

**IN THE COURT OF APPEALS OF IOWA**

No. 9-382 / 08-1390  
Filed June 17, 2009

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**BRADLEY WAYNE KEARNEY,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Story County, James B. Malloy,  
District Associate Judge.

Bradley Kearney appeals following his judgment and sentence for burglary  
in the third degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, Robert P. Ranschau, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert H. Meyers, Assistant Attorney  
General, Stephen Holmes, County Attorney, and Keisha Cretsinger, Assistant  
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**POTTERFIELD, J.****I. Background Facts and Proceedings**

The State charged Bradley Kearney with third-degree burglary and fourth-degree criminal mischief in connection with a break-in at the residence of his former girlfriend, Rebecca Dappen.<sup>1</sup> One of the allegations of criminal mischief was Dappen's claim that her vehicle had been damaged during the burglary.

Jury trial on the charges commenced June 26, 2008. Around noon on the second day of trial, it was brought to the court's attention that one of the juror's vehicles had been vandalized the previous evening, the night of the first day of trial. The court convened in chambers with the juror, counsel, and the defendant. The juror said that he had asked other members of the jury that morning whether any of their vehicles had been vandalized. The other jurors replied that their property had not been damaged. The juror learned over lunch that day that his neighbor's vehicle also had been vandalized. He reported this to the rest of the jury after lunch.

Kearney moved for a mistrial, arguing that he was denied a fair and impartial trial on account of the juror's discussion with the other jury members about the damage to his vehicle. Kearney pointed out that he was on trial for a similar crime and that the juror's discussion led to an inference that the vandalism to the juror's vehicle may have been related to his service as a juror in Kearney's case. The district court denied Kearney's request for a mistrial. Kearney declined the opportunity to converse with each juror to determine whether any had been affected by the report of the vandalism.

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<sup>1</sup> The only judgment on appeal is Kearney's conviction for third-degree burglary.

At the sentencing hearing, Kearney made a motion for new trial, alleging juror misconduct. The district court denied Kearney's motion for new trial, finding the juror did not say anything to the other jurors that would have compromised the jury's ability to be fair.

The jury found Kearney guilty of third-degree burglary and the lesser-included criminal mischief offense of fifth-degree criminal mischief.<sup>2</sup> Kearney appeals from the conviction and judgment of burglary in the third degree, arguing the district court erred in denying his motion for mistrial based on juror misconduct.

## **II. Standard of Review**

We review the district court's ruling on juror misconduct claims for an abuse of discretion. *State v. Johnson*, 445 N.W.2d 337, 340 (Iowa 1989). An abuse of discretion is not found unless the district court's decision was clearly unreasonable. *Id.*

## **III. Juror Misconduct**

The court may grant a new trial when "the jury has received any evidence, paper or document out of court not authorized by the court." Iowa R. Crim. P. 2.24(2)(b)(2). Iowa Rule of Evidence 5.606(b) sets forth the parameters of the court's inquiry, stating in pertinent part that "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon

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<sup>2</sup> The jury's finding of fifth-degree criminal mischief suggests the jury did not believe Kearney damaged Dappen's vehicle.

any juror.” To receive a new trial due to misconduct, Kearney must prove the following three factors:

(1) [E]vidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberation; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict.

*Johnson*, 445 N.W.2d at 341. Kearney did not prove the third factor, that the juror’s conduct was calculated to, and with reasonable probability did, influence the jury’s verdict.

In considering the third factor, the court assesses “the claimed influence critically in light of all the trial evidence, the demeanor of witnesses and the issues presented before making a commonsense evaluation of the alleged impact of the jury misconduct.” *State v. Christianson*, 337 N.W.2d 502, 506 (Iowa 1983). “[P]ast cases discussing this requirement demonstrate that it is not easily satisfied.” *Johnson*, 445 N.W.2d at 342. “The impact of [alleged juror] misconduct is to be judged objectively by the trial court in light of all the allowable inferences brought to bear on the trial as a whole.” *Doe v. Johnston*, 476 N.W.2d 28, 35 (Iowa 1991). “[T]he trial court is in the best position to objectively assess the impact of juror misconduct.” *Id.*

We determine the district court was well within its discretion in denying Kearney’s motion for new trial. The juror stated he thought the vandalism to his vehicle occurred because his “street got picked that night by some kids.” He told the judge that he would not hold the incident against Kearney and described his discussion with other jurors on the subject as “nothing at all.” In addition, the

juror informed the rest of the jury that his neighbor's vehicle had been vandalized as well, indicating the incident was not related to his service as a juror. Kearney's attorney stated at the sentencing hearing that he opted not to question each juror individually about the incident because he "felt . . . that every juror member [sic] would come in and say it didn't affect them." The evidence presented at trial, including testimony that Kearney arrived at a friend's house with all of the items taken from Dappen's apartment, strongly supported the jury's finding of guilt.

Kearney did not argue on appeal, nor do the facts suggest, that the juror's conduct was calculated to influence the jury's verdict. Further, in light of the evidence, a commonsense evaluation of the impact of the juror's statements does not show a reasonable probability of influence. We cannot say the district court abused its discretion in denying Kearney's motion for mistrial.

**AFFIRMED.**