

No. 49085-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**MARSHALL DISNEY,**

Appellant.

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Appeal from the Superior Court of Washington for Pacific County

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**Respondent's Brief**

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**I. RESPONSE TO DISNEY'S ASSIGNMENTS OF ERROR**

1. The trial court did not error when it found the defendant guilty as substantial evidence supported the conviction.
2. The trial court did not deny the defendant a fair trial. While the trial court stated it was taking "judicial notice" of a fact, that was merely a misstatement of what the trial court actually did. The trial court simply explained, for the record, what the chairs in the courtroom looked like and what he saw when he viewed them.
3. Costs are within the discretion of the Court, but should be imposed here as Disney has the future ability to work.

**II. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The trial court did not error, nor violate the defendant's right to due process in finding the defendant guilty.
2. The defendant was not denied a fair trial and the trial court did not take judicial notice of a fact. The trial court merely pointed out, for the record, what it had observed while considering the evidence in the case.
3. This Court has the discretion to refuse to impose appellate costs, but should impose them in this case based on the appellant's future ability to work.

**III. STATEMENT OF THE CASE**

While in the custody of the Pacific County Jail on an Attempted First Degree Burglary charge, on November 26, 2015 Marshall Disney filed a written Prison Rape Elimination Act (PREA) complaint alleging that during a November 13, 2015 court hearing his attorney, Nancy McAllister, intentionally placed her hand under

counsel table onto the inside of Disney's thigh and began rubbing his leg towards his groin. PR (5/11/16) 16.

On December 5, 2015 Pacific County Deputy Randy Wiegardt interviewed Disney at the Pacific County jail. Disney maintained the allegation made in the PREA complaint. RP (5/11/16) 16. Disney asserted that he believed she had intentionally sexually touched him as a ploy to butter him up to make him accept a plea deal. CP 31-35. That perhaps she had done it to "truck [Disney] off for whatever deal/reason... I means she is a public defender." *Id.*

Deputy Wiegardt secured the video footage from the November 13, 2015 court hearing and observed no touching between McAllister and Disney; Deputy Wiegardt was confident he would have observed any touching that would have occurred because of the distance between McAllister and Disney. PR (5/11/16) 19, 27. In fact, McAllister's hands were visible throughout the nearly all of the video. *Id.* Deputy Wiegardt did not find there was probable cause for Disney's allegation. RP (5/11/16) 23. Further Disney exhibited no reaction to the alleged touching lending credence to McAllister's denial of any touching. CP 31-35.

On January 14, 2016 Deputy Wiegardt then returned to Disney and explained that no crime has occurred with McAllister. RP

(5/11/16) 25. Disney maintained his allegations and added that McAllister had intentionally touched Disney on the inside of his thigh in a sexual manner for 3-4 seconds and within 3-4 inches from his groin. CP 31-35.

On January 22, 2016, Disney received a letter from the Lewis County Prosecutor and a letter from the Pacific County Prosecutor, both indicating that there was no evidence of a crime. RP (5/11/16) 58, 59. Following receipt of this notification, Disney made at least four additional allegations that McAllister committed a felony sex offense against him. RP (5/11/16) 25, 59. Disney contacted the Washington State Patrol, Crisis Support Network<sup>1</sup>, the Department of Corrections, the Pacific County Sheriff directly, and then again the Deputy who initially investigated the initial allegation again alleging McAllister had sexually assaulted him. RP (5/11/16) 56, 58-60. Disney's last attempt to see McAllister charged with a felony sex offense came on April 29, 2016 in a letter to Deputy Wiegardt, a mere 11 days before Disney's malicious prosecution trial. RP (5/11/16) 64.

Shortly after making the PREA allegation, and after being appointed a new attorney, Disney called Jackie Settlemeier<sup>2</sup> on a

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<sup>1</sup> Crisis Support Network is Pacific County's sexual assault and domestic violence advocacy center.

<sup>2</sup> Ms. Settlemeier was Disney's girlfriend at the time of the call.

recorded jail telephone line and said, "I'm just glad I have a real lawyer, not a truck like [McAllister]." RP (5/11/16) 63.

Pacific County Corrections Deputy Chanel Wirkkala testified that on November 13, 2015 she was performing courtroom security and was responsible for Disney and his movements while in court. RP (5/11/16) 28. From approximately 10 feet away, Deputy Wirkkala observed Disney sit down next to McAllister.<sup>3</sup> RP (5/11/16) 29. Deputy Wirkkala, Disney, and McAllister were all visible on the courtroom video which the trial court observed. *Id.* During the November hearing Deputy Wirkkala was approximately 8 feet away from Disney observing him. RP (5/11/16) 30. Deputy Wirkkala was able to see Disney's lap throughout the November hearing and did not observe a hand going into Disney's lap. RP (5/11/16) 33. Deputy Wirkkala is trained to observe anything being passed, especially secretively, to inmates. *Id.* Deputy Wirkkala did not observe McAllister touch Disney and indicated that she would have seen any touching had it occurred; she further saw no reaction from Disney to suggest anything unusual occurred. RP (5/11/16) 34, CP 24-28.

During the May 11, 2016 trial, the trial judge came off the

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<sup>3</sup> Appellant incorrectly asserts that Corrections Officer Wirkkala was behind Disney. The video evidence demonstrates she was to the left of Disney and her testimony was that she could see Disney's lap throughout the hearing.

bench and went to the location where Deputy Wirkkala was standing during the November 13, 2015 hearing to determine what she would have been able to see. *Id.* The trial judge determined the height of the Deputy Wirkkala and crouched down to ensure the same vantage point. RP (5/11/16) 30, 31. The trial court considered that his taking the position of the vantage point of the Corrections Deputy was like being shown a picture of the vantage point and area. RP (5/11/16) 69.

McAllister testified that she was appointed to Disney on November 9, 2015 and she met with him that day. PR (5/11/16) 36. She was with him for arraignment on November 13, 2015 and she did not touch Disney's thigh, nor did she touch the inside of his thigh towards his groin. RP (5/11/16) 36, 37. McAllister next met with Disney on November 19. RP (5/11/16) 36. She again attempted to meet with Disney after the 19th, but he refused to meet with her. *Id.* McAllister had represented Disney on at least two prior offenses without issue. RP (5/11/16) 56.

McAllister, who has been a criminal attorney for 22 years, agreed there was not probable cause, and that she was, in fact, innocent, of the crime Disney accused her of committing. RP (5/11/16) 37, 38.

Jonathan Meyer, the Lewis County Prosecutor, who was admitted without objection as a legal expert, testified there was not probable cause for the offense Disney alleged. RP (5/11/16) 41, 43.

Meyer further testified that he was contacted about this case to avoid any conflict issues on the part of the Pacific County Prosecutor's Office in this matter and after reviewing the evidence forward a letter indicating no offense occurred. RP (5/11/16) 42, 43.

The trial court found beyond a reasonable doubt that no probable cause existed. CP 24-28. Further, that Disney, who was angry at the entire legal system, led him down a path to accuse his attorney of an illegal touching just out of spite. *Id.* Disney's acts were intentionally done to annoy or vex his attorney without any justifiable basis in fact. *Id.* The trial court found Disney, with malice and without probable cause, attempted to cause another, specifically his attorney, Nancy McAllister, to be arrested or proceeded against for a crime which she was innocent. CP 31-35.

Disney timely appealed.

#### IV. ARGUMENT

##### A. THERE WAS SUBSTANTIAL EVIDENCE SUPPORTING THE CONVICTION.

The here was substantial evidence supporting the trial court's verdict.

###### 1. Standard of review.

On review evidence will be considered in the light most favorable to the prosecution and ask whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. McNeal*, 145 Wn.2d 352, 360, 37 P.3d 280 (2002).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Appellate courts "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874–75.

**2. The evidence was sufficient to determine Disney committed malicious prosecution.**

Appellant asserts the State failed to establish an essential element of the offense, specifically that the state failed to prove Disney's allegations against his public defender were "without probable cause."<sup>4</sup> Appellant asserts that the trial court adopted an incorrect standard of review in that the court must review the defendant's evidence "assuming it to be true" to determine whether there was probable cause, rather than weighing the evidence presented.<sup>5</sup> Such a standard would lead to an absurd result and render the malicious prosecution statute meaningless and incapable of prosecution.

Appellate courts apply unambiguous statutes according to their plain language. *State v. Ashby*, 141 Wn.App. 549, 170 P.3d 596 (2007), citing *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 948, 162 P.3d 413 (2007). "And no construction should be accepted that has 'unlikely, absurd, or strained consequences.'" *Id.* (quoting *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992)).

A person is guilty of malicious prosecution if they maliciously and without probable case therefor, cause or attempt to cause another to

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<sup>4</sup> Brief of Appellant at 16

<sup>5</sup> Brief of Appellant at 17-18

be arrested or proceeded against for any crime of which he or she is innocent. RCW 9.62.010.

Were Appellant's position to be adopted there would be no consideration as to whether his allegations were true, but only if the allegations provided sufficient evidence to warrant a finding of probable cause. Anyone could, therefore, assert any false allegation and if it withstood a probable cause determination, a defendant would never face the crime or tort of malicious prosecution.

Further, Appellant's assertion would render the last provision of the statute, whether accused person is actually innocent, meaningless. A canon of statutory construction is to interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous. *State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354 (2010). Consequently, had the legislature intended that there be no consideration as to whether the party is innocent, it would not have included such language.

Disney was informed that there was no evidence that the allegations he made were true. He was informed by the investigating Deputy, the Lewis County Prosecutor, the Pacific County Prosecutor, and his attorney. Despite this, Disney persisted and attempted to cause his court appointed attorney to be charged with a felony sex

offense for which she was innocent. Even without the consideration of her innocence, he was informed there was not probable cause of this offense, and persisted. The trial court agreed. The evidence taken in the light most favorable to the prosecution, along with all reasonable inference, demonstrates that this conviction should be affirmed.

Appellant's reliance on *Detention of Petersen v. State*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002) is misplaced. That court resolved the question of the standard of proof at a show-cause hearing on whether facts exist that would grant the predator a full hearing on conditions of release. "The standard of proof is 'probable cause.' . . . Probable cause exists if the proposition to be proven has been prima facie shown. As discussed above, the court determines whether the facts (or absence thereof) if believed warrant more proceedings." *Peterson*, 145 Wn. 2d at 797. It is the Court, not the party or witness, whose belief is essential. Using the *Detention of Petersen v. State* hypothetical of a warrantless arrest, it is essential that the Court – and not the policeman – believes that there is probable cause that a felony had been or was being committed in his presence. Moreover, even in *Peterson* the issue is still resolved by a weighing of evidence, not merely blindly accepting facts.

Disney does not challenge that he made the allegations maliciously; however, as the trial court noted, Disney perceived his court appointed attorney to be a “truck,” who was buttering him up as a ploy to make him accept a plea deal. CP 31-35. He felt he was being prosecuted for something he didn’t do (attempted first degree burglary, a crime he ultimately pleaded guilty to) and his conduct demonstrated to the trial court that Disney had animosity towards his defense attorney. CP 24-28. Disney’s actions were intentionally done to annoy or vex his attorney without any justifiable basis in fact. CP 24-28. The fact that Disney persisted in reporting these false allegations to at least four law enforcement agencies after being informed there was no criminal conduct on the part of his court appointed attorney demonstrated malicious. Consequently, the conviction should be affirmed.

**B. THE TRIAL COURT DID NOT ERROR WHEN IT EXPLAINED FOR THE RECORD WHAT IT WAS OBSERVING.**

While the trial court used the phrase, “judicial notice,” what the trial court actually did was outline for the record what the trial judge observed about the chairs in his courtroom. He did so in the same way as if a photograph had been admitted and the trial court merely explained what was observed from a particular vantage point.

Appellant did not object to the trial court standing in the position of the Corrections Deputy in order to observe what the Corrections Deputy would have been able to observe from her vantage point. As a result it should not be considered on review.

**1. Standard of review.**

A court's taking judicial notice of a matter raises a question of law reviewed *de novo*. *State v. Kunze*, 97 Wn.App. 832, 988 P.2d 977 (1999).

Appellate review of an issue raised for the first time on appeal only if the issue constitutes manifest error affecting a constitutional right. RAP 2.5(a)(3). To be manifest, Disney must show that the asserted error had practical and identifiable consequences at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

**2. The trial court outlining what it observed while conducting a bench trial did not deprive Disney of a fair trial.**

While the trial court characterized its observations as “judicial notice” of the chairs in its courtroom, the State asserts that the trial court was not taking judicial notice, but instead explaining the court’s observations from the vantage point of the Corrections Deputy. Appellant’s characterization that this was improper judicial notice is

misplaced as there was no dispute as to the chairs or their configuration, but instead what the Corrections Deputy observed, or perhaps more correctly, did not observe, about the contact between Disney and his attorney. There was simply no controversy about the chairs themselves as there is not an attorney in Pacific County who does not know of these antiquated, uncomfortable, and noisy chairs.<sup>6</sup>

However, even if there was controversy about the type of chair in question, the trial court considered the observation in the same way as a photograph. As the trial court noted:

So instead of taking a photo, I was asked to go stand over there and look. Now, what I saw is what I saw. But it's no different—there's just no exhibit for me to look at in terms of here's a picture of what it looks like from that vantage point. So that's how I consider it, as though it was a photo that—what I it would have looked like, a photo. I don't know to tell you what I saw, but I saw and I saw.

RP (5/11/16) 69. The trial court went to say, "... I don't know how else to look at it other than though it's as someone took a picture, they showed it to me here and I said, 'Oh, I see what it looks like from that vantage point.'" *Id.* The trial court "judicial notice" is nothing more than an explication of what the court observed. This is not testimony

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<sup>6</sup> Pursuant to ER 201, this is not subject to reasonable dispute because it is known in the judicial territory. Further, the fact of the style of chair is capable of accurate and ready determination.

in a trial prohibited by ER 605, but instead a finding of fact based on an observation made. While Appellant complains the trial court's "judicial notice" statement is tantamount to the trial court finding the Corrections Deputy's testimony credible, in this setting that is entirely left to the court as the trier of fact. As a result the court's finding should not be disturbed here.

Further, Disney raised no objection at trial regarding the court's observation.<sup>7</sup> Appellants only question related to whether the trial court could see trial counsel's left hand from its vantage point. RP (5/11/16) 33. The trial court indicated that he would not become a witness and asked for any objection; there was none. *Id.* As a result, any error would not constitute a manifest error affecting a constitutional right and should, therefore, not be considered on review. However, should this Court consider the court's finding was in error, such error was harmless because it is clear the trial court did not give weight to the issue of the chair, but instead Disney's conduct.

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<sup>7</sup> The Prosecution asked the trial judge to stand were Corrections Deputy Wirkkala was standing so that the Judge could observe what she could or could not see from a particular vantage point. The Defendant had no objection. RP (5/11/16) 29.

### **C. COSTS FOR APPELLATE REVIEW**

Disney requests this Court not impose costs. Costs will be awarded to the State if the State is the substantially prevailing part of review.

#### **1. Standard of review.**

When a party raises the issue in its brief, we will exercise our discretion to decide if costs are appropriate. *State v. Sinclair*, 192 Wn.App. 380, 367 P.3d 612 (2016). Appellate courts base their decision on factors the parties set forth in their briefs rather than remanding to the trial court. *Sinclair*, 192 Wn.App. at 389–90 (As with requests for attorney fees on appeal, “a short paragraph or even a sentence” would be sufficient).

#### **2. Disney will have the future ability to pay his legal financial obligations.**

As noted in Appellant’s brief, Disney is a 27-year-old man. While I have twice prosecuted Disney, once for first degree burglary and again for attempted first degree burglary, he is an abled-body young man without infirmity. As this Court can see from the record below, Pacific County does review a defendant’s telephone calls. Disney’s frequent conversations with his family indicate a future ability to work and, frankly, a desire to do so. While he has been

declared indigent below, and again here, nothing in the record supports his inability to find future employment.

#### **V. CONCLUSION**

The trial court properly found Disney guilty of malicious prosecution based on his accusations that his court appointed attorney sexually assaulted him in open court. Appellant's assertion that the court must review the probable cause determination as if the allegations are true would lead to an absurd result and should not be considered. Disney's accusations were fully investigated and considered by an independent prosecuting authority and were determined to be false. Disney was informed of this and persisted to accuse an innocent woman of sexual assault. His conduct was intentional and driven by his desire to annoy or vex his attorney without any justification. His conviction should be upheld.

RESPECTFULLY submitted this 8th day of October, 2016.

  
\_\_\_\_\_  
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Pacific County Prosecutor  
Attorney for Plaintiff

THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

STATE OF WASHINGTON, )  
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 Respondent, ) No. 49085-4-II  
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 ) CERTIFICATE OF SERVICE  
 MARSHALL DISNEY, )  
 )  
 Appellant. )  
 )

STATE OF WASHINGTON )  
 ) ss.  
 County of Pacific )

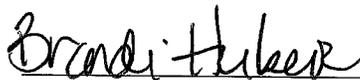
The undersigned being first duly sworn on oath deposes and states: That on the 10<sup>th</sup> day of October, 2016, affiant delivered by electronic mail a true and correct copy of Respondent's Brief to:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Dated this 10<sup>th</sup> day of October, 2016, in South Bend, Washington.



Brandi Huber  
Paralegal

**PACIFIC COUNTY PROSECUTOR**

**October 10, 2016 - 4:37 PM**

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