

IN THE COURT OF APPEALS OF IOWA

No. 9-425 / 88-1047

FILED

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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

EARL SANDY BLANTON,

Appellant.

317

Appeal from the Iowa District Court for Polk County,
Harry Perkins, Judge.

The defendant appeals from a judgment and sentence issued by the trial court following his conviction on a charge of second-degree burglary. Defendant contends: (1) the trial court erred in failing to instruct on attempted burglary as a lesser-included offense; (2) the State's use of a peremptory challenge to exclude the sole black member of the jury panel violated his right to equal protection of the law; and (3) the trial court erred in communicating with the jury in his absence. **REVERSED AND REMANDED FOR NEW TRIAL.**

William L. Wegman, State Public Defender, and Brian K. Sissel, Assistant State Public Defender, for appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; James A. Smith, Polk County Attorney; and Curt Krull, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

In February 1988 Earl Blanton and Billy Johnson entered a vacant home used for the storage of furniture. They returned a short time later and placed two coffee tables in a waiting van driven by John Dady. Blanton and Johnson took the coffee tables to a pawnshop and sold them for thirty dollars. Dady then drove Blanton and Johnson back to the house. Blanton and Johnson returned to the van carrying a chair and drapes.

Blanton's and Johnson's activities were observed by a neighbor, who called the police. The police apprehended the van a short distance from the scene of the burglary, wherein the police found the chair and drapes. The neighbor identified Blanton and Johnson as the men she saw entering the house.

Blanton and Johnson were subsequently charged with second-degree burglary. Blanton was tried individually. During voir dire jury selection the county prosecutor exercised his fourth peremptory challenge by striking the only black member of the jury panel.

At the close of all the evidence defense counsel requested the court instruct the jury that attempted burglary was a lesser-included offense of burglary in the second degree. The trial court overruled the request. While the jury was deliberating, the jury sent a note to the trial court asking about the definition of

second-degree burglary. The trial court telephoned both the prosecutor and defense counsel and obtained their approval for an additional instruction. Blanton, however, was not present during these communications.

The jury subsequently returned a verdict of guilty, and Blanton was sentenced to ten years and assessed a \$5000 fine. The trial court denied Blanton's post-trial motion for reduction of penalty.

Blanton asserts on appeal that pursuant to State v. Jeffries, 430 N.W.2d 728 (Iowa 1988), the trial court erred in refusing to submit the attempted burglary instruction, since it is required to be submitted to the jury without regard to whether it satisfied any factual test. Blanton also argues the prosecutor's striking of the only black member of the jury panel violated his right to equal protection of the law. Blanton argues the prosecutor's explanation was not sufficiently race neutral, and therefore represented a demonstrated racially discriminatory act. Finally, Blanton contends he had a right to be present during the trial court's communications with the jury.

I.

Our supreme court's decision in Jeffries changed the approach our courts take in addressing the issue of lesser-included offenses. With two exceptions not applicable to this case, the court abandoned application of

the factual test and required trial courts to automatically instruct on lesser-included offenses when the legal test is met. Jeffries, 430 N.W.2d at 737.

The State concedes the decision in State v. Royer, 436 N.W.2d 637, 640-41 (Iowa 1989), retroactively applies the Jeffries decision to Blanton's case. It also admits that pursuant to the test set forth in Jeffries, attempted burglary is a lesser-included offense of burglary. The State argues, however, that in cases involving the retroactive application of Jeffries we should adopt a "harmless error" analysis.¹ Citing pre-Jeffries case law, the State contends that when a record does not contain substantial evidence controverting the dissimilar element found in the greater and not the lesser offense, then failure to submit the lesser offense constitutes harmless error. See State v. Morgan, 322 N.W.2d 68, 69-72 (Iowa 1982). The State contends no substantial evidence existed in this case from which a jury could conclude a mere attempt was made to burglarize the property.

1. As alternatives to adoption of a "harmless error" analysis, the State advocates reinstatement of the pre-Jeffries factual basis test or the overruling of that portion of Royer which makes Jeffries retroactively apply to cases pending on appeal. Each of these alternatives would entail reversal of supreme court decisions. Our supreme court has indicated that if its previous holdings are to be overruled, it prefers to do so itself, State v. Eichler, 248 Iowa 1267, 1270, 83 N.W.2d 576, 578 (1957), thus the court of appeals is bound by the Jeffries and Royer decisions.

We decline to adopt a "harmless error" analysis in this matter. The State's requested harmless error standard is in fact a reinstatement of the factual test rejected in Jeffries. One of the specific reasons set forth by the supreme court for adoption of the modified approach in Jeffries was that it "places the factual determination of a lesser-included offense in the hands of the jury, where it belongs." Jeffries, 430 N.W.2d at 738. In light of our supreme court's adoption of the "jury function theory," id. at 736, and its determination that "the factual test as previously applied is contrary to logic and invades the province of the jury," id. at 741, it would be inconsistent and contradictory to adopt a "harmless error" standard which would restore the factual basis test.

We find it prudent to defer to the supreme court's review questions involving the applicability of a "harmless error" standard to cases pending on appeal when Jeffries was decided. As the trial court in this case did not submit the lesser-included offense of attempted burglary, this matter is remanded for a new trial.

II.

As Blanton's other allegations of error are not the type likely to be repeated upon retrial, we decline to address the propriety of those claims.

REVERSED AND REMANDED FOR NEW TRIAL.