

NO. A-25-118

IN THE NEBRASKA COURT OF APPEALS

THE STATE OF NEBRASKA,
Plaintiff/Appellee

v.

KIDONNIE R. SMITH,
Defendant/Appellant

**APPEAL FROM THE DISTRICT COURT OF
OF LANCASTER COUNTY, NEBRASKA**

Honorable Kevin R. McManaman

APPELLANT'S BRIEF

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STATEMENT OF JURISDICTION

On January 9, 2025, in Case Number CR 23-1260, Kidonnie R. Smith (“Appellant”) was found guilty of one count of Possession of a Firearm by a Prohibited Person, a Class 1D Felony. (T143). On February 14, 2025, the Appellant was sentenced in the District Court of Lancaster County on the sole count in the Information. (T145-46).

On February 14, 2025, the Appellant appealed his conviction and sentence pursuant to Neb. Rev. Stat. § 25-1911 (1991) and Neb. Rev. Stat. § 25-1912 (2018). (T152). The Appellant’s Notice of Appeal in this case was timely filed. On February 19, 2025, the District Court granted the Appellant’s motion to proceed in forma pauperis and appointed Trevin Preble to represent the Appellant on the appeal. (T164; T166).

No other motions have been filed for which tolled the time in which to appeal.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a direct criminal appeal alleging reversible error by the District Court in denying Appellant’s Motion to Suppress and conviction of Possession of a Firearm by a Prohibited Person.

B. ISSUES TRIED IN LANCASTER COUNTY DISTRICT COURT

On October 22, 2024, a Motion to Suppress hearing was held. (45:1 – 127:16). On November 26, 2024, the Motion to Suppress was overruled. (T125-130). The issue tried in the District Court of Lancaster County was the guilt or innocence of Appellant on the sole count of Possession of a Firearm by a Prohibited Person in the Information (T145).

C. HOW THE ISSUES WERE DECIDED

The Motion to Suppress was denied on November 26, 2024. (T125-130). On January 6–9, 2025, the sole count of Count I, Possession of a Firearm by a Prohibited Person, was tried by a jury, during which the Motion to Suppress was renewed, and the jury found the Appellant guilty. (T143).

D. SCOPE OF REVIEW

Appellate review is limited to those errors specifically assigned in an appeal to the District Court and again assigned as error in an appeal to the higher appellate court. *Miller v. Brunswick*, 253 Neb. 141 (1997).

“In reviewing a trial court’s ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. The appellate court reviews the trial court’s findings of historical fact for clear error, giving due weight to the inferences drawn from those facts by the trial court.” *State v. Seckinger*, 301 Neb. 963, 967-68 (2018); *State v. Konfrst*, 251 Neb. 214, 228 (1996). “The determination of reasonable suspicion and probable cause are reviewed de novo.” *State v. Konfrst*, 251 Neb. 214, 230 (1996).

“Although an appellate court ordinarily considers only those errors assigned and discussed in briefs, an appellate court may, at its option, notice plain error.” *State v. Paul*, 256 Neb. 669, 677 (1999). “When a defendant has not preserved a claim of prosecutorial misconduct for direct appeal, we will review the record only for plain error.” *State v. Garcia*, 315 Neb. 74, 158 (2023). “We apply the plain error exception to the contemporaneous-objection rule sparingly.” *Id.*

Plain error exists where “there is error, plainly evident from the record but not complained of at trial, that prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to

the integrity, reputation, and fairness of the judicial process.” *State v. Kays*, 289 Neb. 260, 267 (2014); see also *State v. Childs*, 309 Neb. 427, 436 (2021).

“In reviewing a criminal conviction for sufficiency of the evidence, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.” *State v. Kilmer*, 318 Neb. 148, 156 (2024). “The relevant question in reviewing the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.*

ASSIGNMENTS OF ERROR

- I. THE DISTRICT COURT ERRED BY DENYING APPELLANT’S MOTION TO SUPPRESS**
- II. THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT AT TRIAL DURING CLOSING ARGUMENTS BY STATING PERSONAL OPINIONS REGARDING THE CREDIBILITY OF WITNESSES THAT PREJUDICED THE APPELLANT FROM A TRIAL**
- III. POSSESSION OF A FIREARM BY A PROHIBITED PERSON WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AS THE STATE FAILED TO SHOW EVIDENCE THAT THE APPELLANT KNOWINGLY OR INTENTIONALLY POSSESSED THE FIREARM.**

PROPOSITIONS OF LAW

- A. When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from the trial and from the hearings on the motion to suppress. *State v. Hammond*, 315 Neb. 362 (2023).

- B. "In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. The appellate court reviews the trial court's findings of historical fact for clear error, giving due weight to the inferences drawn from those facts by the trial court." *State v. Seckinger*, 301 Neb. 963, 967-68 (2018); *State v. Konfrst*, 251 Neb. 214, 228 (1996). "The determination of reasonable suspicion and probable cause are reviewed de novo." *State v. Konfrst*, 251 Neb. 214, 230 (1996).
- C. Both the Fourth Amendment and the search and seizure provision of the State Constitution guarantee against unreasonable searches and seizures. U.S. Const. Amend. 4; Neb. Const. Art. 1, §7; *State v. Seckinger*, 301 Neb. 963, 968 (2018).
- D. "The ultimate touchstone is one of reasonableness." *State v. Seckinger*, 301 Neb. 963, 968 (2018).
- E. "Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions." *Id.*
- F. "The automobile exception applies (1) when a vehicle is readily mobile and (2) there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle." *State v. Seckinger*, 301 Neb. 963, 968-69 (2018).
- G. "A vehicle is readily mobile, as needed under the automobile exception to the warrant requirement, whenever it is not located on private property and is capable or apparently capable of being driven on the roads or highways." *State v. Seckinger*, 301 Neb. 963, 969 (2018).
- H. "The test used to determine if a defendant has an interest protected by the Fourth Amendment is whether the defendant has a 'legitimate expectation of privacy in the premises.'" *State v. Konfrst*, 251 Neb. 214, 224 (1996).
- I. The Supreme Court determined that "a person can have a legally sufficient interest in a place other than his own home so

that the Fourth Amendment protects him from unreasonable governmental intrusion into that place. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

- J. The Supreme Court later clarified that “property rights are neither the beginning nor the end” of the inquiry, and that the relevant test is whether the person “has a legitimate expectation of privacy in the invaded place.” *U.S. v. Salvucci*, 488 U.S. 83, 91 (1980).
- K. The Supreme Court recognized that what an individual “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Katz v. U.S.*, 389 U.S. 347, 351 (1967).
- L. . In *Rakas*, the Supreme Court rejected the notion that in order for a privacy interest to exist, and for Fourth Amendment protections to apply, the individual must be “legitimately on the premises”. *Rakas v. Illinois*, 439 U.S. 128, 148 (1978).
- M. The Court recognized that legitimate presence on the premises was relevant to one’s expectation of privacy, but it was not a controlling factor. *Id.*
- N. The review of whether probable cause exists is done de novo. *State v. Konfrst*, 251 Neb. 214, 230 (1996).
- O. “Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband evidence of a crime will be found.” *State v. Seckinger*, 301 Neb. 963, 969 (2018).
- P. “An appellate court determines the existence of probable cause to search under an objective standard of reasonableness, given the known facts and circumstances.” *State v. Seckinger*, 301 Neb. 963, 969 (2018); *State v. Vaughn*, 314 Neb. 167, 179 (2023).
- Q. “Probable cause to search is a flexible, commonsense standard that depends on the totality of the circumstances.” *State v. Seckinger*, 301 Neb. at 969.

- R. “When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor’s acts constitute misconduct.” *State v. Barnes*, 317 Neb. 517, 543 (2024); *State v. Mabior*, 314 Neb. 932, 949 (2023).
- S. “Prosecutorial misconduct cannot be neatly defined, but generally encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.” *Id.*
- T. “A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.” *Id.*; *State v. Malone*, 308 Neb. 929, 963 (2021).
- U. A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct. *State. v. Mabior*, 314 Neb. at 949.
- V. But a prosecutor's misconduct that prejudices a defendant's right to a fair trial violates due process. *Id.*

STATEMENT OF FACTS

On June 7, 2023, Lincoln Police Department Officer Nicholas Vest responded to a domestic disturbance call for services at 2921 NW First Street, Lincoln, NE (the “residence”) at approximately 9:00 p.m. (404:19 – 406:9; E5; T108). Michelle Smith (“Ms. Smith”) had called to report a fight between Appellant and Seymour Wilson. During this initial contact Officer Vest determined that Ms. Smith’s daughter Tiffanie Collier (“Ms. Collier”) was also at the residence. (409:8-21; E5) During this initial contact, Ms. Smith told Officer Vest that Appellant did not live at that residence and Ms. Collier told Officer Vest that she believed that Appellant took one of her firearms and that she believed he had a felony conviction (E5).

Ms. Collier testified at the suppression hearing and at trial, that she and Appellant had been living at the residence since June 1, 2023 with Ms. Smith. Ms. Collier acknowledged that she did not advise Officer Vest that

Appellant was living at the residence at the time of the incident and Officer Vest never asked Appellant where he was living. (T108).

When Appellant and Ms. Collier moved into the residence, they spoke with Ms. Smith about where they could park the vehicle. During this conversation, Ms. Smith advised Appellant and Ms. Collier that they were able to park in the driveway of the unoccupied house across from the residence and that she had spoken with the “property manager or the leasing agent in her subdivision, and they gave [them] permission to park there.” (T108). Pursuant to this instruction, Appellant had been parking his vehicle in that driveway between June 1 and June 7, 2023. (T108). Officer Vest did not inquire of any party about whether Appellant had permission to park in the driveway prior to the search, nor did he testify in the hearing on the Motion to Suppress that he made any such inquiry. (T109). The inquiry as to whether Appellant had permission by the owners of the unoccupied property was not made until over a year after the incident and Appellant’s arrest. (T109). Officer Vest further testified that he was familiar with the neighborhood and acknowledged that there was a leasing office, but he did not speak with anyone in the leasing office regarding whether Appellant had permission to park his vehicle in the driveway of the unoccupied house. (T109).

During Officer Vest’s initial interaction with Ms. Collier, she told him that Appellant took one of her firearms and she believed he had a felony conviction. (T109). In addition, at the time of Officer Vest’s arrival, Appellant had already left the residence. During her conversation with Officer Vest, Ms. Collier told him that Appellant did not “really have anywhere to go.” (T109).

While on patrol at 2:30 a.m., over five (5) hours after the incident, Officer Vest saw Appellant’s vehicle and he followed it back to the residence and watched Appellant park in the driveway of the unoccupied property. (T109). After Appellant was arrested, Officer Vest searched the vehicle and found Ms. Collier’s firearm in the glove compartment. (T110).

On September 27, 2023, the State of Nebraska filed an Information in the Lancaster County District Court charging the Appellant with

Possession of a Firearm by a Prohibited Person. (T38). The Information generally alleged that the Appellant was a previously convicted felon, and a firearm was found in his possession. *Id.* The Appellant entered a plea of not guilty, and the case proceeded to trial. On April 12, 2024, the State of Nebraska filed an Amended Information in the Lancaster County District Court outlining the specifics of Appellant's prior convictions which supported the allegations that he was a Prohibited Person. (T76).

On April 19, 2024, Appellant filed a Motion to Suppress seeking to suppress all evidence seized from the Appellant, his motor vehicle or any other place where he had an expectation of privacy on the grounds that Appellant had an expectation of privacy and did not consent to seizure of the evidence; the search and seizure violated Appellant's rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution, Article 1, Section 7 of the Nebraska Constitution and all relevant provisions of the Nebraska Revised Statutes; the search and seizure was not incident to a lawful arrest nor was it allowed pursuant to any other recognized exception to the warrant requirement; and the search and seizure was not conducted pursuant to a lawfully issued warrant from any court or magistrate. (T91).

After a briefing by the parties and a hearing on the Motion, on November 26, 2024, the Trial Court denied Appellant's Motion to Suppress on the grounds that Appellant did not have an expectation of privacy in the driveway, so the automobile exception applied. (T125).

On January 6, 2025, a jury trial commenced with Judge Kevin R. McManaman presiding. (148:1-15; T170). The appellant renewed his motion to suppress, for which the Court overruled. (286:21 – 288:4).

During the State's case in chief Officer Vest testified as to the details of the initial report, arrest, and search of the vehicle. Officer Vest also provided body camera footage as evidence. Officer Vest explicitly stated that when taking the report about the disturbance involving Michelle Smith, the Appellant, Tiffanie Collier and Seymore Wilson, nobody mentioned that the Appellant had a gun during the disturbance. Additionally, no one stated the Appellant pulled out and threatened

anybody with the gun, that he flashed the gun at anybody, that he fired the gun, that the gun was located on the Appellant, or that the Appellant threaten any officer with the gun.

Officer Michael Belleci also provided details of the search of the vehicle, focusing on where the firearm was ultimately located. Belleci acknowledged he located the firearm in the locked glove box of the vehicle. (309:20-310:11).

Officer Kevin Sladek testified that he collected DNA swabs from the Appellant, and had no role in comparing the DNA.

Identification Lab Specialist Bridget Johnson testified that she was responsible for taking swabs of the gun and magazine. Specifically, stating that she “found absolutely no usable fingerprints on either the magazine or the gun.”

The case was ultimately submitted to the jury, and the jury returned a verdict on January 9, 2025, finding the Appellant guilty of the possession of a firearm by a Prohibited Person. (T143; T171).

On February 14, 2025, the District Court of Lancaster County entered its judgment and sentenced the Appellant to a term of not less than 12 years, 10 of such years being a mandatory minimum, nor more than 16 years. (T145). The Appellant timely filed his Notice of Appeal on February 14, 2025. (T152).

ARGUMENT

I. DISTRICT COURT ERRED IN DENYING APPELLANT’S MOTION TO SUPPRESS.

Appellant respectfully asserts that the District Court erred in denying his Motion to Suppress during pretrial and at trial. Appellant asserts that the search of his vehicle by law enforcement was in violation of his Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, Article I, Section 7 of the Nebraska Constitution, and all relevant provisions of the Nebraska Revised Statutes. The search at issue

in this matter was not conducted pursuant to a lawfully issued warrant from any court, nor was it allowed pursuant to any recognized exception to the warrant requirement. For the reasons outlined below, Appellant's Motion to Suppress and renewed objection at trial should have been granted.

A. The Warrantless Search was Unreasonable Because It Was Not Executed Pursuant to the Automobile Exception to the Warrant Requirement.

Both the Fourth Amendment and the search and seizure provision of the State Constitution guarantee against unreasonable searches and seizures. U.S. Const. Amend. 4; Neb. Const. Art. 1, §7; *State v. Seckinger*, 301 Neb. 963, 968 (2018). "The ultimate touchstone is one of reasonableness." *State v. Seckinger*, 301 Neb. at 968. "Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions." *Id.*

One such exception to the warrant requirement is the automobile exception. *Id.* The justification for the automobile exception is that the vehicle's ability to be easily moved would cause the items to be potentially seized to be out of the reach of a search warrant. *Carroll v. U.S.*, 267 U.S. 132, 151 (1925). "The automobile exception applies (1) when a vehicle is readily mobile and (2) there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle." *State v. Seckinger*, 301 Neb. at 968-69.

1. Appellant's Vehicle Was Not Readily Mobile.

The first element that must be satisfied for the automobile exception to a warrantless search to apply is the vehicle must be readily mobile. "A vehicle is readily mobile, as needed under the automobile exception to the warrant requirement, whenever it is not located on private property and is capable or apparently capable of being driven on

the roads or highways.” *Id.* There is no argument that Appellant’s vehicle was capable of being driven on the roads or highways, so this element is satisfied.

However, the second prong requiring that the vehicle not be located on private property is not satisfied in this case. The facts are clear that the vehicle was located on private property at the time of the warrantless search, as it was parked in the driveway of an unoccupied house across from the residence where the Appellant was staying. (T108). Therefore, Appellant had a legitimate expectation of privacy in his vehicle. The issue before the District Court on whether the automobile exception applied was whether Appellant had an expectation of privacy in the private property where he parked.

The District Court determined that Appellant lacked an “objectively reasonable expectation of privacy” in the driveway of the unoccupied house across the street from where he was staying because he did not own the property, and the evidence was conflicting regarding whether he had permission to park there. As a result, there was no “more expectation of privacy than parking on the street.” (T129). The Court further supported this conclusion by noting that Appellant asked his partner to move the car so it wouldn’t be towed, indicating a lack of privacy expectation. *Id.* “Clearly, if in fear of being towed, he [Appellant] did not himself believe he had permission and clearly had no expectation of privacy.” (T130).

Appellant asserts that the District Court’s findings were clearly erroneous because the facts show that Appellant was staying at the residence at the time of his arrest and had permission to park his vehicle in the driveway where it was located. (T108). At the time the warrantless search was conducted, Officer Vest made no attempt to discover whether Appellant was living at the residence or whether he had permission to park in the driveway of the unoccupied residence. (T109). Officer Vest had no reasonable belief that Appellant did not have a legitimate expectation of privacy in his vehicle when it was parked in that driveway.

a. Appellant Had a Legitimate Expectation of Privacy in his Vehicle.

The District Court's determination that Appellant did not have a legitimate expectation of privacy in his vehicle parked in the private driveway was clearly erroneous. "The test used to determine if a defendant has an interest protected by the Fourth Amendment is whether the defendant has a 'legitimate expectation of privacy in the premises.'" *State v. Konfrst*, 251 Neb. 214, 224 (1996).

As previously stated, at the time of the warrantless search, Appellant's vehicle was parked in a private driveway. The fact that Appellant did not own the driveway where the vehicle was parked does not preclude him from having a legitimate expectation of privacy when he parked his vehicle there. Having a privacy interest that is protected by the Fourth Amendment is not dependent on the individual asserting the rights of ownership in the property. This concept has been articulated by the Supreme Court in several cases.

In *Rakas*, the Supreme Court clarified the holding in *Jones v. United States*, 362 U.S. 257, 261 (1960) by explaining that "that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to governmental invasion of those premises, even though his 'interest' in those premises might not have been a recognized property interest at common law." *Rakas v. Illinois*, 439 U.S. 128, 144 (1978). Said differently, the Supreme Court determined that "a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place. *Id.* at 143.

The Supreme Court later clarified that "property rights are neither the beginning nor the end" of the inquiry, and that the relevant test is whether the person "has a legitimate expectation of privacy in the invaded place." *United States v. Salvucci*, 488 U.S. 83, 91 (1980).

The relevant case law supports the finding that Appellant had a legitimate privacy interest in the driveway where he parked on June 7, 2023. The facts show that Appellant and Ms. Collier moved into the residence on June 1, 2023 and they spoke with Ms. Smith about where they could park the vehicle. Ms. Smith advised Appellant and Ms. Collier that they were able to park in the driveway of the unoccupied house across from the residence and that she had spoken with the “property manager or leasing agent in her subdivision, and they gave [them] permission to park there.” (T108). Pursuant to this instruction, Appellant had been parking his vehicle in that driveway from June 1, 2023 to June 7, 2023, the day of his arrest. (T108). No facts count to Appellant having permission to park in the driveway were sought or obtained until well after the case had begun. At the time of the warrantless search, Officer Vest had made no inquiry as to whether Appellant’s vehicle was permissibly parked in the driveway.

Upholding the District Court’s finding would cause individuals to suffer the loss of their right to privacy simply because they do not own the premises where, in this case, their vehicle was rightfully located. As previously stated, the Supreme Court has not held that a privacy interest can only be found where the incidents of ownership of the property have been found. For example, in *Katz v. U.S.*, the government placed an eavesdropping device on a public payphone in order to listen to the conversations of a subject of an investigation. It is clear that the individual had no ownership rights to the public telephone booth. Nonetheless, the Supreme Court recognized that the individual had a legitimate privacy interest when using the public telephone booth because he entered the phone booth and closed the door to ensure privacy. *Katz v. United States.*, 389 U.S. 347, 353 (1967). The Supreme Court recognized that what an individual “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Id.* at 351. The facts support a finding that Appellant’s use of the private driveway for the parking of his vehicle, instead of the public street, is an act of Appellant to preserve his

privacy interest in his vehicle because it is out of the way of view of the public.

Even if the District Court's finding that Appellant did not have permission to park in the driveway, and therefore no legitimate right to be there, this does not negate Appellant's privacy right. The Supreme Court has stated that legitimate presence is not required for a privacy interest to exist. In *Rakas*, the Supreme Court rejected the notion that in order for a privacy interest to exist, and for Fourth Amendment protections to apply, the individual must be "legitimately on the premises". *Rakas v. Illinois*, 439 U.S. at 148. The Court recognized that legitimate presence on the premises was relevant to one's expectation of privacy, but it was not a controlling factor. *Id.* The facts still show that Appellant's vehicle was parked in a private driveway near the residence he was occupying and that he routinely used that driveway to keep his vehicle off of the public street.

A review of the relevant case law and facts supports a finding that the District Court's determination that Appellant did not have a legitimate expectation of privacy in his vehicle parked on a private driveway is clearly erroneous. *Id.* at 144.

2. There Was No Probable Cause for the Warrantless Search.

The second part of the automobile exception, requiring probable cause to search is also not present in this case. The review of whether probable cause exists is done de novo. *State v. Konfrst*, 251 Neb. 214, 230 (1996). "Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband evidence of a crime will be found." *State v. Seckinger*, 301 Neb. 963, 969 (2018).

"An appellate court determines the existence of probable cause to search under an objective standard of reasonableness, given the known facts and circumstances." *State v. Seckinger*, 301 Neb. 963, 969 (2018); *State v. Vaughn*, 314 Neb. 167, 179 (2023). "Probable cause to search is a flexible,

commonsense standard that depends on the totality of the circumstances.” *State v. Seckinger*, 301 Neb. 963, 969 (2018).

In the Order on the Motion to Suppress, the District Court determined that Officer Vest “had a reasonable belief that the firearm was probably still in the vehicle.” (T127). The District Court based this determination on the fact that Ms. Collier had told Officer Vest that Appellant had taken her firearm, that she believed he was a felon and that Appellant “had nowhere else to go.” (T126, 127). The District Court acknowledges that there was a five (5) hour gap between when the incident occurred and when Appellant was seen returning to the house but ignores that no attempt was made by Officer Vest to determine where the Appellant was during that time or where he lived. The belief that the firearm was still in the vehicle after such a long time period based solely on the statement of an angry partner that Appellant “had nowhere else to go,” so it was unlikely that Appellant “would have been able to get rid of the firearm,” is not reasonable. (T127).

Appellant asserts that the District Court’s determination was clearly erroneous because it was not reasonable to ignore the more than five (5) hours that had passed between the time of the incident and the time Appellant was seen returning to the house. If the search had been conducted contemporaneously with the statement about the firearm or even within a short period of time, a finding of reasonableness might be supported. Instead, Officer Vest conducted no inquiry of Appellant to elicit facts about Appellant’s actions during those five (5) hours to determine whether his belief as to the firearm being in the car was reasonable. Therefore, Officer Vest had no reasonable belief that the firearm was still located in the vehicle and no probable cause to conduct the warrantless search.

II. THE APPELLANT’S RIGHT TO A FAIR TRIAL WAS PREJUDICED WHEN THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT IN THEIR CLOSING ARGUMENT.

Appellant claims that his right to a fair trial was prejudiced because the State expressed a personal belief in the truthfulness of the Appellant's evidence, which constitutes prosecutorial misconduct in their closing argument. Appellant admits that this error was never raised or considered by the District Court. Therefore, the Appellant requests that this court review this assignment of error under the plain error doctrine. *State v. Barnes*, 317 Neb. at 544 (a defendant's failure to move for a mistrial based on alleged prosecutorial misconduct is treated like a forfeiture by conducting a plain error review in such circumstances).

Under the plain error jurisprudence, "an appellate court may find plain error on appeal when an error unasserted or un-complained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process." *State v. Childs*, 309 Neb. 427, 440 (2021); *see also State v. Senteney*, 307 Neb. 702 (2020). "Plain error should be resorted to only in those rare instances where it is warranted, and it is warranted only when a miscarriage of justice would otherwise occur." *Id.*

It is well established that "[a] prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct." *State v. Barnes*, 317 Neb. at 543. "If the appellate court concludes that a prosecutor's acts were misconduct, the court next considers whether the misconduct prejudiced the defendant's right to a fair trial." *Id.*

In this case, during the closing arguments, the following statements made by the State were plainly evident in the record and ultimately misled and unduly influenced the jury:

- "I would submit to you that much of what you heard from the defense witnesses is just simply not reasonable." (676:20-21).
- "I would submit that that is unreasonable with regard to the issue of credibility," referring to the testimony of the witness

not knowing that the Appellant was a convicted felon.
(677:12-13).

- “That is unreasonable” referring to the witness stating that she bought two firearms but never informed the Appellant that she had them or her reason for buying them. (677:24).
- In reference to the testimony that the Appellant never saw the witness with a firearm, “I submit to you, that is unreasonable.” (678:3).
- “I would submit to you that the testimony provided by Ms. Smith, Ms. Collier, and Mr. Smith, they’re all biased to one side of this equation.” (679:5-7).
- “Also, is it reasonable for him to exit? I mean, it really is kind of amazing that he wasn’t shot here. The way he was holding his arms, what the officers knew, it’s reasonable for the officer to believe he had a gun. And when he’s down like this and the officer can’t see him, that’s a really bad recipe for disaster. Good thing nothing happened like that here.” (684:17-24).
- “One thing that is not reasonable, I believe, is that the explanation of Ms. Collier, she’s there when the search is taking place, the search is taking place when he is in a cruiser. And officers are telling everybody, Mr. Smith, Ms. Collier, Ms. Smith, Yeah, well, we’re going to arrest him for possession of a firearm because he’s a convicted felon.” (685:13-19).
- “That’s not reasonable, ladies and gentleman,” referring to the witness testimony of Ms. Collier now stating that the gun was hers and she left it in the car. (686:2-3).
- “So we know his DNA is on the magazine. And that is consistent with somebody handling that handgun or that --- at least the magazine.” (687:25-688:2).

Although the statements do not directly accuse the witnesses of lying, the prosecution's attempt to reframe the term "lying" as

“unreasonable” was not lost on the jury. Repeatedly during the closing arguments, the prosecution does more than simply present a conclusion; they imply their own personal belief that the witnesses' testimony and evidence were “unreasonable” concerning their credibility. These remarks were neither isolated nor accidental. The closing statements specifically focused on the jury instructions about credibility and the factors the jury could consider when assessing credibility. However, it is entirely inappropriate for the State to make such overt remarks, effectively calling each of the Appellant's witnesses liars. At no time did the Court provide a curative instruction contemporaneously with the remarks that were personal beliefs. Moreover, these remarks were not invited by the remarks of Appellant's trial counsel, as one would see in a rebuttal, but rather in the State's initial closing remarks. It is clear that the prosecutor's statements were not only prejudicial but also improper, and therefore constitute misconduct that violated the Appellant's due process.

Additionally, the prosecution deliberately misstated evidence by claiming that DNA found on a magazine is consistent with someone handling a handgun. No evidence supports this bold assertion. In fact, the evidence only shows that the Appellant's DNA was on the magazine, but it cannot be determined which part of the magazine the DNA was on, since “once an item is swabbed, there [is no] way to pinpoint exactly on that item the DNA was found, since it was swabbed with one.” Furthermore, there was no evidence that the Appellant's DNA was on the handgun itself, and the State also provided no evidence that the Appellant's fingerprints were on either the magazine or the handgun. Therefore, this Court should reverse the conviction to prevent a miscarriage of justice due to the misconduct by the prosecution, which undeniably tainted the trial and prejudiced the Appellant's right to a fair trial.

**III. THE EVIDENCE PRESENTED AT TRIAL WAS
INSUFFICIENT TO SUSTAIN A CONVICTION
BECAUSE NO RATIONAL TRIER OF FACT COULD**

**HAVE FOUND BEYOND A REASONABLE DOUBT
THAT THE APPELLANT KNOWINGLY AND
INTENTIONALLY POSSESSED A FIREARM**

Finally, the Appellant argues that the evidence presented at trial was inadequate to support a conviction because there was no proof he knowingly or intentionally possessed a firearm. Under Neb. Rev. Stat. 28-1206(1), in relevant part, “A person commits the offense of possession of a deadly weapon by a prohibited person if he or she: (a) Possesses a firearm, a knife, or brass or iron knuckles and he or she: (i) Has previously been convicted of a felony[.]” Here, the parties agreed that the Appellant had a prior felony conviction. (E9, p. 1). However, no reasonable trier of fact could have concluded that the Appellant knowingly or intentionally possessed the firearm.

Actual possession refers to physical possession. *State v. Warlick*, 308 Neb. 656, 682 (2021). Constructive possession, on the other hand, can be established through ownership, control, or dominion over contraband, combined with the intent to control it. *Id.* The concept of constructive possession has also been applied to the crime of a felon possessing a firearm under § 28-1206. *State v. Sherrod*, 27 Neb. App. 435 (2019). Constructive possession can be demonstrated by direct or circumstantial evidence, such as the defendant’s proximity to the item at the time of arrest or evidence of control over it. *State v. Warlick*, 308 Neb. at 682.

The evidence adduced at trial woefully failed to show that the Appellant had knowingly or intentionally possessed the firearm. It is undisputed that there is no evidence that the Appellant had actual possession. Rather, the State’s case relied solely on circumstantial evidence, speculation, and conjecture regarding what the Appellant knew or didn’t know.

Specifically, the evidence showed that no one ever saw the Appellant with the firearm. In fact, there were no fingerprints or DNA from the Appellant found on the firearm itself. The only DNA evidence of the Appellant was obtained from the magazine, which does not provide

conclusive proof that he knowingly possessed the firearm since there was no definitive explanation of how his DNA ended up on the magazine. The presence of the Appellant's DNA alone on the magazine is not sufficient to establish that he was aware of the firearm. The evidence clearly demonstrated that the firearm belonged to his fiancée, who had been driving his car. The firearm was locked in the glove compartment, which was part of her usual routine.

It is beyond apparent from the evidence that the Appellant had no knowledge of the firearm that was in his vehicle, nor any intent to control said firearm. As a result of the lack of conclusive evidence of knowledge and intent, the conviction cannot reasonably stand against the constitutional requirement that guilt be proven beyond a reasonable doubt. Therefore, this court should reverse and vacate the conviction.

CONCLUSION

This Court should reverse the conviction because the District Court erred in denying the Appellant's motion to suppress, and the evidence presented at trial lacked proof that the Appellant had knowledge or intent to possess the firearm. Even if the Court finds that a rational fact-finder could have convicted the Appellant beyond a reasonable doubt, this Court should still reverse the Appellant's conviction due to the blatant prosecutorial misconduct that denied the Appellant the right to a fair trial.

A new trial is necessary to address these critical errors and ensure justice is served. For the reasons set forth above, the Appellant firmly believes that this Court should reverse the conviction and sentence and remand the case to the District Court for a new trial.

DATED: July 21, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that on July 21, 2025, this brief complied with the word count limitation and typeface requirements provided in Neb. Ct. R. App. P. §2-103 and further certify that the word count function was applied to all text. This document was prepared using Microsoft Word version 16.67 and contains 6,912 words.

/s/ Oluseyi O. Olowolafe

Certificate of Service

I hereby certify that on Monday, July 21, 2025 I provided a true and correct copy of this *Brief of Appellant Smith* to the following:

State of Nebraska represented by Michael Thomas Hilgers (24483) service method: Electronic Service to **katie.beiermann@nebraska.gov**

Signature: /s/ Oluseyi O. Olowolafe (26896)