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**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

No. A-25-0118

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

KIDONNIE R. SMITH,

Appellant.

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

The Honorable Kevin R. McManaman, District Judge

BRIEF OF APPELLEE

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Statement of the Case

A. Nature of the Case

Following a jury trial, Smith was convicted of possession of a firearm by a prohibited person under Neb. Rev. Stat. § 28-1206 (Cum. Supp. 2022), a Class ID felony. See (T76–T78); (T143). At a subsequent sentencing hearing, the district court found that Smith was a habitual criminal and sentenced him to 12 to 16 years’ imprisonment, with the first 10 years being a mandatory minimum. See (T145–T147); (746:14–25); (757:21–760:23).

B. Issues Before the District Court

As relevant here, the issues before the district court were (1) the proper disposition of Smith’s motion to suppress; and (2) whether the evidence was sufficient to submit the charge to the jury. See brief of appellant, at 7.

C. How the Issues Were Decided in the District Court

Following a hearing, see (45:9–127:15), and briefs from the parties, see (T97–T124), the district court denied Smith’s motion to suppress in a written order, see (T125–T131). Additionally, the district court denied Smith’s motion for directed verdict and submitted the charge after the close of the evidence. See (535:1–18); (728:7–8).

D. Scope of Review

When 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. See, e.g., *State v. Falcon*, 319 Neb. 911, 25 N.W.3d 462 (2025). Regarding historical facts, an appellate court reviews the trial court’s findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court’s determination. See *id.*

Consideration of plain error occurs at the discretion of an appellate court. See, e.g., *State v. Roth*, 311 Neb. 1007, 977 N.W.2d 221 (2022).

When 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. See, e.g., *State v. Briggs*, 317 Neb. 296, 9 N.W.3d 632 (2024). The relevant question 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. See *id.*

Propositions of Law

I.

Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.

See *State v. Vaughn*, 314 Neb. 167, 989 N.W.2d 378 (2023).

II.

Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.

See *State v. Vaughn*, 314 Neb. 167, 989 N.W.2d 378 (2023).

III.

One of those exceptions is the automobile exception.

See *State v. Vaughn*, 314 Neb. 167, 989 N.W.2d 378 (2023).

IV.

The automobile exception to the warrant requirement applies when a vehicle is readily mobile and there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle.

See *State v. Vaughn*, 314 Neb. 167, 989 N.W.2d 378 (2023).

V.

Recently, in *State v. Barnes*, 317 Neb. 517, 10 N.W.3d 716 (2024), the Nebraska Supreme Court summarized the relevant law, as explained in *State v. Gonzales*, 294 Neb. 627, 884 N.W.2d 102 (2016):

In . . . *Gonzales*, we explained that “when a prosecutor’s comments rest on reasonably drawn inferences from the evidence, the prosecutor is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense. We then proceeded to adopt an approach that looks at the “entire context of the language used” to determine whether the prosecutor “was expressing a personal opinion or merely submitting to the jury a conclusion that the prosecutor is arguing can be drawn from the evidence.

State v. Barnes, 317 Neb. 517, 546, 10 N.W.3d 716, 740–41 (2024) (internal footnotes omitted).

VI.

And “[i]f the prosecutor is commenting on the fact that the evidence supports the inference that the defendant lied, as opposed to a personal opinion carrying the imprimatur of the government, the comment is not misconduct.”

State v. Gonzales, 294 Neb. 627, 647, 884 N.W.2d 102, 118 (2016).

Statement of Facts

INCIDENT

On Wednesday, June 7, 2023, at around 9:00 p.m., the police received a call about a domestic disturbance at 2921 Northwest First Street. See (404:7–406:14). That address belonged to a three-bedroom, two-bath trailer home. See (541:4–20). In response to that call, Officer Nicholas Vest was dispatched to that address. See (404:7–406:14). The police dispatcher relayed to Vest that “the daughter’s ex-boyfriend assaulted somebody or there was a disturbance between them” and that “[h]e stole a firearm and left the scene.” See (404:23–405:2). Vest arrived at the home roughly five to ten minutes later. See (406:15–21).

When he arrived, Vest approached and made contact with Michelle Smith (hereinafter Michelle), who lived at that address. See (408:25–409:11). Vest also spoke with Michelle’s husband, Seymour Wilson, who lived there too, and Michelle’s daughter, Tiffanie Collier, who had a 4-year-old son with Smith. See (408:25–409:21); (540:6–542:7); (566:10–18); (591:7–21); (620:20–23).

From speaking with the three adults, Vest acquired certain information. In particular, Vest was told that (1) there had been some sort of altercation between Smith and Michelle and/or Wilson; (2) Smith and Collier were not in a relationship at that time; (3) Smith had taken Collier’s gun without her permission; (4) Smith was believed to be convicted felon (which Vest then confirmed, see (411:11–17)); and (5) Smith was driving a black Kia Stinger. See (408:25–412:17); (449:8–450:17); (553:25–554:23); (E5, Clip 1).

Thereafter, Vest returned to his regular patrol, though he “focused more on driving by this address, as well as the area, in case the vehicle or [] Smith came back.” See (402:2–21). And several hours later, at around 2:30 a.m., Vest saw a vehicle in the area matching the description that he had received earlier. See (421:1–8).

When Vest started to follow the vehicle, it began driving irregularly (it made a u-turn and then drove all the way around a roundabout) before ultimately turning into the trailer park with the home where the earlier incident had occurred. See (421:9–24). However, rather than going to that home, the vehicle parked a block or two away in the driveway of another home that was vacant and for sale. See (421:24–422:18); (E5, Clip 4).

Vest followed and parked a ways behind the vehicle before turning on his spotlight and his takedown lights, which lit up the area. See (422:19–25); (E5, Clip 4). Vest then got out and approached the vehicle on the passenger’s side. See (422:19–423:2); (E5, Clip 4). However, the window tint on the vehicle was “extremely dark,” so he could not see inside the vehicle, even using his flashlight. See (423:2–3); (E5, Clip 2, 00:00–00:25).

Thereafter, Smith got out of the front driver’s seat and asked Vest why he had been following him. See (E5, Clip 2, 00:20–00:35). In response, Vest asked Smith to come to him and to show him his hands, at which point Smith became argumentative. See (E5, Clip 2, 00:20–00:50). And when Vest got closer and told Smith to put his hands behind his back, Smith ran. See (423:2–6); (E5, Clip 2, 00:20–00:50).

Specifically, Smith ran back to the house where the earlier incident had occurred. See (452:15–24). Vest pursued, along with a few other officers that had arrived by that point. See (425:7–21); (E5, Clip 2, 00:45–02:00). Eventually, the officers arrested Smith on the porch of the home where the earlier incident had occurred. See (452:15–24); (E5, Clip 2, 00:45–02:00). A search of Smith’s person incident to arrest revealed the keys to Smith’s vehicle, among other things, but no gun. See (427:18–428:22); (E5, Clip 2, 02:00–04:15).

After the officers arrested Smith, Vest made contact with the residents of the home again. See (E2, 04:15–11:52). At some time later, Smith asked Vest to give his keys to Collier so that she could move his vehicle, which Vest did; Smith also indicated that the reason he

wanted his vehicle moved was so that it would not get towed. See (429:7–430:11). But as Collier was getting ready to move the vehicle, Vest got the go-ahead from his supervisor to search the vehicle for the gun. See (430:12–431:7). So Vest had Collier get out of the vehicle and give him the keys, and then he searched the vehicle. See (430:12–431:15); (E5, Clip 3). As relevant here, Vest found the gun inside the locked glovebox of the vehicle. See (431:8–433:18); (E5, Clip 3).

Thereafter, Smith was transported to jail. See (640:23–641:10). On the way to jail, Smith asked Vest what he was being charged with and Vest told him illegal possession of a firearm. See (89:24–92:3); (640:23–641:10). In response, Smith indicated that it was not his gun, “[t]hat’s been in there,” and that it was Collier’s. See (89:24–92:3); (640:23–641:10).

PRE-TRIAL

In an amended information, the State charged Smith with possession of a firearm by a prohibited person under § 28-1206, a Class ID felony, and alleged that he was a habitual criminal. See (T76–T78).

Before trial, Smith filed a motion to suppress the evidence obtained from Smith during the incident. See (T91–T93); (45:9–52:17). The primary issue was whether the automobile exception justified the search of Smith’s vehicle, particularly considering that it was located on private property. See (45:9–52:17); (T125–T131).

At the hearing on Smith’s motion, Vest testified and his testimony was consistent with the facts set forth previously. See (53:2–106:14); (120:8–124:21). Vest also testified that he subsequently contacted the son of the owner of the vacant, for-sale home where Smith had parked and the son said that neither he nor the owner had given permission for anyone to park there. See (86:3–88:4). Additionally, the State entered into evidence several video clips from Vest’s body camera and his cruiser camera. See (74:21–76:8); (E1). Finally, Collier (who was now engaged to Smith) testified as well. See (107:23–119:20). Among other things, Collier testified that at the time,

they were temporarily staying with Michelle and Wilson and that they believed that they were allowed to park at the vacant, for-sale home because Michelle had told them that a “leasing agent” with the trailer park had permitted it. See (107:23–119:20).

In a subsequent written order, the district court denied Smith’s motion to suppress. See (T125–T131). In short, the district court determined that the automobile exception justified the warrantless search of Smith’s vehicle because the evidence showed both that (1) Smith’s vehicle was readily mobile and (2) there was probable cause to believe the gun was in the vehicle. See (T125–T131). And the fact that Smith’s vehicle was on private property (the driveway of the vacant, for-sale home) was immaterial, since the evidence showed that Smith had no privacy interest in that property. See (T125–T131). Thus, suppression was not warranted. See (T125–T131).

TRIAL

At trial, the parties stipulated that Smith was a convicted felon at the time, see (438:17–439:12); (E9), so the key issue was whether he possessed the gun, see (297:13–25). The State called Vest to testify, as well as a few other officers and various forensic technicians. See (306:5–320:7); (320:17–327:10); (331:1–385:4); (400:21–456:4); (456:15–472:17); (477:12–533:25). The State also offered into evidence numerous exhibits. See (E5–E17). In his defense, Smith testified, as did Collier and Michelle. See (539:22–588:25); (589:16–612:12); (619:5–663:2). A summary of the most relevant evidence adduced is set forth below.

Vest testified consistent with the facts previously set forth. See (400:21–456:4). Additionally, Officer Belleci testified about how he helped Vest open the locked glovebox and Officer Sladek testified about obtaining a DNA sample from Smith. See (308:24–310:11); (321:13–325:4).

As stated, several forensic technicians testified for the State as well. Most notably, Danielle Oshlo testified regarding her DNA

analysis of the gun and accompanying magazine. See (477:12–533:25). Regarding the gun itself, Oshlo testified that there was a partial DNA profile detected, with at least 2 contributors, but that because she was unable to determine exactly how many individuals were present, the DNA profile was uninterpretable. See (504:5–16). Regarding the accompanying magazine, Oshlo testified that there was a partial DNA profile detected, with two contributors, and that it was 1.82×10^8 times more likely that it originated from Smith and an unknown, unrelated individual than two unknown, unrelated individuals, which was support for Smith being included as a contributor to the DNA mixture. See (507:15–508:25). Furthermore, Smith was included as the main contributor to the DNA mixture, contributing about 68 percent of it. See (511:21–512:9).

The State also entered into evidence redacted video clips from Vest’s body camera, as well as the video clip from his cruiser camera, with the limitation that any statements made by anyone in those clips other than Smith were received only for the limited purpose of showing why Vest “took the actions that he took during the course of his investigation.” See (416:15–418:7); (E5). The district court twice gave a limiting instruction to that effect to the jury. See (416:15–418:7); (723:5–10).

Following the close of the State’s evidence, Smith moved for a directed verdict, which the district court overruled. See (535:1–18). Thereafter, Smith presented his case-in-chief.

First, Smith called Collier to testify. See (539:22–588:25). As relevant here, Collier testified that she and Smith had just moved back to Nebraska on June 1 and that at the time of the incident they were temporarily staying with Michelle. See (540:6–541:23). Collier also testified that she owned two guns (though only one was at issue here), that she had never told Smith about them in their seven and a half years of being together, and that she did not believe he had ever seen her with them. See (547:3–548:10); (567:3–18); (569:16–18). And Collier initially made it seem like she had not known at the time that

Smith was a convicted felon, before eventually admitting that was not true. See (567:3–568:11); (572:25–574:3).

Additionally, Collier testified that at the time, she was using Smith's car because hers was in the shop, and that her routine was to put her gun in her purse before work, lock it in the glovebox on the way to work, and then when she got home from work, she'd put it in her purse and then lock that in her mother's closet. See (549:16–550:14). However, on the day of the incident, Collier said that she forgot to take it out of the glovebox after work. See (551:13–552:14). And Collier said that she did not tell the officers any of this (or told them something different) that night because she was scared and/or upset and because Vest said that he would follow up with her later. See (552:17–553:7); (574:4–576:25); (584:12–585:25).

Second, Smith called Michelle to testify. See (589:16–612:12). In short, Michelle provided additional details about the incident and corroborated portions of Collier's testimony; additionally, she said that she had lied to the officers that night in various respects, including about knowing that Smith had the gun. See (589:16–612:12).

Finally, Smith himself testified. See (619:5–663:2). Smith basically took the same position as Collier, saying that she must have put the gun in the glovebox, he had no idea it was in there, and he had no reason to look in there while he was driving the car. See (632:19–634:16). Additionally, he claimed that he never knew Collier had guns, that he never touched one of her guns or a magazine, and that he never told her about his felon status (again, despite being together for over 7 years). See (621:4–623:6). Smith also tried to explain his statements to Vest on the way to jail about the gun. See (640:23–641:10).

After Smith testified, the defense rested. See (663:1–4).

Following closing arguments, jury deliberations began. See (673:13–728:8). Ultimately, the jury found Smith guilty. See (T143); (733:8–739:7).

SENTENCING

At a subsequent sentencing hearing, the district court first heard from the parties on the enhancement issue and determined that Smith was a habitual criminal. See (742:10–746:25). The district court then heard from the parties, as well as Smith himself, on the appropriate sentence to be imposed. See (747:1–757:20). Thereafter, the district court sentenced Smith to 12 to 16 years’ imprisonment, with the first 10 years being a mandatory minimum. See (757:21–760:23).

Smith appealed.

Argument

I.

THE DISTRICT COURT DID NOT ERR IN DENYING SMITH’S MOTION TO SUPPRESS

Smith argues that the district court erred in denying his motion to suppress. See brief of appellant, at 7, 14–20. This is because, according to Smith, the district court incorrectly determined that the automobile exception applied to justify the search of Smith’s car. See *id.* The State disagrees. As will be explained below, the district court correctly determined that the automobile exception justified the search of Smith’s car and that suppression was therefore not warranted.

Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures. See *State v. Vaughn*, 314 Neb. 167, 989 N.W.2d 378 (2023). Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions. See *id.* One of those exceptions is the automobile exception. See *id.* The automobile exception to the warrant requirement applies when a vehicle is readily mobile and there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle. See *id.*

Both of those requirements were met here. Regarding the first requirement, the Nebraska Supreme Court has stated that “[a] vehicle is readily mobile 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, 920 N.W.2d 842, 847 (2018) (citing *State v. Rocha*, 295 Neb. 716, 755, 890 N.W.2d 178, 207 (2017)). The State submits, however, that that “private property” language was imprecise, as the issue in that regard really is whether the defendant has a privacy interest in the property where the vehicle was located, see *Collins v. Virginia*, 584 U.S. 586, 138 S. Ct. 1663, 201 L. Ed. 2d 9 (2018); *Rocha, supra*; *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012), which is also analytically distinct from whether the automobile exception applies, see *Collins, supra*.

With that said, as the district court determined, Smith did not have a privacy interest in the driveway where he parked. The driveway was “open to the public on the road, without any gate or restricted entrance.” See (T128); (E5, Clip 4). The house itself was vacant and had a for-sale sign in the front yard. See (E5, Clip 4). Smith did not have permission to park there from the owner. See *supra*, at 9. And even if a “leasing agent” had in fact told Michelle, who then told Smith, that he could park there (which the State questions, considering that Smith himself wanted Collier to move the vehicle because he was worried it would be towed, see *supra*, at 8–9), the State does not see how that would convey a *privacy interest* because the driveway was still fundamentally open to the public. Additionally, as the district court observed, see (T128), Vest had just seen Smith driving the vehicle, so it was clearly “capable or apparently capable of being driven on the roads or highways,” see *Rocha, supra*.

Regarding the second requirement, 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 or evidence of a crime will be found. See *Vaughn, supra*. As the district court determined, probable cause to search the car existed here.

Among other things, Vest had reason to believe that (1) Smith had taken Collier’s gun; (2) Smith was a convicted felon; (3) it was Smith’s car; (4) Smith had lingered in the car when Vest approached and tried to look inside; (5) Smith had only been gone roughly 5 hours and he had “nowhere else to go;” (6) Smith did not have the gun on his person; and (7) Smith had fled from the officers. See *supra*, at 7–8; (73:17–74:2); (96:6–18); (116:14–20).

Under these circumstances, there was certainly a reasonable belief that the car contained evidence of a crime, that being the gun.

Accordingly, the automobile exception applied and the search of Smith’s vehicle was reasonable. The district court therefore properly denied Smith’s motion to suppress.

II.

THERE WAS NO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS

Smith argues that the prosecutor committed plain-error misconduct during closing arguments. See brief of appellant, at 7, 20–23. The State disagrees. Viewed in context, the prosecutor’s statements were permissible comments on the evidence and the witnesses’ credibility. Accordingly, there was no error here, let alone plain error.

Recently, in *State v. Barnes*, 317 Neb. 517, 10 N.W.3d 716 (2024), the Nebraska Supreme Court summarized the relevant law, as explained in *State v. Gonzales*, 294 Neb. 627, 884 N.W.2d 102 (2016):

In . . . *Gonzales*, we explained that “when a prosecutor’s comments rest on reasonably drawn inferences from the evidence, the prosecutor is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense. We then proceeded to adopt an approach that looks at the “entire context of the language used” to determine whether the prosecutor “was

expressing a personal opinion or merely submitting to the jury a conclusion that the prosecutor is arguing can be drawn from the evidence.

Barnes, supra, 317 Neb. at 546, 10 N.W.3d at 740–41 (internal footnotes omitted). And “[i]f the prosecutor is commenting on the fact that the evidence supports the inference that the defendant lied, as opposed to a personal opinion carrying the imprimatur of the government, the comment is not misconduct.” *Gonzales, supra*, 294 Neb. at 647, 884 N.W.2d at 118.

Applying that law here, there was no prosecutorial misconduct. The statements that Smith takes issue with, see brief of appellant, at 21–22, were all in reference to the evidence adduced. In other words, it was the prosecutor “submitting to the jury a conclusion that the prosecutor is arguing can be drawn from the evidence.” See *Barnes, supra*. Accordingly, they were not misconduct, see *Gonzales, supra*, and certainly did not rise to the level of plain error. And as for the alleged misstatement of the evidence by the prosecutor, see brief of appellant, at 22–23, the State simply disagrees with that characterization; that Smith was included as the main contributor to the DNA mixture on the magazine *is* consistent with him having handled the gun.

III.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT SMITH’S CONVICTION

Smith argues that the evidence was insufficient to support his conviction. See brief of appellant, at 7, 23–25. The State disagrees. When the evidence is viewed in the light most favorable to the prosecution, as the relevant standard of review requires, see *Briggs, supra*, a rational trier of fact could have found all the elements beyond a reasonable doubt. Accordingly, Smith’s argument fails.

Smith was convicted of one count of possession of a firearm by a prohibited person under § 28-1206, which provides, in relevant part:

(1) 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. . . .

The parties stipulated that on the relevant date, Smith was a prohibited person because he had previously been convicted of a felony. See *supra*, at 10. So the only element really at issue was whether Smith possessed a firearm. See *id.* And when the evidence is viewed in the light most favorable to the prosecution, as the relevant standard of review requires, see *Briggs, supra*, a rational trier of fact could have found that element beyond a reasonable doubt.

Specifically, the record shows, among other things, that (1) Michelle and Collier indicated to Vest that Smith had taken Collier's gun; (2) Smith ran from the officers; (3) the gun was found in the locked glovebox of Smith's vehicle; and (4) Collier's later testimony indicating that she had mistakenly left the gun there and Smith did not even know she owned guns, was not credible. See *supra*, 7–8, 11–12.

Conclusion

For the reasons noted above, the appellee respectfully requests that this court affirm the judgment of the district court.

STATE OF NEBRASKA, Appellee,

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Certificate of Compliance

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-103. This brief contains 4,579 words, excluding this certificate. This brief was created using Word Microsoft 365.

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Certificate of Service

I hereby certify that on Monday, October 20, 2025 I provided a true and correct copy of this *Brief of Appellee State* to the following:

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