court has held that a perpetrator of first-degree criminal sexual conduct need not have the weapon in his hands while committing the offense charged, so long as he has knowledge of the weapon's location and the weapon is reasonably accessible to the perpetrator. *Davis, supra*, 101 Mich App 203. Here, the trial court thought that "reasonably accessible" (the language requested by the prosecutor) was too broad and replaced the phrase with "readily accessible". "Readily" is defined as "without delay; quickly, without difficulty." *Webster's New Twentieth Century Dictionary: Unabridged Edition* (1983). "Reasonably" is defined as "in a reasonable manner." *Webster's New Twentieth Century Dictionary: Unabridged Edition* (1983). Contrary to defendant's argument that this instruction requires reversal because "readily" was never explained to the jury, where, as here, the language can be understood by a person of ordinary intelligence, it is not necessary for the court to

define or explain it. *People v Skowronski*, 61 Mich App 71, 77; 232 NW2d 306 (1975). The trial court did not abuse its discretion in substituting the word “readily” for “reasonably” in jury instructions for “armed with a weapon” because the trial court’s instruction was actually more restrictive and, therefore, more favorable to defendant than the instruction the prosecution proposed. *Perry, supra*, 218 Mich App 526. Viewing the jury instructions in their entirety, they fairly presented the issue to be tried and sufficiently protected defendant’s rights.

Finally, defendant alleges prosecutorial misconduct based on the prosecutor’s questions regarding the absence of witnesses who could support his alibi. We disagree. If defendant fails to object to the prosecutor’s remarks at trial, as defendant failed to do, review is foreclosed unless the prejudicial effect of the remark is so great that it could not have been cured by an appropriate instruction or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

During direct examination, defendant testified that he had been with Boyer and McKay all night and that they went to Teesha’s house. Defendant also testified that he was carrying a weapon when he was arrested because Teesha asked him to deliver a gun to Boyer’s neighbor. On cross-examination, the prosecutor asked defendant if Boyer, McKay or Teesha were going to testify in support of this alibi. Defendant now argues that the prosecutor’s questions shifted the burden of proof to him. Defendant’s argument is without merit. The prosecutor’s questions did not suggest that defendant had a duty to produce these witnesses or that their testimony would have been adverse to defendant. Instead, the questions served the proper purpose of revealing weaknesses in a defendant’s alibi where he has failed to call witnesses in support of that alibi. *People v Fields*, 450 Mich 94, 117; 538 NW2d 356 (1995). Defendant’s assertion of an alibi defense invited cross-examination about his failure to produce corroborating witnesses. *People v Spivey*, 202 Mich App 719, 723; 509 NW2d 908 (1993). Additionally, the trial court instructed the jury that the prosecutor had to prove each element of the crimes beyond a reasonable doubt and that defendant was not required to prove anything.

Affirmed.

/s/ Stephen J. Markman

/s/ Henry William Saad

/s/ Joel P. Hoekstra

¹ MCL 750.520b(1)(e); MSA 28.788(2)(1)(e).

² We note that the court admitted this statement over the objection of the prosecutor, and that defendant made the statement against the firm advice of his counsel.