

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

SONNY ADAMS AND TESS ADAMS, HUSBAND AND WIFE,
Counter-Defendants/Appellees,

v.

DANIEL A. ESTRADA, A SINGLE MAN,
Counter-Claimant/Appellant.

No. 2 CA-CV 2013-0074
Filed January 23, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Cochise County

No. CV201100005

The Honorable Charles A. Irwin, Judge

**AFFIRMED IN PART;
REVERSED AND REMANDED IN PART**

COUNSEL

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez concurred and Judge Miller dissented.

H O W A R D, Chief Judge:

¶1 Appellant Daniel Estrada appeals the trial court’s order granting a directed verdict in favor of Sonny and Tess Adams on Estrada’s counter-claim for malicious prosecution and intentional infliction of emotional distress. He also argues the trial court erred in its ruling on certain evidentiary matters. We affirm the trial court’s ruling on the evidentiary issues and the intentional infliction of emotional distress claim. Because the jury could have found Estrada established the elements of malicious prosecution, the court erred by granting a directed verdict to the Adamses on that claim. We therefore reverse and remand in part.

Factual and Procedural Background

¶2 On appeal from a directed verdict we view the facts in the light most favorable to the non-moving party. *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, ¶ 6, 995 P.2d 735, 738 (App. 1999). Daniel Estrada and Sonny Adams were involved in an altercation, at night, in the road in front of their neighboring homes in January 2009. At trial, Estrada testified that Adams had snuck up and, without provocation, struck him in the shoulder and knocked him to his knees. Adams then threatened to kill Estrada, and a fight ensued. Estrada testified that Adams had continued to advance toward him, swinging at him and hitting him, despite Estrada’s repeated blows. He further testified that he had continued to back up trying to get away from Adams and that he had feared for his safety. Finally, Adams grabbed Estrada’s shirt, and Estrada threw Adams to the ground. At that point the fight ended, and Estrada called an ambulance to assist Adams.

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¶3 The fight left Estrada with an injured fist and Adams with a broken rib, fracture to his sinus area, cuts requiring stitches in his mouth and above his eye, and cuts on the back of his head requiring staples. Estrada was arrested and charged with aggravated assault and assault.

¶4 After a jury trial, Estrada was later acquitted of the criminal charges. The Adamses then sued Estrada for personal injuries arising out of the incident. Estrada counter-claimed for malicious prosecution and intentional infliction of emotional distress. Before trial, the parties settled the Adamses' claims but went to trial on Estrada's counter-claims. After three days of trial, the court granted the Adamses' motion for judgment as a matter of law, made pursuant to Rule 50, Ariz. R. Civ. P., concluding that Adams had probable cause to act as the complaining witness in the criminal prosecution against Estrada. We have jurisdiction over Estrada's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Malicious Prosecution

¶5 Estrada first argues the trial court erred in granting a directed verdict in favor of the Adamses on the malicious prosecution claim because he produced sufficient evidence that Adams had acted without probable cause when he told a police officer that Estrada attacked him. We review a trial court's ruling granting a directed verdict de novo. *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty.*, 222 Ariz. 515, ¶ 14, 217 P.3d 1220, 1229 (App. 2009). A motion for directed verdict should be granted "only if the facts presented in support of a claim have so little probative value that reasonable people could not find for the claimant." *Shoen v. Shoen*, 191 Ariz. 64, 65, 952 P.2d 302, 303 (App. 1997).

¶6 The tort of malicious prosecution¹ requires that the plaintiff establish the defendant, as complaining witness, instituted

¹Although the terms are often used interchangeably, "malicious prosecution" is the correct legal term where the

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or continued criminal proceedings against the plaintiff, which terminated in the plaintiff's favor, without probable cause and with malice. *Lantay v. McLean*, 2 Ariz. App. 22, 23, 406 P.2d 224, 225 (1965); see also *Bearup v. Bearup*, 122 Ariz. 509, 510, 596 P.2d 35, 36 (App. 1979). The existence of probable cause is a complete defense to a malicious prosecution claim, and is a question of law to be determined by the court. *Hockett v. City of Tucson*, 139 Ariz. 317, 320, 678 P.2d 502, 505 (App. 1983). But if the evidence is conflicting, and probable cause would exist under one set of facts but not the other, then the jury must determine the true set of facts and apply the law given to it by the trial judge. *Id.*

¶7 “The proper test [for probable cause in a malicious prosecution action] is subjective and objective. . . . The initiator of the action must honestly believe in its possible merits; and, in light of the facts, that belief must be objectively reasonable.” *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 417, 758 P.2d 1313, 1319 (1988) (citations and emphasis omitted). Under the subjective element, “the [accuser must] actually believe[] that the accused was guilty of the crime.” *Id.* If the accuser does not, “it is immaterial that the facts . . . were such that reasonable men might have regarded them as proof of the guilt of the accused.” *Id.*, quoting Restatement (Second) of Torts § 662 cmt. c (1977).² Under the

underlying action is a criminal proceeding, while “wrongful institution of civil proceedings” is technically correct where the underlying action is a civil matter. *Lane v. Terry H. Pillinger, P.C.*, 189 Ariz. 152, 153 n.1, 939 P.2d 430, 431 n.1 (App. 1997).

²The subjective element has been criticized, and the California case on which our supreme court in *Bradshaw* relied has been overturned on that issue. See *Williams v. Coombs*, 224 Cal. Rptr. 865, 871 (Ct. App. 1986), abrogated by *Sheldon Appel Co. v. Albert & Olier*, 765 P.2d 498, 505-09 (Cal. 1989) (probable cause only requires court “to make an objective determination of the ‘reasonableness’ of the defendant’s conduct,” whereas defendant’s subjective belief is primary focus of malice element). But it continues to be an element in Arizona until our supreme court overturns it. See *City of Phoenix v.*

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objective element, the initiator must “‘reasonably believe[] that he has a good chance of establishing [his case] to the satisfaction of the court or the jury.’” *Chalpin v. Snyder*, 220 Ariz. 413, ¶ 38, 207 P.3d 666, 676 (App. 2008), quoting *Bradshaw*, 157 Ariz. at 417, 758 P.2d at 1319. Put another way, “‘would a reasonably prudent [man] have instituted or continued the proceeding?’” *Id.*, quoting *Carroll v. Kalar*, 112 Ariz. 595, 596, 545 P.2d 411, 412 (1976).

¶8 Aggravated assault, as relevant here, is an assault that causes serious physical injury or is committed using a “deadly weapon or dangerous instrument.” A.R.S. § 13-1204(A)(1), (2). But “a person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other’s use or attempted use of unlawful physical force.” A.R.S. § 13-404(A). Actions taken in self-defense do not constitute “criminal or wrongful conduct.” A.R.S. § 13-205(A).

¶9 In considering whether the directed verdict should have been granted, we accept as true Estrada’s version of events. *See Monaco*, 196 Ariz. 299, ¶ 6, 995 P.2d at 738. Estrada and Adams had a history of bitter disputes with one another. In Estrada’s version of events, Adams was the aggressor in the fight, attacking Estrada without provocation and threatening to kill him. Estrada, fearing for his safety, continued to back up and defend himself because Adams would not stop coming toward him, swinging at him and hitting him, until Estrada finally threw Adams to the ground.

¶10 Therefore, according to his version of events, Estrada’s actions would have been justified as self-defense and not criminal or wrongful conduct. *See* §§ 13-404(A), 13-205(A). And, under that version, Adams necessarily would have lied when he told police that Estrada attacked him, unprovoked, with a wooden board and

Leroy’s Liquors, Inc., 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993) (we are bound by supreme court decisions); *see also Chalpin*, 220 Ariz. 413, ¶ 21, 207 P.3d 666, 672 (App. 2008).

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proceeded to beat him. Adams also claimed that he never fought back or said anything to Estrada. If the jury accepted Estrada's version of events, it further could have found that Adams did not believe that Estrada had committed the crime and therefore did not have the subjective belief that Estrada had committed aggravated assault. *See Bradshaw*, 157 Ariz. at 417, 758 P.2d at 1319; *see also Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, ¶ 12, 9 P.3d 314, 318 (2000) (witness credibility and weight testimony is afforded are issues for the jury to decide).

¶11 Furthermore, if it accepted Estrada's version of events, the jury could have found that Adams did not have an objectively reasonable belief that he had a good chance of establishing his case to the satisfaction of the jury. *See id.* Accordingly, under both the objective and subjective tests, the jury could have found Adams did not have probable cause to act as the complaining witness in the criminal prosecution for aggravated assault. Although Adams gave a different version of events, the trial court erred in granting the directed verdict in favor of the Adamses. The ultimate determination of the underlying facts should have been decided by the jury, and the jury then should have applied the law given to it by the trial judge. *See Hockett*, 139 Ariz. at 320, 678 P.2d at 505. Accordingly, we reverse the order granting the Adamses a directed verdict and remand for further proceedings consistent with this decision.

¶12 The Adamses claim however the trial court could have found that Estrada exceeded any justification because he was trained in martial arts. But they cite no authority for the proposition martial artists do not have a right to defend themselves. Although the jury could have found that he exceeded any reasonable self-defense claim, it also could have found that he did not. Under Estrada's version, Adams continued to advance and throw punches despite being struck and injured. We are unable to conclude that Estrada's training, even coupled with Adams's injuries, provides probable cause as a matter of law.

¶13 The Adamses additionally claim that Adams could not have instituted the criminal proceedings against Estrada because the

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police officer testified she would have arrested Estrada regardless of Adams's statements about how the fight began and proceeded. We will uphold the trial court if it is legally correct for any reason. *Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538, 540 (App. 2006).

¶14 One who gives to a third person, whether public official or private person, information of another's supposed criminal conduct or even accuses the other person of the crime, causes the institution of such proceedings as are brought by the third person. Restatement § 653 cmt. g. But a person who, in good faith, provides information of another's criminal misconduct does not "initiate" criminal proceedings if the decision is left entirely to an officer or prosecutor's discretion. *Id.*; see also *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, ¶ 24, 165 P.3d 173, 179 (App. 2007) (Arizona courts follow Restatement in absence of governing law to contrary). This protection applies even if the information later "proves to be false and [the reporting party's] belief was one that a reasonable man would not entertain." Restatement § 653 cmt. g. "The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings." *Id.*

¶15 If, on the other hand, a person knowingly gives an officer false information the "intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information." *Id.* As the Seventh Circuit explained, "a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial – none of these decisions will shield a [complaining witness] who deliberately supplied misleading information that influenced the decision." *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988).

¶16 Other states relying on Restatement § 653 have similarly found that "when a person makes a knowingly false report to a prosecuting officer, the resulting prosecution is attributable to that person" but "a person who unwittingly gives a prosecuting officer false information . . . is not liable." *Allen v. Berger*, 784 N.E.2d 367,

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370 (Ill. App. Ct. 2002); *see also White v. Frank*, 855 F.2d 956, 962 (2d Cir. 1988) (“[P]rosecutor’s role in a criminal prosecution will not necessarily shield a complaining witness from subsequent civil liability where the witness’s testimony is knowingly and maliciously false.”); *Young v. Klass*, 776 F. Supp. 2d 916, 923-24 (D. Minn. 2011) (“[W]hen someone tells lies to a prosecutor and those lies result in criminal charges, the liar is responsible for initiating criminal proceedings.”); *Farm Bureau v. Cully’s Motorcross Park*, 742 S.E.2d 781, 787 (N.C. 2013) (Restatement “only protects a reporting party who believes it to be true, thus preserving the element of malice”).

¶17 Thus, although the officer in this case testified she would have arrested Estrada based on her own observations, the record shows that Adams’s version was integral to Estrada’s prosecution and therefore whether Adams was lying determines whether he initiated the prosecution. First, Adams and Estrada were the only eyewitnesses to the fight, and therefore their statements as to who was the instigator were the only evidence available on that issue. Second, the claim that Estrada attacked Adams with a wooden board came solely from Adams; no evidence was ever found that any type of board was used during the fight. Lastly, at the grand jury, the officer focused on Adams’s statements, barely mentioned that Estrada had claimed Adams had been the aggressor, and gave no additional details of Estrada’s version of the fight. When a grand juror asked whether Adams was being charged based on Estrada’s statement that Adams initially pushed him, her response was, “There was no evidence that that part of the assault had occurred.” Her testimony thus left the grand jury with, essentially, only Adams’s version of events and evidence of his injuries to base the indictment on.

¶18 Consequently, if the jury believed Estrada’s version, it necessarily believed Adams had lied to the officer about how the fight started. It could further have found that the officer, who had taken Adams’s side throughout, had made her statement to help Adams. *Estate of Reinen*, 198 Ariz. 283, ¶ 12, 9 P.3d at 318 (witness credibility solely for jury). If Adams lied to the officer, he is not protected by the officer’s exercise of discretion and is responsible for initiating Estrada’s prosecution. *See* Restatement § 653 cmt. g. We

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thus cannot conclude that the officer's testimony as to her initial decision to arrest Estrada alone defeats the malicious prosecution claim.

¶19 The Adamses finally argue the directed verdict was proper because Estrada presented insufficient evidence of malice. The Adamses claim Adams could not have been acting maliciously because it was Estrada, not Adams, who had called the police to report the fight, and also because Adams's severe injuries prevented him from acting maliciously when he told his allegedly false version of events to the police officer. Again, we will uphold the trial court if it legally correct for any reason. *Forszt*, 212 Ariz. 263, ¶ 9, 130 P.3d at 540.

¶20 First, the fact that Estrada, and not Adams, initially contacted the police is not relevant to whether Adams was acting with malice when, in Estrada's version of events, he lied to the police officer and stated he wanted to press charges against Estrada. Moreover, Adams's injuries, standing alone, do not preclude a jury from finding he acted with malice in lying to the police officer and others. If the jury believed Estrada's version of events, in which Adams necessarily lied, and in light of Adams and Estrada's lengthy history of disputes, a jury could find Adams was acting with malice. *See Shoen*, 191 Ariz. at 65, 952 P.2d at 303. Moreover, if the jury were to conclude that Adams lacked probable cause, it could infer that Adams acted with malice. *See Cullison v. City of Peoria*, 120 Ariz. 165, 169, 584 P.2d 1156, 1160 (1978) ("The key element of malicious prosecution is malice, which can be inferred from a lack of probable cause.").

The Dissent

¶21 Our dissenting colleague first claims the majority fails to address the substantive role of the trial court in determining whether Adams initiated the prosecution without probable cause. But the trial court found that "Adams, in fact, did make a statement and wish to prosecute the claim." The court went on to determine, however, that Adams did so with probable cause. Accordingly, we are not overruling any finding by the trial court but rather

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evaluating the Adamses' attempt to uphold the court's ruling on a different basis, lack of initiation. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 10, 96 P.3d 530, 535 (App. 2004) (appellate court defers to trial court's "explicitly or implicitly" made factual findings, even if conflicting evidence exists). It would be inappropriate for this court to make a finding of fact concerning initiation when the trial court has not expressly done so.

¶22 Moreover, when facts are conflicting as to whether probable cause existed, the jury must determine "the circumstances under which the proceedings were initiated . . . to determine whether the defendant had probable cause." *See* Restatement § 673(2)(a) & cmt. e; *see also Pierce v. Gilchrist*, 359 F.3d 1279, 1291-92 (10th Cir. 2004) (dismissal not appropriate where jury could determine defendant played role in initiation of criminal proceedings against plaintiff); *Lacy v. Maricopa County*, 631 F. Supp. 2d 1197, 1210 (D. Ariz. 2008) (jury's role to determine whether defendant's "reckless indifference to the truth" caused initiation of criminal prosecution); *Young*, 776 F. Supp. 2d at 924 (jury could find defendant initiated criminal proceedings based on evidence). Thus, given the conflicting evidence as to whether Adams had probable cause, the jury necessarily also had to determine the circumstances under which Estrada's criminal prosecution was initiated. *See* Restatement § 673(2)(a). In this case, that means the jury had to determine whether Adams's or Estrada's version, or some combination of both, was the true set of facts. Based on the authority discussed above, *supra* ¶¶ 14-16, Estrada produced sufficient evidence from which a judge or jury could find Adams initiated the prosecution, without probable cause, if his statement was false.

¶23 Additionally, we reach a different conclusion than our dissenting colleague on whether an issue of fact arises if we view the entire record in the light most favorable to Estrada, as we are required to do. *See Monaco*, 196 Ariz. 299, ¶ 6, 995 P.2d at 738. For example, the dissent relies only on the testimony of Estrada and the arresting officer to determine whether Estrada had shown the elements of malicious prosecution. But this reliance fails to address the police reports and transcripts from the officer's interviews with

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Adams and Estrada both the night of the fight and the following morning, as well as the grand jury transcript, that show significant factual disputes. Additionally, although the dissent claims that Estrada's and Adams's version of the fight differed only as to who threw the first punch, thus minimizing the effect any false statements might have had, a review of the entire record in the light most favorable to Estrada reveals much more significant discrepancies regarding nearly every aspect of the fight.³ And the jury could have found the officer's grand jury testimony was far from "objective," as labeled by the dissent, because she emphasized Adams's version and was dismissive of Estrada's.

¶24 Our dissenting colleague also limits the evidence regarding the "initiation" element to the deputy's testimony regarding her decision to arrest and charge Estrada. In doing so, the dissent asserts the officer simply relayed Adams's and Estrada's version of events and it was up to the prosecutor and grand jury to decide which version to accept and whether probable cause existed. But if Adams provided false information about the fight, it tainted the entire process, including the officer's decision to arrest Estrada, the prosecutor's decision to charge him and not dismiss the case, and the grand jury's decision to indict him. *See White*, 855 F.2d at 962; *Young*, 776 F. Supp. 2d at 923-24. If the jury in this case found Adams had lied, then "an intelligent exercise of the officer's discretion [became] impossible, and [the] prosecution based upon it [was] procured by [Adams]." Restatement § 653 cmt. g. Under § 653 of the Restatement, the decisions of the officer, prosecutor, and the grand jury would not "shield [Adams if he] deliberately

³Adams told the officer that Estrada came onto Adams's property and attacked him, unprovoked, with a two-by-four or some other blunt object and proceeded to beat him. Adams claimed he never said anything to Estrada, or ever fought back during the altercation. In contrast, Estrada contends that Adams, without provocation, struck Estrada from behind while he was on the street. Estrada also claimed that Adams threatened to kill him, and he continued to defend himself because Adams would not stop coming toward him until he finally threw Adams to the ground.

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supplied misleading information that influenced the decision.” See *Jones*, 856 F.2d at 994. Contrary to the dissent’s assertion, a jury could reasonably infer that Adams’s version of events, as documented through transcripts and police reports, influenced the officer’s, prosecutor’s, and grand jury’s decisions. See Restatement § 653; *McReynolds v. Am. Commerce Ins. Co.*, 225 Ariz. 125, ¶ 8, 235 P.3d 278, 280 (App. 2010) (“[D]eciding questions of credibility, weighing of the evidence, and the drawing of reasonable inferences are functions of the jury.”). Although the dissent attempts to distinguish these cases on factual grounds, it fails to undermine the principles of law upon which the majority relies.

¶25 Relying on the Texas case *King v. Graham*, 126 S.W.3d 75, 77-79 (Tex. 2003), the dissent also claims that Estrada’s alleged failure to present evidence of what exactly influenced the prosecutor’s decision is “fatal to his establishing that Adams initiated the prosecution.” But the Texas Supreme Court has clarified that “nothing in *King* suggests that plaintiffs must provide direct evidence of causation or that prosecutors can be subpoenaed to provide live testimony regarding causation or anything else.” *In re Bexar Cnty. Criminal Dist. Attorney’s Office*, 224 S.W.3d 182, 186 (Tex. 2007). Rather, the *King* court weighed the prosecutor’s testimony in its analysis only because the prosecutor in that case did, in fact, testify as to what influenced his decision to prosecute the plaintiffs. *Id.* Estrada produced sufficient circumstantial evidence to raise an issue of fact.

¶26 Lastly, our dissenting colleague notes that “[t]he majority apparently finds as a matter of law there was no probable cause because Estrada could assert self-defense.” That statement, however, is incorrect. Instead we have only concluded that a jury could find that Estrada either did or did not reasonably defend himself after determining the true set of facts. We have made no findings as a matter of law, and conclude only that the significant factual disputes in this case precluded the trial court’s grant of a directed verdict to the Adamses on Estrada’s malicious prosecution claim. See *Orme Sch. v. Reeves*, 166 Ariz. 301, 308, 802 P.2d 1000, 1007 (1990) (trial judge cannot weigh evidence, evaluate witness

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credibility, or draw inferences where conflicting inferences are possible on motion for directed verdict).

Intentional Infliction of Emotional Distress

¶27 Estrada next argues the trial court erred in granting the directed verdict to the Adamases on Estrada’s intentional infliction of emotional distress (“IIED”) claim. As stated above, we review de novo a trial court’s granting of a directed verdict. *A Tumbling-T Ranches*, 222 Ariz. 515, ¶ 14, 217 P.3d at 1229. To succeed on an IIED claim, the plaintiff must show “reckless or intentional conduct, extreme and outrageous conduct, a causal connection between the conduct and the emotional distress, and emotional distress which is severe.” *Lindsey v. Dempsey*, 153 Ariz. 230, 233, 735 P.2d 840, 843 (App. 1987). Extreme and outrageous conduct goes “beyond all possible bounds of decency, and [is] to be regarded as atrocious and utterly intolerable in a civilized community.” *Mintz v. Bell Atl. Sys. Leasing Int’l, Inc.*, 183 Ariz. 550, 554, 905 P.2d 559, 563 (App. 1995). Additionally, “[e]ven if a defendant’s conduct is unjustifiable, it does not necessarily rise to the level of ‘atrocious’ and ‘beyond all possible bounds of decency’ that would cause an average member of the community to believe it was ‘outrageous.’” *Nelson v. Phx. Resort Corp.*, 181 Ariz. 188, 199, 888 P.2d 1375, 1386 (App. 1994), quoting *Ford v. Revlon, Inc.*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987).

¶28 The conduct Estrada complains of—Adams making purportedly false statements to the police officer and indicating he wished to press criminal charges after suffering injuries in a fight—does not rise to the high level of outrageousness required by our courts. This court found conduct was not extreme and outrageous when a defendant publicly made false statements against a police officer to the city council and newspapers, and proceeded to engage in public demonstrations based on those false accusations. *Duhammel v. Star*, 133 Ariz. 552, 561, 653 P.2d 15, 18 (App. 1982), disapproved on other grounds by *Godbehere v. Phx. Newspapers, Inc.*, 162 Ariz. 335, 340, 783 P.2d 781, 786 (1989). Assuming Adams lied to the police officer and unjustifiably stated he wished to press charges, that conduct was not “atrocious” and “beyond all possible bounds of decency.” See *Mintz*, 183 Ariz. at 554, 905 P.2d at 563. The trial

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court thus did not err in granting a directed verdict in favor of Adams on Estrada's IIED claim. See *Lindsey*, 153 Ariz. at 234, 735 P.2d at 844.

Motions in Limine

¶29 Estrada also argues that the trial court erred in granting the Adamses' motion to preclude evidence of prior acts of domestic violence, and in denying Estrada's motion to preclude evidence of probable cause in the underlying criminal case. "We review a trial court's decision on a motion in limine for an abuse of discretion." *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, ¶ 33, 180 P.3d 986, 998 (App. 2008). "'An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision.'" *Hurd v. Hurd*, 223 Ariz. 48, ¶ 19, 219 P.3d 258, 262 (App. 2009), quoting *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 14, 66 P.3d 70, 73 (App. 2003). Although we reverse the directed verdict on the malicious prosecution claim, we will review these issues to the extent we can because they are likely to arise at retrial. See *MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, ¶ 53, 197 P.3d 758, 773 (App. 2008).

Adams's Prior Acts of Violence

¶30 Estrada argues the trial court erred by precluding evidence of Adams's history of domestic violence and anger management issues. In his response filed in the trial court, Estrada argued the evidence should be admitted because it was relevant to Adams's psychological damages claim and the Adamses' loss of consortium claim in the personal injury suit, which was later settled. Estrada stated the evidence was "not being offered to show that Sonny Adams has [a] 'violent character.'" On appeal, however, Estrada argues for the first time this evidence was probative "in corroborating Estrada's claims that Sonny Adams initiated the altercation by ambushing Estrada in the dark of night and thereafter advancing against Estrada during the fight," and "in showing the reasonableness of Estrada's response."

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¶31 An objection on one ground does not preserve another for appeal. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, ¶ 6, 119 P.3d 467, 470-71 (App. 2005); *Selby v. Savard*, 134 Ariz. 222, 228, 655 P.2d 342, 348 (1982). Estrada has therefore forfeited this argument, and we do not consider it.⁴ *See Romero*, 211 Ariz. 200, ¶ 7, 119 P.3d at 471.

Probable Cause Evidence in the Criminal Prosecution

¶32 Estrada next argues the trial court erred in denying his motion in limine to exclude certain evidence establishing that probable cause existed in the underlying criminal action, including the grand jury indictment, a transcript of the arresting officer's testimony before the grand jury, and the arresting officer's booking sheet/probable cause statement. Estrada argues this evidence is irrelevant to the issue of whether Adams had probable cause to accuse Estrada of assaulting him and is additionally confusing to the jury and prejudicial to Estrada. Our record, however, does not contain the hearing transcript. Estrada, as the appellant, was obligated to "mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *see also* Ariz. R. Civ. App. P. 11(b). In the absence of the transcript, we presume it supports the trial court's ruling. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767. Given that presumption, we cannot say on the record before us that the trial court abused its discretion in denying Estrada's motion.⁵ *See id.*

Disposition

¶33 For the foregoing reasons, we affirm in part and reverse and remand in part for further proceedings.

⁴By doing so, we do not intend to prevent the trial court from revisiting the issue on retrial, should it so desire.

⁵Again, we do not preclude the trial court from reconsidering the issue, should it desire to do so.

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MILLER, Judge, dissenting:

¶34 I respectfully dissent from the conclusion that Estrada met his burden of proof to establish the elements of malicious prosecution. The majority does not address Estrada’s burden to persuade the trial court that Adams⁶ initiated Estrada’s arrest and prosecution. See Restatement §§ 672(1)(a) and 673(1)(a). By overlooking Estrada’s burden of persuasion and the trial court’s substantive role, the decision confuses the functions of court and jury. Because unlike the majority of torts, malicious prosecution has always required the trial court alone to determine whether plaintiff proved that defendant initiated the criminal proceedings, and if so, whether there was probable cause. Restatement §§ 672(1)(a), (c) and 673(1)(a), (c); see also William L. Prosser, *Law of Torts* § 96, at 879 (1941) (Although existence of probable cause is measured by a reasonable person standard, the determination “usually is taken out of the hands of the jury, and held to be a matter for decision by the court.”). Only where “there is a conflict in the testimony as to the circumstances under which the defendant acted in initiating the proceedings” is the jury required“ to give the court information upon which to determine . . . probable cause [based on] the circumstances that are pertinent.” Restatement § 673 cmt. h.

¶35 Here, the majority essentially assumes Adams initiated the criminal proceedings and then delegates to the jury the task of determining whether “Estrada either did or did not reasonably defend himself.” *Supra* ¶¶ 24, 26. For the reasons that follow, I cannot agree with my colleagues that the law requires a jury determination of who started the altercation and whether Estrada’s fighting conduct was justified as necessary to the trial court’s decision on initiation of criminal proceedings and probable cause.

⁶Sonny and Tess Adams were counter-defendants and appellees generally, but in the factual context of this limited dissent the reference to “Adams” means Sonny alone.

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Discussion

¶36 The trial court granted Adams judgment as a matter of law at the conclusion of Estrada’s case-in-chief. As was required, the court viewed Estrada’s evidence and all inferences in a light most favorable to him. *See Rocky Mountain Fire & Cas. Co. v. Biddulph Oldsmobile*, 131 Ariz. 289, 291-92, 640 P.2d 851, 853-54 (1982). The court found Estrada had not sustained his burden of proof on probable cause or malice.

¶37 The elements of malicious prosecution are easy to list, but their application is more complex because parties, and occasionally courts, confound them with the elements required to prove wrongful use of civil proceedings. *See Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 414, n.1, 758 P.2d 1313, 1316 n.1 (1988) (term “malicious prosecution” mistakenly used in trial court and court of appeals). Additionally, the application and required proof also varies depending upon whether the defendant is a law enforcement officer. For instance, cases against an arresting officer frequently conclude the plaintiff must prove the officer acted without probable cause. *See, e.g., Haaf v. Grams*, 355 F. Supp. 542, 546 (D. Minn. 1973) (“The only defense police have to actions under Section 1983 is that of good faith and probable cause.”); *cf. Dellums v. Powell*, 566 F.2d 167, 193 (D.C. Cir. 2009) (police chief could be liable for giving misleading information to prosecuting attorney if prosecutor did not make independent judgment). Similar holdings exist in cases of private persons with direct authority to arrest or to issue criminal complaints. *See Bearup v. Bearup*, 122 Ariz. 509, 510, 596 P.2d 35, 36 (App. 1979) (private person filed felony complaint to cause arrest).

¶38 Stated generally, malicious prosecution requires plaintiff to prove 1) the defendant initiated criminal proceedings against the plaintiff, 2) the criminal proceedings terminated in favor of the accused, 3) the criminal proceedings lacked probable cause, and 4) the defendant acted primarily for a purpose other than bringing an offender to justice. *Sarwark Motor Sales, Inc. v. Woolridge*, 88 Ariz. 173, 176, 354 P.2d 34, 36 (1960). Tailored to the particular facts alleged in his complaint, Estrada had the burden of proving:

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1) Adams's statement to the deputy initiated the arrest of or charge against Estrada; 2) the criminal charge against Estrada was terminated in his favor; 3) the deputy's arrest of or charge against Estrada lacked probable cause; and, 4) Adams's statement to the deputy was made with malice or primarily for a purpose unrelated to the altercation.

¶39 It is undisputed Estrada was acquitted of the criminal charge against him. What remains, therefore, is whether the testimony of Estrada⁷ and the deputy⁸ support the remaining elements.⁹

¶40 Estrada testified that as he was investigating barking dogs on the road in front of his house, he was struck in the back by an unknown assailant. He was knocked to his knee and, while turning to face his assailant, heard his neighbor, Adams, threaten to kill him. Estrada immediately engaged Adams in a fight. Although he received several more hits, Estrada eventually knocked down Adams using hard strikes to the eye, nose, mouth, and abdomen. Estrada had Special Forces training in the military and possesses a black belt in martial arts. Adams had a broken nose, facial lacerations, possible broken ribs, and cuts to the back of his head. After Adams was on the ground, Estrada told him to stay put while he called 9-1-1 to summon an ambulance for Adams. Estrada

⁷The testimony of the remaining witnesses pertained to events before the altercation, Estrada's damages, his martial arts training, and medical personnel who treated Adams.

⁸The testimony of the deputy recounted here is either undisputed or based on Estrada's testimony.

⁹To the extent the majority concludes "circumstantial evidence" from police reports and interview transcripts could be used to allow the jury to reach a different probable cause determination than the deputy and trial court, the error in placing the probable cause determination with the jury is addressed at ¶¶ 34 and 56.

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informed the 9-1-1 operator he had “gotten into a fight” and to “please hurry.”

¶41 Deputy Patricia Smalley was the first officer on the scene. As such, she was the case officer responsible for interviews, evidence collection, and reports. She also decided whom to arrest and whether to file charges.

¶42 Deputy Smalley testified her first contact was with Estrada. She did not see Adams. The deputy detained and cuffed Estrada in the back of her patrol car to ensure her safety while she investigated the scene. She did not interview Estrada before leaving to search for Adams. After approximately 30 minutes, Deputy Smalley returned to the patrol vehicle and informed Estrada he was under arrest. Except for a couple of questions about the possible use of a board and the location of the altercation,¹⁰ there was no questioning of Estrada until he was transported to a detention station.

¶43 Deputy Smalley acknowledged that she had arrested Estrada without interviewing him. She explained her primary intent at that point was to ensure officer safety and to provide first aid to injured persons.

¶44 During the drive to the detention station, Deputy Smalley listened to and observed Estrada. He made varying, inconsistent statements about the events, denied criminal intent, and asked questions. She also observed signs of intoxication, mood swings, and concern for Adams. The deputy questioned Estrada at the detention station. Although neither Smalley nor Estrada testified in detail about what occurred, it is possible to ascertain the

¹⁰Adams told Deputy Smalley that he might have been hit by a two-by-four board. When asked about the board, Estrada laughed and informed her “I don’t need a 2x4. I have a black belt.” He testified the tension of the situation caused him to laugh and his martial arts training gave him different skills to defend against an attacker instead of using a weapon such as a board.

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main points about the interview from the deputy's explanation about why she charged Estrada with aggravated assault.

¶45 Deputy Smalley testified she had decided to charge Estrada with assault “[b]ased on all the facts and circumstances of the case, the evidence, [and] statements made by both parties.” The admitted physical evidence included photographs taken the night of the altercation and the following day. The night photo shows a rock with blood on it. The day photos show blood splatters on an embankment leading to a pool of blood at its base. It was undisputed that the photos depict Adams’s blood. Additionally, Deputy Smalley noted in her admitted police report, “Estrada had excessive amounts of blood on his hands and clothing.”

¶46 Deputy Smalley further testified that if she had never taken Adams’s statement, her charging decision would have been the same because of the inconsistencies in Estrada’s statements, the absence of physical evidence supporting Estrada’s statements, blood on a rock consistent with blunt force trauma, the severity and location of Adams’s injuries, and the lack of injuries to Estrada. She unequivocally testified those facts supported probable cause to charge Estrada with aggravated assault.

¶47 In his motion for judgment as a matter of law, Adams argued probable cause existed based on the testimony of Deputy Smalley. The trial court, however, in its oral decision from the bench posed a different dispositive issue: Whether Adams, as judged by “a reasonably prudent person in his situation [would] institute or continue with the proceeding or the charge against Mr. Estrada?” In essence, the court thereby asked if Adams had “probable cause” to make his statements to Deputy Smalley. It concluded Adams had probable cause to proceed based, in part, on the fact that the “severity of the injuries sustained by Mr. Adams far exceeded what was necessary [for] a reasonable person in Mr. Estrada’s position to defend himself.” The court’s conclusion actually addresses two elements needed to prove malicious prosecution: initiating a criminal proceeding and probable cause for the proceeding.

Is There Evidence Adams Initiated a Criminal Proceeding Through Deputy Smalley?

¶48 A person who provides false information to an officer is not liable for malicious prosecution if the officer makes an arrest or files charges based on other information. Restatement § 653 cmt. g; *see also Randall v. Lemke*, 726 N.E.2d 183, 186 (Ill. App. Ct. 2000) (no initiation of prosecution where arrest based upon separate information, the informer does not affect the officer's discretion, and the officer alone is responsible for prosecution). The majority decision agrees with this principle. But the majority rejects Deputy Smalley's testimony that her arrest and charging decisions were made solely on the basis of Estrada's statements and the physical evidence. It concludes that Adams's statements to her about who had instigated the altercation could have influenced her to take "Adams's side throughout" and to testify in such a manner "to help Adams." *Supra* ¶ 18.

¶49 I cannot agree that a jury might properly disregard a law enforcement officer's undisputed, sworn trial testimony about the reasons for her probable cause determinations. Estrada's story about the altercation differed from the one provide by Adams only to the extent of who hit whom first.¹¹ Estrada offered no testimony about Deputy Smalley's legal authority to act independently, her motivations, her knowledge of or interaction with Adams, her investigation of the physical evidence, or her legal decisions to arrest

¹¹Although the majority relies on a "claim" by Adams that he was attacked with a board, the deputy testified to the contrary:

- Q. On the night of this incident, Mr. Adams clearly told you he had been hit with a 2x4, correct?
- A. He had said he thought it was a 2x4, but he was not sure.

The testimony is consistent with her admitted police report: "Adams initially believed he was hit with a 2x4 board but was unsure."

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and charge. Thus, the undisputed evidence before the trial court showed that Deputy Smalley made an independent decision to arrest and charge Estrada based on separate information. As such, the court could not find, as a matter of law, that Adams's statements to Smalley, even if false, had initiated criminal proceedings against Estrada. *See State v. Roberts*, 138 Ariz. 230, 233, 673 P.2d 974, 977 (App. 1983) (civil rule against rejection of uncontradicted testimony applicable to criminal proceedings); *O'Donnell v. Maves*, 103 Ariz. 28, 32, 436 P.2d 577, 581 (1968) (uncontradicted evidence may not be arbitrarily rejected).

¶50 To the extent the majority relies upon the deputy's testimony before the grand jury about Adams's statements, such reliance is misplaced. The decision to present an indictment to the grand jury was made by the Cochise County Attorney. *See A.R.S. § 21-408; Marston's, Inc. v. Strand*, 114 Ariz. 260, 265, 560 P.2d 778, 783 (1977) (prosecutor presents the evidence and prepares the indictment). There is no evidence of communication from Adams to the presenting prosecutor, Roger Contreras, or anyone else in the County Attorney's office.

¶51 Moreover, the grand jury transcript shows Deputy Smalley described the results of her investigation in an objective manner. Most important, she did not falsify, omit, or even discount Estrada's statements about the initiation of the fight and his self-defense actions using only his hands as weapons. Pertinent to the majority's conclusion about the two-by-four board, the grand jury did not receive evidence of Adams's claiming to have been hit by a board because she noted Adams "was not sure." Moreover, Smalley testified accurately that Estrada claimed he only used his hands to injure Adams; no two-by-four board with blood was found at the scene; and, a bloody rock consistent with head injuries was found by her. Smalley, the prosecutor, and the grand jury all knew Estrada and Adams claimed the other started the altercation. Neither the prosecutor nor the grand jury was required to accept Estrada's version, but assuming they had done so, each was required to determine if the remaining facts established probable cause for assault by Estrada.

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¶52 The limitation on malicious prosecution explained in comment g of Restatement § 653 is stricter when a public official is responsible for initiating criminal proceedings, such as an elected county attorney and a sworn grand jury. Unless the false information supplied by an accuser is the exclusive or predominant evidence relied upon by the prosecutor or grand jury, the accuser does not initiate a criminal proceeding. W. Page Keeton et al., *Prosser and Keeton on Torts* § 119, at 872 (5th ed. 1984) (“defendant cannot be held responsible unless the defendant takes some active part in instituting or encouraging the prosecution”; and “if the officer makes an independent investigation . . . [defendant] is not regarded as having instigated the proceeding”); *see also* 2 Dan B. Dobbs, *The Law of Torts* § 431 (2001).

¶53 In *King v. Graham*, 126 S.W.3d 75, 78 (Tex. 2003), the Texas Supreme Court considered whether false information provided to a prosecutor, standing alone, is sufficient to “cause a criminal prosecution.” The prosecutor testified about the factors that led him to present the case to the grand jury and different factors convincing him it was premature. *Id.* at 77-79. In vacating the court of appeals decision affirming the jury verdict for the plaintiff, the Texas Supreme Court concluded that “to recover for malicious prosecution when the decision to prosecute is within another’s discretion, the plaintiff has the burden of proving that that decision would not have been made *but for the false information supplied by the defendant.*” *Id.* at 78 (emphasis added). Here, Estrada presented no evidence that prosecutor Contreras would have refused to prosecute if he accepted only Estrada’s version of events. As the Texas court observed, prosecutors recognize that some information they receive is unreliable but it does not affect their independent decision whether to charge a crime. *Id.* at 78-79. Estrada’s failure to present any evidence that Contreras’s decision to present the charge was based exclusively or primarily on Adams’s statement is fatal to his establishing that Adams initiated the prosecution. That factor is independent of Deputy Smalley’s probable cause determinations.

¶54 The majority decision cites a variety of cases for the proposition that it is impossible for a law enforcement officer to

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exercise discretion if a person knowingly gives the officer false information. *Supra* ¶¶ 15-16. In the lead case cited, *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988), several law enforcement officers engaged in misconduct that included falsified reports, hiding exculpatory evidence in secret files, threatening to kill a fellow officer who said he might testify for the defendant in the criminal trial, and refusing to conduct a line-up with the person who said he might have committed the murder. *Id.* at 990-93. *Jones* has nothing to do with officers unable to exercise discretion because of false information from a witness; rather, it was a case of rogue officers acting on a hunch that a person was guilty, who “were not going to let a mere absence of evidence stand in their way.” *Id.* at 993. The other cases are inapposite for similar reasons. *White v. Frank*, 855 F.2d 956, 957, 962 (2d Cir. 1988) (corrupt officer who gave false testimony to grand jury not shielded because prosecutor present); *Young v. Klass*, 776 F. Supp. 2d 916, 922-24 (D. Minn. 2011) (complaining witness provided primary information supporting trespass and disorderly conduct charges); *Allen v. Berger*, 784 N.E.2d 367, 369-70 (Ill. App. Ct. 2002) (false reports and testimony provided in grand jury proceeding).

¶55 Finally, *Farm Bureau v. Cully’s Motorcross Park*, 742 S.E.2d 781 (N.C. 2013), is cited for dicta that a reporting party must believe his statements to be true to preserve malice. *Supra* ¶ 16. The actual holding of *Farm Bureau* applied to this case supports affirmance. In that case, an insurance investigator reported his suspicions of arson to the police, including the homeowner’s questionable financial dealings. *Farm Bureau*, 742 S.E.2d at 785. The homeowner denied arson and improper financial transactions. *Id.* She was arrested and charged with a property offense, but the district attorney dismissed the charge. *Id.* At a bench trial, the court found for the homeowner on her malicious prosecution claim against the insurance company and the court of appeals affirmed. *Id.* at 786. The North Carolina Supreme Court vacated the court of appeals decision and directed entry of judgment for the insurance company on the malicious prosecution claim. *Id.* at 788. The court found the arresting officer’s testimony that he alone decided whether to pursue charges showed *Farm Bureau* did not initiate the criminal proceedings. *Id.* The fact that the officer considered and

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used the allegedly false information supplied by Farm Bureau did not negate the officer's exercise of discretion, or even create a fact issue. *Id.* Here, Deputy Smalley provided equally firm testimony that her decision to arrest belonged only to her based on all of the information in her possession, which necessarily included Adams's statements.

Did Estrada Prove to the Trial Court that Adams Had Probable Cause?

¶56 Assuming for the purpose of argument that Adams rather than Deputy Smalley or prosecutor Contreras initiated the criminal proceedings, it was the duty of the trial court to determine whether Estrada proved the absence of probable cause.¹² *Sarwark Motor Sales, Inc. v. Woolridge*, 88 Ariz. 173, 178, 354 P.2d 34, 37 (1960), citing Restatement § 673(1)(c). Estrada had "the burden of persuading the court that the circumstances established by all the evidence did not give [Adams] probable cause for acting as he did." Restatement § 672 cmt. e. The court determines probable cause measured against "the conduct of a reasonable man under the circumstances." Keeton, *supra*, § 119, at 882; *see also* Restatement § 673 cmt. e. The trial court properly assumed Adams made the initial hit and Estrada's responding strikes were made for the purpose of self-defense rather than to assault Adams. The court concluded, nonetheless, the severe injuries inflicted on Adams "far exceeded what was necessary for a reasonable person in Mr. Estrada's position to defend himself."

¶57 The majority apparently finds as a matter of law there was no probable cause because Estrada could assert self-defense

¹²There is a subtle distinction as to whether the probable cause determination pertains to Deputy Smalley or Adams. *See, e.g., Nasim v. Tandy Corp.*, 726 F. Supp. 1021, 1026 (D. Md. 1989) (distinguishing between probable cause for police officer versus store manager's probable cause to make statements). If Deputy Smalley had probable cause, then arguably Adams would be in no different position. For the present purposes, however, it will be assumed the probable cause determination is limited to Adams.

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pursuant to A.R.S. § 13-404(A). I disagree. Arizona's justification statute permits a defendant to demand a self-defense instruction on the criminal charge if the record contains evidence he acted in self-defense. *See State v. King*, 225 Ariz. 87, ¶ 14, 235 P.3d 240, 243 (2010). In that circumstance, the burden shifts to the state to prove beyond a reasonable doubt the defendant failed to act in the manner of a reasonable person. *Id.* It is a defense asserted at trial. I am aware of no authority permitting self-defense as justification to avoid investigation or arrest where there is probable cause to conclude the defendant committed aggravated assault. The evidence of Adams's extensive medical injuries, Estrada's lack of serious injuries, and Estrada's martial arts skills and experience support probable cause. I conclude the trial court did not err in finding probable cause for the criminal proceedings.

Conclusion

¶58 Estrada met his burden of proof on the first element, termination of the criminal proceedings in his favor. Deputy Smalley controlled the decision to arrest and charge Estrada, which she made on the basis of the physical evidence and Estrada's own statements, independent of what she learned from Adams. Adams did not initiate the criminal proceeding.

¶59 Even assuming Adams lied to Deputy Smalley about who had initiated the altercation, it was proper for the deputy to investigate the injuries Estrada inflicted on Adams. It was proper for Adams to show Deputy Smalley his injuries. It was proper for Deputy Smalley to compare Adams's injuries with the near absence of injuries sustained by Estrada. Adams acted with probable cause and Deputy Smalley had probable cause to arrest and charge Estrada.

¶60 For these independent reasons, I conclude the trial court did not err in granting the motion for judgment as a matter of law. I join the majority decision regarding the claim of intentional infliction of emotional distress.