VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of February, 2017.

Dwayne E. Robinson, Appellant,

against Record No. 151806
Circuit Court No. CL14-547

Jenny Copeland, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Southampton County.

Upon consideration of the record, briefs, and the argument of counsel, the Court is of the opinion that the judgment should be reversed.

Dwayne E. Robinson ("Robinson") brought an action for malicious prosecution against Jenny Copeland ("Copeland") in the Circuit Court of Southampton County ("trial court"). Robinson filed his complaint after he was acquitted of criminal charges initiated against him by Copeland for brandishing a firearm and for abusive language, in violation of Code §§ 18.2-282 and 18.2-416.

Robinson and Copeland were neighbors. On December 26, 2013, Robinson was walking to the back of his property to hunt deer with his shotgun when he encountered someone lying down, wearing a mask and a "full camo outfit," and carrying something that looked like "an assault-style weapon." After seeing this individual, Robinson immediately exited the woods, left his shotgun at his house, and knocked on Copeland's door to ask her whether her children were outside in the woods behind his home. Copeland confirmed that her children were outside and she called for them to come inside. Robinson saw two children walking back toward the Copeland's house, and he "believe[d] the area was clear" because the Copelands only "have two kids that live with them." Robinson then walked back into the woods, where he heard dogs running at the hunt club adjacent to his property. Upon hearing the dogs, Robinson racked his

shotgun, chambering a slug with the goal of shooting a deer. After racking his shotgun, Robinson continued walking into the woods "carrying the gun by the receiver" in a "nonthreatening" manner.

Robinson testified that he then saw "someone out of the corner of [his] eye." At first, Robinson did not recognize the person, and he yelled "[y]ou need to get the hell off my property." Robinson then realized the person was Alexander Uran ("Alexander"), one of Copeland's children. Although Alexander was wearing a mask, Robinson recognized him "because of [his] glasses and hair." Robinson spoke to Alexander, telling him: "I told your mother [Copeland] and Gene [Copeland's husband] I hunt back here. It's not safe. You cannot be back here." Alexander apologized as he walked out of the woods. Robinson testified that none of the children he saw in the woods that day were wearing blaze orange. He also testified that he never pointed the gun at Alexander or said anything else to him. "Not more than 30, 40 minutes" later, sheriff's deputies arrived at Robinson's home after being called by Copeland. Robinson explained to the deputies what had occurred, and they left without arresting or charging him.

Several weeks later, on January 19, 2014, Robinson was collecting wood from a pile in his yard when he heard a "click, click, click, click" sound and noticed two children on Copeland's "back deck pointing a little gun at [him]." Robinson informed his wife, and she decided to call Copeland's husband to "get this resolved." Robinson's wife called Copeland's husband, but he did not answer. The Robinsons testified that they had developed a relationship with Copeland's husband after Copeland and her children moved out of the Copeland home for a year and a half. During that time, the Robinsons befriended Copeland's husband and often brought him food and vegetables from their garden. The Robinsons acknowledged they had not formed a similar friendship with Copeland.

On January 20, 2014, Copeland came to the fence separating the Robinson property from hers and she told Robinson: "[w]e need to talk." Robinson was working in his garage and had "earbuds in listening to music," but Copeland spoke loudly enough that he "heard her through [his] earbuds." Robinson told Copeland that "I am not going to talk to you" but "I will speak to your husband." According to Robinson, Copeland responded aggressively: "[d]on't have your bitch wife call my husband [,] I don't appreciate another woman calling my husband," and "I

don't appreciate another woman cooking for my husband while I was out of town." Robinson also testified that Copeland accused him of "threaten[ing] my kid with a gun." Robinson stated that during the January 20, 2014 conversation he "didn't see anybody but [Copeland]," and he did not "curse at any of the children that day." Robinson's wife corroborated her husband's account, testifying that Robinson "came straight in" and did not speak to the children.

Meanwhile, Copeland and Alexander drove to the sheriff's office where they spoke with the magistrate and sought an emergency protective order and charges against Robinson. Copeland and Alexander provided the magistrate with sworn statements about the December 26, 2013 and January 20, 2014 incidents. Copeland was the complainant and signed all the paperwork on behalf of her son. Three days later, Robinson was arrested on one charge of brandishing a firearm in front of Alexander and two charges of using abusive language in the presence of Alexander and Copeland's other son, Brandon. All of these charges were eventually dismissed and expunged from Robinson's record. However, Robinson missed at least 10 days of work, incurred roughly $4,000 in legal fees, and temporarily lost a security clearance that affected his employment. Ultimately, because they felt they could no longer live next to Copeland, the Robinsons moved away and sold their house even though "it was supposed to be [their] forever home."

Robinson's malicious prosecution suit against Copeland was set for trial with a jury on July 27, 2015. At trial, Robinson called Copeland and Alexander as witnesses. Regarding the December 26, 2013 incident, Alexander testified that he "was on the property line," but "might have been a couple feet into [Robinson's] property." Alexander "heard [Robinson] chamber a round in his shotgun," at which point Alexander said, "[h]ey, I am right here." Alexander testified that he did not "know if [Robinson] saw me or not" and that he had not seen Robinson "until [he] heard [Robinson] chamber the round." Alexander conceded that Robinson "was not facing toward me" and that Robinson was "looking in an alternate direction." Copeland also admitted that it was "possible that Mr. Robinson didn't even know where [her] son was." When he heard Robinson chamber the shotgun round, Alexander was walking through broom straw as tall as he was, and he and Robinson "were about to walk past each other going different directions." Nonetheless, after Robinson spoke to him, Alexander became "terrified" and "literally ran back to [the Copeland] house."

In regard to the second incident, Copeland testified that Robinson called her a "bitch" and "got mad" when she attempted to talk to him on January 20, 2014. Copeland said she returned to her house after the interaction with Robinson, and as she was calling her husband, two of her children, Alexander and Brandon, came in the house and stated that "Robinson yelled, 'Fuck you' and threw his hands up in the air." Copeland also testified that the children told her Robinson "was looking at them" as he said it, but she admitted that she "was in the house at that point" and had not seen the interaction herself. Copeland believed Robinson's "anger was getting worse, not better, and [she] was scared."

On the second day of trial, at the end of Robinson's case-in-chief, Copeland moved to strike the evidence on the grounds that there was insufficient evidence to prove that the charges brought against Robinson were without probable cause or malicious. After considering the motion, the trial court noted that the only question was whether the charges of brandishing a firearm and abusive language were brought without probable cause. The trial judge stated,

> Everybody pretty much agrees that the matter was instituted by the defendant, and that the case was terminated in a favorable fashion to the plaintiff. So it leaves a question of whether or not there is evidence of malice and whether or not there is probable cause. If you find that there was no probable cause, then the law is that you can infer malice.

The trial court acknowledged that although there were "reasonable conflicts" between Copeland's testimony and Robinson's testimony, it would consider "all of the plaintiff's evidence, which in large measure [was] evidence given by testimony [from Copeland] and her son." The trial court cited *Massie v. Firmstone*, 134 Va. 450, 114 S.E. 652 (1922), for the proposition that when "you call somebody who is adverse to your case, such as the other party" then "[y]ou're bound by so much of their testimony that is credible and is not contradicted by other evidence that the plaintiff may put on." The trial court stated that probable cause is satisfied when "the person who is ultimately making the complaint to the law enforcement authorities has a reasonable belief based on correct, factual information that the law may have been violated." After ruling that it did "not believe that the matter was without probable cause," the trial court granted Copeland's motion to strike. The trial court entered a final order

dismissing Robinson's complaint with prejudice. Robinson noted his objections, and this appeal followed.

We awarded Robinson an appeal on the following assignment of error:

1. The Circuit Court of Southampton County committed reversible error because the court granted defendant's motion to strike plaintiff's evidence in plaintiff's claim for malicious prosecution against defendant.

Standard of Review:

"According to well-settled principles of appellate review, when the trial court grants a motion to strike the plaintiff's evidence, we review the evidence on appeal in the light most favorable to the plaintiff." *Green v. Ingram*, 269 Va. 281, 284, 608 S.E.2d 917, 919 (2005).

> A motion to strike challenges whether the evidence is sufficient to submit the case to the jury. What the elements of the offense are is a question of law that we review de novo. Whether the evidence adduced is sufficient to prove each of those elements is a factual finding, which will not be set aside on appeal unless it is plainly wrong.

Lawlor v. Commonwealth, 285 Va. 187, 223-224, 738 S.E.2d 847, 868 (2013) (citations omitted). In evaluating a motion to strike, a trial court "should grant the motion only when it is conclusively apparent that plaintiff has proven no cause of action against defendant, or when it plainly appears that the trial court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it." *Banks v. Mario Indus.*, 274 Va. 438, 455, 650 S.E.2d 687, 696 (2007) (citation omitted).

Analysis:

An action for malicious prosecution requires proof of four elements: "the prosecution was (1) malicious, (2) instituted by or with the cooperation of the defendant, (3) without probable cause, and (4) terminated in a manner not unfavorable to the plaintiff." *Reilly v. Shepherd*, 273 Va. 728, 732, 643 S.E.2d 216, 218 (2007). In this case, the only disputed element is whether Copeland lacked probable cause when she initiated criminal charges against Robinson.

"[I]n the context of a malicious prosecution action, probable cause is defined as 'knowledge of such facts and circumstances to raise the belief *in a reasonable mind*, acting on those facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected.'"

O'Connor v. Tice, 281 Va. 1, 9, 704 S.E.2d 572, 576 (2011) (emphasis added). The existence of probable cause "is determined at the time the defendant took the action initiating the criminal charges." *Id.* Additionally, the issuance of a criminal warrant does not establish the existence of probable cause as a matter of law. *Id.* at 9-10, 704 S.E.2d at 576-77.

"[W]hether probable cause is proven will depend upon whether the circumstances disclosed by the evidence were such as to justify an ordinarily prudent person in acting as [Copeland] acted here." *F.B.C. Stores, Inc. v. Duncan*, 214 Va. 246, 251, 198 S.E.2d 595, 599 (1973). "Unless the evidence leaves no room for reasonable men to disagree," this inquiry is "a question of fact properly within the province of the jury." *Id.*; *see also O'Connor*, 281 Va. at 9, 704 S.E.2d at 576 ("When the facts relating to the question of probable cause are in dispute, the issue is one of fact to be resolved by the trier of fact.").

Brandishing Firearm Charge

Code § 18.2-282(A) provides, in pertinent part, that it is "unlawful for any person to point, hold or brandish any firearm or any air or gas operated weapon or any object similar in appearance, whether capable of being fired or not, in such manner as to reasonably induce fear in the mind of another." Here, there was sufficient evidence to find that Copeland lacked probable cause to initiate the brandishing of a firearm charge. Robinson testified unequivocally that he never pointed his gun at Alexander, that he racked his gun to load buckshot before he ever saw Alexander, and that he was carrying the gun in a "nonthreatening" manner when he encountered Alexander in the woods. Likewise, Alexander admitted that he yelled out to Robinson because he did not "know if [Robinson] saw me or not." Alexander further conceded that when Robinson racked the shotgun, Robinson was "looking in an alternate direction" with "his side to [Alexander]." Alexander only became "terrified" after Robinson had spotted him and yelled at him to get off the property. Based on this evidence, a reasonable fact finder could hold that Copeland lacked probable cause to charge Robinson with brandishing a firearm.

Abusive Language Charges

Code § 18.2-416 is titled "punishment for using abusive language to another," and makes it a Class 3 misdemeanor for any person:

> in the presence or hearing of another, [to] curse or abuse such other person, or use any violent abusive language to such person concerning himself or any of his relations, or otherwise use such

> language, under circumstances reasonably calculated to provoke a breach of the peace.

On the evidence presented, reasonable jurors could disagree about whether probable cause existed for Copeland to initiate the abusive language charges. Robinson testified that he never spoke to or saw Copeland's sons on January 20, 2014, and Robinson's wife testified that Robinson "came straight in" after the incident with Copeland. Copeland also admitted that she never heard or saw Robinson curse at her children. Copeland testified that Alexander and Brandon informed her that "Robinson yelled, 'Fuck you' and threw his hands up in the air." However, Copeland conceded she could not confirm whether Robinson actually cursed at her sons because she "was in the house at that point." In the light most favorable to Robinson, as plaintiff, the evidence did not prove that Robinson cursed "in the presence" of Alexander and Brandon "under circumstances reasonably calculated to provoke a breach of the peace." Code § 18.2-416. Therefore, a reasonable fact finder could conclude that Copeland lacked probable cause to charge Robinson with two counts of use of abusive language.

Although the trial court acknowledged that there were "reasonable conflicts" in the testimonies of Robinson and Copeland, it resolved the conflicts in favor of Copeland, the defendant. This was error. On a motion to strike, the trial court should "resolve any reasonable doubt as to the sufficiency of the evidence in plaintiff's favor." *Banks v. Mario Indus.*, 274 Va. at 454–55, 650 S.E.2d at 696 (citation omitted). In this case, because the evidence could support a finding that the prosecution was instituted without probable cause, the trial court should have denied Copeland's motion to strike. *See Commissary Concepts Mgmt. Corp. v. Mziguir*, 267 Va. 586, 590, 594 S.E.2d 915, 918 (2004). In granting Copeland's motion to strike, the trial court misconstrued *Massie v. Firmstone*, 134 Va. 450, 114 S.E. 652 (1922). In *Massie*, we held that "when two or more witnesses introduced by a party litigant vary in their statements of fact, such party has the right to ask the court or jury to accept as true the statements most favorable to his case." *Id.* at 462, 114 S.E. at 656. When weighing a motion to strike the plaintiff's evidence, the trial court does not "sit[] as the fact finder" but instead "rul[es] on a matter of law to determine whether the [plaintiff] made out a prima facie case." *Costner v. Lackey*, 223 Va. 377, 382, 290 S.E.2d 818, 820 (1982). Consequently, because "material fact[s]" remained "genuinely in dispute," *id.* at 381, 290 S.E.2d at 820, the trial court erred in granting Copeland's motion to

strike. Robinson presented sufficient evidence to place the issue of probable cause in dispute, and it was therefore a matter for the jury to decide.

Accordingly, we reverse the judgment of the trial court and remand the case for a new trial.

A Copy,

Teste:

Clerk