

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
LANCASTER COUNTY, NEBRASKA**

Honorable Judge Kevin R. McManaman

APPELLANT'S REPLY BRIEF

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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.*
- W. "[A]n 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).
- X. "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.*
- Y. "As we have stated, 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." *State v. Barnes*, 317 Neb. 517, 534 (2024) (citing *State v. Mabior*, *supra*).

- Z. “A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.” *Id.*
- AA. “Then, 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.*
- BB. “Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infects the trial that the resulting conviction violates due process.” *Id.*
- CC. “Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.” *Id.* (citing *State v. Garcia*, 315 Neb. 74 (2023)).
- DD. “In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, we consider the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury, (2) whether the conduct or remarks were extensive or isolated, (3) whether defense counsel invited the remarks, (4) whether the court provided a curative instruction, and (5) the strength of the evidence supporting the conviction. *Id.*
- EE. “To determine the elements of a crime, the Court looks to the text of the statute.” *State v. Mann*, 302 Neb. 804 (2019).
- FF. “Possession of a firearm may be actual or constructive.” *State v. Warlick*, 308 Neb. 656 (2021).
- GG. “Actual possession is defined as including only those weapons on one's person or within one's immediate control, which is the area within which one might immediately gain possession of a weapon.” *State v. Garza*, 256 Neb. 752 (1999).
- HH. “Constructive possession may be proved by mere ownership, dominion, or control over contraband itself, coupled with the intent to exercise control over the same. *State v. Warlick*, *supra*.
- II. The fact of possession may be proved by circumstantial evidence. *State v. Long*, 8 Neb. App. 353 (1999).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING SMITH'S MOTION TO SUPPRESS AND ADMITTING EVIDENCE OF THE UNLAWFUL SEARCH

The district court erred in ruling that the automobile exception justified the search of Smith's car. Smith indeed had a reasonable privacy interest in the private driveway, and the State lacked probable cause to search the vehicle. The State's assertions – that the driveway was open to the public, and probable cause existed solely because Smith was a felon and suspected of taking a gun – misapply the automobile exception. See Brief of Appellee, at 14. While vehicles are subject to a lower expectation of privacy, the context – here, a private driveway connected to a home – warrants heightened protection. The fact that the driveway was not Smith's residence and was visible to the public does not negate Smith's reasonable privacy expectation. Use of the driveway established that Smith had not waived or surrendered his privacy rights. The State failed to prove its warrantless search met any exception to the Fourth Amendment or Nebraska equivalent. Thus, the evidence from that search should have been suppressed, and Smith's conviction must be reversed.

While “[a]ll evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in the criminal trial in a state court,” the constitution's touchstone – reasonableness – remains paramount. *State v. Hammond*, 315 Neb. 362 (2023). The Fourth Amendment guarantees “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. Amend. IV. The Nebraska Constitution is substantially identical. Neb. Const. Art. 1, §7

The law recognizes certain exceptions to the warrant requirement, including the automobile exception, which is premised on mobility and the reduced expectation of privacy in automobiles. *State v. Vaughn*, 314 Neb. 167 (2023) (see also *State v. Rocha*, 295 Neb. 716 (2017) (“[holding] that

the requirement of ready mobility for the automobile exception is met whenever a vehicle is not located on private property is capable or apparently capable of being driven on the roads or highways”).)). However, the automobile exception does not erase all privacy expectations, particularly where the facts indicate a heightened privacy interest.

Here, the driveway where the vehicle was located was connected to a home—even if that residence was vacant at the time and Smith did not live at that particular residence. The simple fact that a driveway is visible from the street or accessible to the public does not undermine the longstanding principle that an individual retains a reasonable expectation of privacy in the curtilage of a home, which includes the driveway. See *Collins v. Virginia*, 138 S. Ct. 1663, 1667-68 (2018) (holding that a driveway, as part of the home’s curtilage, is subject to a heightened expectation of privacy despite its openness to public view). There is no requirement that Smith had to own the driveway. The record is clear that Smith was using the driveway to park his vehicle, because there was no other location in front of the residence he was staying at to park his vehicle. The absence of any express authorization to enter the driveway reinforces the claim that the Smith’s privacy interest in using the driveway was not surrendered. *Id.*

Additionally, the vacancy of the home does not inherently diminish the Fourth Amendment’s protection of the curtilage. Absent clear abandonment or public invitation, the privacy expectation attached to the property should persist. The State bears the burden of proving that its warrantless intrusion was justified under an exception to the warrant requirement. *State v. Hammond*, *supra*.

In sum, while the automobile exception operates as a limited carveout to the warrant requirement, it must not be applied in a manner that obliterates recognized privacy rights, particularly where—like here—those rights have not been waived or otherwise surrendered through

abandonment or explicit consent. Therefore, Smith's conviction and sentence should be reversed, as the district court permitted evidence from the search that should have been suppressed.

II. THE STATE PREJUDICED SMITH'S RIGHT TO A FAIR TRIAL BY ENGAGING IN PROSECUTORIAL MISCONDUCT DURING ITS CLOSING ARGUMENT

The numerous statements made by the prosecutor during the State's closing arguments were both improper and prejudicial to Smith's right to a fair trial. The State's argument that the prosecutor's statements were permissible comments on the evidence and the witness's credibility completely disregarded the fact that they were not a summation of evidence but were personal opinions. The prosecutor repeatedly made personal statements regarding Smith's credibility rather than summarizing evidence. Nebraska law bars such conduct as it risks misleading the jury. The prosecutor's remarks were neither responses to defense argument nor fair inference from evidence. For example, statements about the "unreasonableness" of Smith and Collier's actions were unsupported and reflected personal opinion, not evidence. "When considering a claim of prosecutorial misconduct, we first consider whether the prosecutor's acts constitute misconduct." *State v. Gonzales*, 294 Neb. 627, 645-46 (2016). "A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct." *Id.* "But if we conclude that a prosecutor's acts were misconduct, we consider whether the misconduct prejudiced the defendant's right to a fair trial." *Id.*

A. PROSECUTOR'S STATEMENTS CONSTITUTED MISCONDUCT

During closing arguments in Smith's trial, the prosecutor made statements that clearly expressed personal opinions about Smith's guilt and credibility rather than limiting comments to a fair summation of the evidence. See Brief of Appellant, at 21-22. Nebraska law provides that prosecutorial misconduct occurs when a prosecutor's actions violate legal

or ethical standards and risk undermining a defendant's right to a fair trial. *State v. Barnes*, 317 Neb. 517, 534 (2024); *State v. Gonzales*, 294 Neb. 627, 645-46 (2016); and, *State v. Cotton*, 299 Neb. 650 (2018). Specifically, misconduct arises when the prosecutor's remarks reflect personal beliefs or opinions, rather than arguments based solely on reasonable inferences from the evidence presented. *Id.*

"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." *State v. Gonzales*, 294 Neb. 627 (2016). "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.'" *Id.*

In *Barnes*, the Court found the prosecutor's statement during closing arguments that she did not "think [one of Matulka's former boyfriends] ha[d] much credibility did not constitute prosecutorial misconduct. *Barnes*, 317 Neb. at 547. The Court reasoned the statement was in response to comments by defense counsel that came as a reply to the defense counsel's comment claiming that the testimony of the former boyfriend was "very important" in determining whether Barnes was telling the truth. *Id.*

In *State v. Kipple*, 310 Neb. 654, 661 (2022), the Court held that various statements made by the State were perhaps provocative, but were not improper as to rise to a level necessitating reversal. The Court found that the jury was instructed that counsel's statements were not evidence, most of the statements were made during opening arguments, and thus any prejudice was lessened by the production of evidence at trial, and the evidence against Kipple was ample. *Id.*

In this case, the prosecutor's statements reflected his or her own belief about Smith's guilt and truthfulness, as well as the truthfulness of his witnesses. Unlike *Barnes*, there is no evidence that Smith's counsel invited such remarks, nor does it seem the court gave any curative instruction to counteract their effect. Additionally, unlike *Kipple*, these statements were not made during opening arguments but during the closing. Here, the prosecutor's statements were not a summary of evidence, nor were they reasonable inferences from the evidence. For example, when considering the context, the prosecutor's remark, "I would submit to you that much of what you heard from the defense witnesses is just simply not reasonable" precedes several statements that lacked support from the evidence. (676:20-21). Specifically, the prosecutor criticizes the truthfulness of Smith and his witness in stating the following:

"But you think about this relationship, you're talking about guns, you're talking about one of the individuals having the status of being a convicted felon, in those many years -- and they've got a child, a young child, they're living together, and you have one who has a status of convicted felon. And in all those years, he never bothers to tell Ms. Collier that he is a convicted felon, can't have firearms, this is my status. Never once says that. She never once asks. I would submit that that is unreasonable with regard to the issue of credibility."

(677:4-13). This is a primary example of improper statements that rise to the level of misconduct. This statement, along with many, was improper because, as stated in *Gonzales*, the test is whether the language used, when viewed in total context, is a summary of the evidence or is expressing the prosecutor's personal opinion. The State's blanket

argument that the remarks were inferences drawn from the evidence fails, as there was no evidence presented to support the remarks of the prosecutor. Specifically, there was no evidence in the record to dispute when Collier learned that Smith was a convicted felon, or that she never inquired about his status. This is a blatant example of an opinion that is not inferred from the evidence, but rather the prosecutor's personal opinion about the evidence presented by Smith. It is well established that personal opinions by the prosecutor are not allowed, as they are likely to mislead or unduly influence the jury and distract the jury from its duty to decide the case solely based on the evidence. *State v. Figures*, 308 Neb. 801, 824-25 (2021). Accordingly, the record is very clear of the multitude of times the prosecutor's statements were not a summation of evidence but were personal opinions that were improper.

B. PROSECUTOR'S STATEMENTS WERE PREJUDICIAL

The misconduct in the State's closing arguments prejudiced Smith's right to a fair trial. Prejudice occurs when the misconduct so infects the trial proceedings that it undermines due process. See *Barnes*, 317 Neb. at 534. The Nebraska Supreme Court sets forth factors to consider in finding prejudice, including: (1) the degree to which the prosecutor's comments misled or influenced the jury, (2) whether the comments were extensive, (3) whether defense counsel invited the response, (4) whether the court provided a curative instruction, and (5) the strength of the evidence supporting conviction. *Id.*; see also, *State v. Garcia*, 315 Neb. 74 (2023). "Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process." See *Gonzales*, 294 Neb. at 646. "Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred." *Id.* Here, the repeated personal remarks by the prosecutor, in a closely contested case, tipped the scale unfairly. Without overwhelming evidence of Smith's guilt, the improper statements likely influenced the verdict. Smith's conviction should be reversed on this ground.

In *State v. Hernandez*, 299 Neb. 896, 928-29 (2018), the Court held that the prosecutor's statement telling the jury that it "honestly made [him] sick that the State had to present certain witnesses as part of its case in chief was highly improper, not a summation of the evidence, and expressed a personal opinion not based on any evidence. The Court found the statement clearly constituted prosecutorial misconduct. Notwithstanding, the Court concluded the misconduct did not prejudice his right to a fair trial as the evidence against Hernandez was overwhelming. *Id.*

Likewise, in *State v. Cotton*, 299 Neb. 650 (2018), the Court concluded the statement made by the prosecutor in reference to Cotton's testimony, "I thought it was unreasonable what Cotton was talking about" constituted statements on his personal opinion as to the credibility of Cotton's testimony. Although the Court found the comment to be improper, the Court ultimately found the misconduct was not exceedingly prejudicial or pervasive, as the comment occurred only once in the closing argument and did not inundate the trial. *Id.*

Here, the prosecutor's statements clearly constituted prosecutorial misconduct, as they were not minor or isolated as the Court found in *Cotton*; instead, they were repeated direct expressions of personal belief that undermined Smith's and his witnesses' credibility before the jury. Most importantly, there was not overwhelming evidence of Smith's guilt; the case turned on contested issues of credibility, and the weight of the evidence was closely balanced. Because the prosecutor's personal opinions tipped the scales for the jury, this misconduct was not harmless.

Thus, the prosecutor's improper statements expressing personal beliefs and misstatements of the evidence likely misled or unduly influenced the jury, and deprived Smith of a fair trial under Nebraska law. Given that the State's case against Smith was not overwhelming, there is at least a reasonable probability that these statements impacted the jury's

verdict. Therefore, Smith's conviction should be reversed due to prosecutorial misconduct.

III. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN SMITH'S CONVICTION

The evidence presented at trial lacked any indication that Smith knew that a firearm was in his car to sustain the conviction that he possessed a gun. Smith was charged and convicted of one count of possession of a firearm by a prohibited person under Neb. Rev. Stat. § 28-1206. To determine the elements of a crime, the Court looks to the text of statute. *State v. Mann*, 302 Neb. 804 (2019). The statutory definition of a deadly weapon by a prohibited person in effect at the time of the offense is set forth in Neb. Rev. Stat. § 28-1206. This section provides, in relevant part, "A person commits the offense of possession of a deadly weapon by a prohibited person if he or she... [p]ossesses a firearm... and he or she [h]as previously been convicted of a felony[.]" Neb. Rev. Stat. § 28-1206; See, also, Neb. Rev. Stat. § 28-1212 (presence in a motor vehicle other than a public vehicle of any firearm referred to in section 28-1206 shall be prima facie evidence that it is in the possession of and is carried by all persons occupying such motor vehicle at the time such firearm or instrument is found, except that this section shall not be applicable if such firearm or instrument is found upon the person of one of the occupants therein).

Smith concedes that the parties had stipulated at trial that Smith was prohibited from possessing a firearm because he had previously been convicted of a felony. (E9). Accordingly, Smith agrees that the only element at issue was whether Smith possessed a firearm. See Brief of Appellee, at 17. However, when the evidence is viewed in light most favorable to the prosecution, a rational trier of fact cannot have concluded that element beyond a reasonable doubt.

There is no dispute that Smith did not have actual possession of the firearm that was in the locked glovebox of his vehicle. Thereby, the State relied solely upon the doctrine of constructive possession to prove this

element. It is undisputed that the doctrine of constructive possession has been extended to the crime of possession of a firearm by a felon under § 28-1206. “Constructive possession means the possessor did not have actual possession but was aware of the presence of the contraband and had dominion or control over it.” *State v. Howard*, 282 Neb. 352 (2011). Yet, the State’s argument that Smith had constructive possession of the firearm fails to demonstrate that he had any knowledge or awareness of the presence of the firearm.

In *State v. Sherrod*, 27 Neb. App. 435, 445 (2019), this Court held that the defendant had constructive possession of a firearm found in the first-floor bedroom because the evidence showed that a key to the bedroom was found alongside the key to a vehicle registered to the defendant. Additionally, DNA was located on the firearm, and the defendant could not be excluded as a contributor to that DNA. *Id.* In the current case, there is no dispute that the firearm was located in a vehicle owned and registered to Smith. However, unlike *Sherrod*, there was no evidence that the DNA on the firearm belonged to Smith. Therefore, relying on the DNA evidence alone is insufficient to prove that Smith had knowledge of or was aware of the firearm's presence in the locked glovebox.

Smith further disagrees with the State’s argument that the evidence of Michelle Smith and Tiffany Collier stating to Officer Vest that Smith had taken Collier’s firearm and that Collier’s subsequent testimony claiming otherwise supports that Smith constructively possessed the firearm. In *State v. Botts*, 26 Neb. App. 544, 557-58 (2018), the Court held there was sufficient evidence that Botts possessed a weapon, as the evidence showed that after Botts was placed in the cruiser, he repeatedly claimed that the weapon was his and that he used it for his business. The Court further concluded that Botts was the only person with the vehicle, which the officers knew he had been driving earlier, and the weapon was found under his driver’s seat. *Id.*

Here, Smith made no admissions that the gun was his or that he ever had knowledge that the gun was in the car. (E5). Smith was not seen sitting the passenger seat of the car, nor was there any evidence that Smith had accessed the glove box as Officer Vest approached the vehicle. There is simply no evidence to that Smith ever knew Collier owned guns or that he knew the gun was in the vehicle. In fact, there is no evidence that either Michelle Smith or Collier ever saw Smith go into Collier's purse to take her gun. In fact, none of the parties stated that they saw Smith with Collier's gun. As mentioned above, the State's only argument is that Smith must have known about the gun based on the length and nature of his relationship with Collier, which is unsupported by any evidence and is merely the personal opinion and conjecture of the prosecutor. See *supra*, 9-10.

Lastly, the State's claim that Smith's fleeing from officers suggests he knew or was aware of the firearm is highly speculative. There is not enough evidence to treat flight as strong proof of Smith's consciousness of guilt. First, Smith's fleeing from the home was based on Michelle Smith's admission that she pulled a knife and told Smith to leave her house. The record clearly shows that Smith had no chance to gather his belongings and left immediately when Michelle Smith yelled at him to go. Smith's interactions with law enforcement were not a continuation of that initial flight from the scene of the dispute. Second, when Smith argued with law enforcement because they provided no explanation for why he was being followed, it reflected his mental state. Neither this behavior nor his decision to flee shows that Smith knew he was guilty of possessing a firearm. Instead, Smith's state of mind indicated awareness of his actions related to the dispute that caused him to leave initially. The record fully supports that Smith's mindset during his interaction with law enforcement was one of self-defense from having a knife pulled on him. Under these circumstances, the evidence of flight does not prove guilt, especially regarding his knowledge or awareness of the gun.

The evidence failed to prove beyond a reasonable doubt that Smith knew about the firearm in the car. Although the car belonged to him and he was a convicted felon, the only evidence linking him to the gun was its presence. No DNA, admissions, or witness statements showed that he was aware of the gun in the locked glove compartment. The State's argument relies entirely on conjecture and uncorroborated assumptions about Smith's knowledge based on his relationship with Collier. Furthermore, the evidence of Smith's flight does not prove knowledge of the gun, as the record indicates he ran after being threatened with a knife, not because he was aware of the weapon. Therefore, the State did not meet the proof requirements for constructive possession under Nebraska law.

CONCLUSION

For the reasons outlined above, Smith respectfully requests that this Court reverse his conviction and sentence, and remand the case to the district court for a new trial. The district court's errors on the suppression motion, the plain error of the prosecutor's misconduct, and the insufficient evidence each deprived Smith of a fair trial.

DATED: November 6, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that on November 6, 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 5,139 words.

/s/ Oluseyi O. Olowolafe

Certificate of Service

I hereby certify that on Thursday, November 06, 2025 I provided a true and correct copy of this *Reply Brief* to the following:

State of Nebraska represented by Austin Nicholas Relph (24718) service method: Electronic Service to **austin.relph@nebraska.gov**

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