

Judgment rendered May 10, 2002.
Application for rehearing may be filed
within the delay allowed by Art. 922,
LSA-CCrP.

No. 35,478-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA

Appellee

versus

MARSHALL T. BATCHELOR

Appellant

* * * * *

Appealed from the
Sixth Judicial District Court for the
Parish of Madison, Louisiana
Trial Court No. 8750811

Honorable Michael E. Lancaster, Judge

* * * * *

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* * * * *

Before NORRIS, BROWN and STEWART, JJ.

NORRIS, Chief Judge

Marshall Batchelor appeals his conviction of armed robbery and sentence of 60 years at hard labor without benefit of probation, parole, or suspension of sentence, with credit for time served. For the following reasons, we reverse his conviction and sentence and remand the case to the trial court.

Facts

On June 22, 1998, Batchelor was drinking beer outside of the Wyche Apartments when Brett Peoples delivered a pizza there to Theodore and Annie McGowan. After Peoples delivered the pizza, Batchelor and his two associates, Tyrone Henton and Nakia Brown, forced Peoples behind the building. Peoples offered no resistance, pleaded for them to leave him alone, and told his assailants to take whatever of value he had. Instead, his assailants knocked him to the ground and began hitting and kicking him about the body and head. Peoples was aware of someone taking his watch, wallet, and shoes before he lost consciousness.

From inside her apartment, Annie McGowan heard the men forcing Peoples behind the building and opened her door to see the source of the noise. She saw that Batchelor, Henton, and Brown had Peoples on the ground and were beating and kicking him. Specifically, she saw Batchelor beating Peoples with a rusty iron implement and a brick. Her husband, Theodore, also saw Batchelor strike Peoples with a brick several times. The McGowans then went back into their apartment and called the police to report the crime. A neighbor of theirs, Latasha Dixon, also saw the events that evening and went to a payphone to call the authorities.

Peoples appeared dead to paramedics who arrived at the scene about the

same time as the police. He had suffered blunt trauma to the head, bleeding from the ears and mouth, and permanent brain damage as a result of the severe beating. He also had severe facial edema, or swelling, and showed signs of a possible linear skull fracture.

Batchelor was apprehended by police that same evening when he returned to the scene. He was taken into custody that night and gave a statement of his involvement in the crime. Batchelor was charged with several felony offenses and found guilty of armed robbery by trial before a jury on December 1, 2000. He was sentenced to 60 years at hard labor, without benefit of probation, parole, or suspension of sentence, with credit for time served.

Batchelor objected to the sentence at the sentencing hearing, although he filed no written motion to reconsider sentence. Batchelor then filed for appeal. Batchelor argues that the evidence presented is insufficient to support a conviction for armed robbery, that his sentence of 60 years at hard labor is unconstitutionally excessive, and argues *pro se* that he was denied his constitutional right to self-representation.

Discussion - Sufficiency of the Evidence

Although the record does not reflect that Batchelor filed a motion for post verdict judgment of acquittal pursuant to La. C.Cr.P. art 821, this court will consider sufficiency arguments in the absence of such a motion. *State v. Green*, 28, 994 (La. App. 2d Cir. 2/26/97), 691 So.2d 1273.

When issues are raised on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. The reason for reviewing

sufficiency first is that the accused may be entitled to an acquittal under *Hudson v. Louisiana*, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981), if a rational trier of fact, viewing the evidence in accord with *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), in the light most favorable to the prosecution, could not reasonably conclude that all of the elements of the offense have been proved beyond a reasonable doubt. *State v. Hearold*, 603 So.2d 731 (La. 1992); *State v. Bosley*, 29,253 (La. App. 2d Cir. 4/2/97), 691 So.2d 347, writ denied, 97-1203 (La. 10/17/97), 701 So.2d 1333.

The *Jackson* standard is applicable in cases involving both direct and circumstantial evidence. When the direct evidence is thus viewed, the facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of every essential element of the crime. *State v. Sutton*, 436 So.2d 471 (La. 1983); *State v. Owens*, 30,903 (La. App. 2d Cir. 9/25/98), 719 So.2d 610, writ denied, 98-2723 (La. 2/5/99), 737 So.2d 747.

In order to support a defendant's conviction as a principal, the state must show that the defendant had the requisite mental state for the crime. *State v. Brooks*, 505 So.2d 714 (La. 1987), cert. denied, 484 U.S. 947, 108 S. Ct. 337, 98 L. Ed. 2d 363 (1987); *State v. Richardson*, 96-2598 (La. App. 4th Cir. 12/17/97), 703 So.2d 1371, writ denied, 98-0228 (La. 9/25/98), 726 So.2d 7. The determination of whether the requisite intent is present in a criminal case is for the trier of fact. *State v. Huizar*, 414 So.2d 741 (La. 1982); *State v. Dean*, 528 So.2d 679 (La. App. 2d Cir. 1988). Though intent

is a question of fact, it need not be proved as a fact. It may be inferred from the circumstances. *State v. Kahey*, 436 So.2d 475 (La. 1983).

All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals. La. R.S. 14:24.

Armed robbery is defined as “the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.” La. R.S. 14:64. A dangerous weapon is defined as “any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm.” La. R.S. 14:2(3).

The production of a weapon is not necessary in an armed robbery prosecution where the state can establish through witness observations at the crime scene, all of the elements of the offense beyond a reasonable doubt, including the existence and use of a dangerous weapon. *State v. James*, 33,262 (La. App. 2d Cir. 3/10/00), 754 So.2d 429, *writ denied*, 2000-0956 (La. 3/9/01), 786 So.2d 113.

This court’s review does not extend to credibility determinations made by the trier of fact. La. Const. art. 5, § 10(B); *State v. Williams*, 448 So.2d 753 (La. App. 2d Cir. 1984). The jury’s decision to accept or reject the testimony of a witness in whole or in part will be accorded great deference. *State v. Bosley, supra*; *State v. Rogers*, 494 So.2d 1251 (La. App. 2d Cir. 1986), *writ denied*, 499 So.2d 83 (1987).

The record is replete with direct and circumstantial evidence which,

viewed in the light most favorable to the prosecution, supports the jury's finding that Batchelor was guilty, beyond a reasonable doubt, of being a principal in the armed robbery of Brett Peoples. *Jackson v. Virginia, supra*. Even without considering Batchelor's incriminating recorded statement and the testimony of his co-defendant, Brown, the testimony of objective eyewitnesses, the McGowans and Dixon, is direct evidence supporting the jury's finding that Batchelor was involved in the taking of something of value belonging to Peoples, from the person of Peoples, by use of force while armed with a dangerous weapon.

The evidence shows that the brick was a dangerous instrumentality in the instant case. In the manner Batchelor used the brick, it was likely to produce death or great bodily harm, and can therefore be defined as a dangerous weapon. La. R.S. 14:2(3). This conclusion is supported in part by testimony given by Jerry Strong, the emergency medical technician, together with the photographs and testimony of the victim, Brett Peoples, regarding the severity of the injuries the victim suffered as a result of the crime.

From the McGowans' testimony alone the jury could reasonably conclude that Batchelor was a principal, as he was directly involved in the commission of this armed robbery. La. R.S. 14:24. The McGowans' testimony directly supports the finding that Batchelor participated in beating the victim while his co-defendants robbed the victim. Batchelor's criminal intent to commit the armed robbery of the victim is easily inferred from these circumstances. *State v. Kahey, supra*.

Under La. R.S. 14:24, the state need not prove that the defendant directly took anything of value from the victim during the crime to be found a

principal to the armed robbery. Nevertheless, the McGowans' testimony was corroborated by Latasha Dixon, and the physical evidence supports the trial testimony that the victim's wallet, keys, and shoes were taken during the crime. Batchelor's role as a principal in this armed robbery is further supported by Brown's testimony, which implicates Batchelor as the instigator of the crime and a recipient of some of the stolen money. Finally, in Batchelor's own recorded statement he admits that he participated in kicking the victim and threw a brick at him. Batchelor's admission that he "let" his co-defendant take the victim's valuables is further proof of his role in the crime.

Contrary to Batchelor's argument, the production at trial of a weapon was not necessary for Batchelor's armed robbery conviction. The state established through witness observations at the crime scene all of the elements of the offense beyond a reasonable doubt, including the existence and use of a dangerous weapon. *State v. James, supra*. This assignment is therefore without merit.

Self-representation

In his *pro se* brief, Batchelor asserts that the trial court was in error for failing to grant his motion to dismiss his counsel and allow him to represent himself at trial. Batchelor claims that his conviction was obtained in violation of his constitutional right to self-representation, as recognized by the case of *United States v. Faretta*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), because the trial court failed to conduct a proper *Faretta* hearing.

An accused has the right to choose between the right to counsel and the

right to self-representation. *State v. Bridgewater*, 2000-1529 (La. 1/15/02) 2002 WL 47169; *State v. Strain*, 585 So.2d 540, 542 (La. 1991). As the Louisiana Supreme Court has noted, “A trial judge confronted with an accused’s unequivocal request to represent himself need determine only whether the accused is competent to waive counsel and is ‘voluntarily exercising his informed free will.’ ” *State v. Santos*, 99-1897 (La. 9/15/00), 770 So.2d 319, 321, quoting *Faretta, supra*.

Batchelor first filed his written motion to dismiss counsel and represent himself on October 14, 1999. He reiterated this request immediately before his trial by a written filing on November 29, 2000. In both of his filings, Batchelor specifically cited *Faretta* and claimed the constitutional right to represent himself, stating that he desired to proceed *pro se* with stand-by counsel only, and that he was making this request “with his eyes opened.” R. p. 114. Batchelor clearly and unequivocally declared his desire to exercise his Sixth Amendment right to represent himself. *See State v. Carpenter*, 390 So.2d 1296 (La. 1980).

The motion was heard in open court February 7, 2000, at which time trial was set for March 20, 2000. As in *Santos, supra*, Batchelor’s request was made “under circumstances which precluded a finding that he was simply engaged in dilatory tactics.” *Bridgewater, supra*.

A review of the transcript of the trial court proceeding which resulted in the denial of Batchelor’s motion reveals that the trial court did not conduct any meaningful inquiry to determine if Batchelor was competent to waive his right to counsel. At the hearing, Batchelor’s court-appointed attorney told the court that he believed Batchelor “has a right to represent himself.” The trial

court then asked Batchelor if he “had anything to say.” Batchelor replied, “No, sir.” The trial court then denied his motion. *See*, Supp. R. (2/7/00), p. 10.

The trial court should have interrogated Batchelor to determine if he was competent to waive his right to counsel. The competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself. *Santos, supra*, quoting *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). The trial court must determine whether defendant’s waiver of counsel is “intelligently and voluntarily made.” *State v. Carpenter, supra*; *State v. Hegwood*, 345 So.2d 1117 (La. 1977). “There must be a sufficient inquiry (an interchange with more than “yes” and “no” responses by the defendant) to establish on the record that the defendant is making an intelligent and knowing waiver under the circumstances.” *Strain, supra*, at 542.

During this hearing, the defendant should have been informed of the consequences of proceeding without counsel. *State v. LaFleur*, 391 So.2d 445 (La. 1980), citing *Faretta, supra*. There should be some indication that the trial judge tried to assess the defendant’s literacy, competency, understanding and volition. *State v. Bell*, 381 So.2d 393 (La. 1980). The trial judge should have advised the defendant of the nature of the charges and the penalty range, inquired into the accused’s age, education and mental condition, and determined according to the totality of the circumstances whether the accused understood the significance of the waiver. *State v. Dunn*, 30,269 (La. App. 2 Cir. 2/25/98), 713 So.2d 479, citing *Von Moltke v.*

Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948).

The trial court's error in denying Batchelor his Sixth Amendment right to self-representation is not subject to harmless-error analysis. *Santos, supra*; *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 956, 79 L.Ed.2d 122 (1984). Because Batchelor's conviction and resulting sentence are reversed, it is not necessary to address Batchelor's claim that he received a constitutionally excessive sentence.

Because we find that the trial court made no meaningful effort to inform Batchelor of the consequences of proceeding without counsel, try to assess the defendant's literacy, competency, understanding, or volition, or determine whether defendant's waiver of counsel was "intelligently and voluntarily made," we must reverse the conviction and sentence, and remand this case to the trial court for new proceedings.

Conclusion

For the foregoing reasons, Batchelor's conviction and sentence are reversed and this case is remanded to the trial court for all proceedings consistent with the views expressed herein.

CONVICTION AND SENTENCE REVERSED;

CASE REMANDED.

BROWN, J., dissenting.

The transcripts of the hearings on February 7, 2000, and November 27, 2000, clearly show that the issue presented and argued concerned whether defense counsel was ineffective or had a conflict of interest. On October 14, 1999, defendant filed a handwritten Motion For Dismissal of Counsel. In the motion, defendant complained that counsel failed to secure his release from jail. In one paragraph, he asked that he be allowed to proceed pro se with standby counsel only; however, when he appeared in court that same day and was asked by the judge whether he wished to enter a plea of not guilty, he replied, "I rather not say unless I have a presence of counsel." The court declined to dismiss counsel on February 7, 2000.

On the day of trial, November 27, 2000, defendant filed another Motion For Dismissal of Counsel citing ineffective assistance and again including a paragraph seeking to be allowed to proceed pro se with standby counsel.¹ What was argued concerned only the court appointed attorney's alleged conflict of interest.

The trial court ruled:

. . . Court has had an opportunity to review the complaint filed in federal court by Mr. Batchelor against Mr. Kelly. Court finds that after extensive review of the documents and also by virtue of Mr. Kelly's sworn representation to the Court that he has diligently represented Mr. Batchelor to this point and that I, the court is convinced that there is nothing in the record and there is nothing that has been demonstrated by Mr. Kelly that would adversely affect his ability to proceed as effective counsel on behalf of Mr. Batchelor. Court also notes that I think that if co-counsel were appointed at this time, or substitute counsel were appointed at this juncture of the proceedings that it would create more problems than such action would solve, those problems

¹The clerk noted that the handwritten document was filed on November 29; however, it was argued and denied on November 27.

being for the substitute attorney, that attorney's liability, and ability to prepare for trial. Therefore, the motion to appoint counsel is denied . . .

This hearing took place on the day of trial and, like at the hearing on February 7, 2000, when defendant was asked whether he had anything further, he never mentioned a desire for self-representation. Clearly this was a delaying tactic. The court did not deny a request for self-representation and only ruled on the issues argued, which were ineffectiveness and an alleged conflict of interest. Under these circumstances, I question whether defendant sought self-representation and, if he did, it was implicitly waived. Thus, I respectfully dissent.