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STATE OF CONNECTICUT *v.* LAURENCE V. PARNOFF (SC 19588)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

Convicted of disorderly conduct in connection with his confrontation of two water company employees on his property, the defendant appealed. The two employees had entered the defendant's property pursuant to an easement in order to perform fire hydrant maintenance when they noticed that one of the hydrant's caps was missing. The employees found the cap in a shed on the property and determined that someone impermissibly had tampered with it. Shortly thereafter, the defendant approached the employees to confront them about their presence on his property. The defendant was wearing shorts, no shirt, appeared disheveled, and was carrying a can to collect worms for fishing. One of the employees explained to the defendant the reason for their presence and that the cap had been altered. The defendant told the employees that they had no right to be on his property and that, if they did not leave, he was going to go into his house and get a gun to shoot them. On appeal to the Appellate Court, the defendant claimed that there was insufficient evidence to sustain his conviction of disorderly conduct because his comments did not constitute fighting words, that is, speech that is not protected by the first amendment to the federal constitution because it would cause a reasonable addressee to respond with imminent violence under the circumstances. The Appellate Court concluded that the defendant's comments were not fighting words because the state had failed to present sufficient evidence to establish beyond a reasonable doubt that those statements were likely to provoke an immediate violent reaction from the employees. Accordingly, that court reversed the judgment of the trial court and remanded the case with direction to render a judgment of acquittal, and the state, on the granting of certification, appealed to this court. *Held* that the Appellate Court correctly concluded that the defendant's statements were not fighting words, as they were not likely to provoke an immediate and violent reaction from the water company employees, and, thus, there was insufficient evidence to sustain the defendant's conviction: the defendant's threatening words, unaccompanied by effectuating action, were not likely to provoke an immediate and violent reaction from the employees at whom those words were directed, as the objectively apparent circumstances did not indicate the defendant's immediate intent or ability to carry out his threat, given that he appeared unarmed and would need to retrieve his gun from a separate location, which decreased the likelihood that addressees in the employees' positions would consider any danger so imminent that they would feel compelled to react with violence to dispel it; moreover, the improbability of a violent response was further supported by the fact that the two employees, who were readily identifiable as water company employees on the basis of their uniforms, vehicles, and identification badges, were professionals performing within the scope of their duties on behalf of the water company, which included using easements over private land and encountering confrontational property owners, and they would reasonably be expected to exercise a higher degree of restraint than an ordinary citizen and would be unlikely to react violently when faced with an angry property owner; furthermore, a subjective analysis of the employees' failure to outwardly react or to leave the premises in response to the defendant's statements confirmed this court's independent conclusion that the average water company employee in the position of the employees would not likely be incited to react immediately and violently in response to those statements.

(*One justice concurring separately; one justice dissenting*)

Argued October 10, 2017—officially released July 3, 2018

Procedural History

Substitute information charging the defendant with the crimes of criminal mischief in the fourth degree and disorderly conduct, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Dennis*, *J.*; verdict and judgment of guilty of disorderly conduct, from which the defendant appealed to the Appellate Court, *Keller*, *Prescott* and *West*, *Js.*, which reversed the trial court's judgment and remanded the case to that court with direction to render a judgment of acquittal, and the state, on the granting of certification, appealed to this court. *Affirmed*.

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Michael A. DeJoseph, Jr.*, senior assistant state's attorney, for the appellant (state).

Norman A. Pattis, for the appellee (defendant).

Opinion

D'AURIA, J. The defendant, Laurence V. Parnoff, uttered threatening words to two water company employees who had entered his property pursuant to an easement to service a fire hydrant—telling them, essentially, that if they did not leave his property, he would retrieve a gun and shoot them. As a result of his statement, the defendant was convicted after a jury trial of disorderly conduct in violation of General Statutes § 53a-182 (a) (1), which criminalizes intentionally or recklessly causing inconvenience, annoyance, or alarm by way of "violent, tumultuous or threatening behavior . . . ." The defendant appealed to the Appellate Court from the judgment of conviction, arguing that, under principles stemming from the first amendment to the United States constitution, there was insufficient evidence to sustain a guilty verdict as to the disorderly conduct charge. *State* v. *Parnoff*, 160 Conn. App. 270, 274, 125 A.3d 573 (2015). Because the behavior giving rise to his conviction was pure speech and not physical violence, the first amendment forbids the imposition of criminal sanctions unless that speech amounts to so-called "fighting words"—words that would cause a reasonable addressee to respond with imminent violence under the circumstances. (Internal quotation marks omitted.) *State* v. *Baccala*, 326 Conn. 232, 234–35, 251, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017); see also U.S. Const., amend. I. The Appellate Court reversed the judgment after concluding that the defendant's statement was not fighting words because, although inappropriate, the defendant's words were not likely to provoke an immediate and violent reaction from the water company employees. *State* v. *Parnoff*, supra, 281. We agree with the Appellate Court and affirm its judgment.

The jury reasonably could have found the following facts. On the day of the incident, two employees of the Aquarion Water Company (water company) were sent to the defendant's property to perform fire hydrant maintenance. One of the two employees, Kyle Lavin, was an apprentice level employee working his fourth summer for the water company performing hydrant maintenance. Lavin needed assistance locating a fire hydrant on the defendant's property that he was scheduled to routinely service, and he called fellow water company employee David Lathlean to help him. Lathlean was an experienced employee, having worked for the water company for approximately ten years. Although the fire hydrant was located on the defendant's private property, the water company had a preexisting easement that spanned a radius of twenty feet beyond the fire hydrant and hydrant pipe.[1]

Lavin and Lathlean arrived at the defendant's property in separate company branded trucks, wearing bright yellow company branded safety shirts and identi-

fication badges. They entered the property together and located the hydrant down a long driveway through a wooded area, approximately 100 feet from the defendant's residence. Upon inspecting the fire hydrant, Lavin and Lathlean discovered that one of its caps was missing. They then began to look for the cap in the vicinity of the hydrant, including in an open-ended shed with a canopy roof located several yards away. Lathlean entered the open-ended shed and discovered the hydrant's missing cap, which appeared to have a garden hose fitting welded into it. This indicated to Lathlean that someone had tampered with the hydrant because the water company does not permit the removal or modification of hydrant caps. As a result, the two employees called another water company employee, Beverly Doyle, who handled theft of service investigations.

Shortly thereafter, the defendant's daughter, who had just arrived at the property to visit her parents, and the defendant's wife were approached by the water company employees. Lathlean first spoke to the defendant's daughter, conveying to her that he suspected someone had tampered with the hydrant. The daughter testified that Lathlean was "[n]ot very nice, loud," and "angry."

The defendant then appeared and approached Lavin and Lathlean to confront them about their presence on the property. The defendant was wearing shorts and no shirt, and he appeared disheveled. He was also carrying a can that he was using to collect worms from the ground in order to go fishing with his grandson, who was elsewhere on the property. Lavin looked on as Lathlean explained to the defendant that they were employed by the water company to perform hydrant maintenance and had discovered the altered hydrant cap. According to Lavin, the defendant was very upset, throwing his arms up and down, yelling, and he told them to leave his property multiple times.

Despite Lathlean's explanation, the defendant told Lavin and Lathlean that they had no right to be on his property. According to Lathlean, the defendant then told him that, "if [they] didn't get off his property, he was going to get a gun or something like that . . . [t]o shoot [them]." Although the defendant did not speak directly to Lavin, Lavin testified that he heard the defendant say, " 'if you go into my shed, I'm going to go into my house, get my gun and [fucking] kill you.' "[2]

Lathlean called the police, but the two employees remained on the property, even though they were trained by the water company to leave if a property owner became angry. Lathlean gave no outward reaction to the defendant's statement, testifying that "it just bounced right off [of] me" and that "I just stood there and was like, okay then, you know, let's see what happens." Lathlean also testified that he was not frightened

by the defendant's words. In fact, when Lathlean called the police, he referred to the defendant as merely " 'a little crabby' " and did not report anything about a gun. Although Lavin testified that the defendant's words "[a]bsolutely" caused him alarm and trepidation, like Lathlean, he remained on the property. Nothing in Lavin's testimony indicated that he believed that the defendant was armed, and, thus, it did not appear that he was immediately capable of carrying out the threat. The defendant made no effort to return to his house to retrieve a gun.

After making the gun comment, the defendant walked away from Lavin and Lathlean and toward a nearby, fenced off animal pen. Lathlean began following the defendant around his property as the defendant continued to search for worms to collect. The defendant continued to repeatedly ask Lavin and Lathlean to leave his property. Around this time, Doyle arrived to investigate possible water contamination as a result of the tampering, and the defendant told her to leave the property too.

After Lathlean called the police, the defendant also called the police himself to report the incident. When the police officers arrived, the defendant admitted he had told Lavin and Lathlean he would shoot them with a gun. The officers repeatedly asked the defendant to step back so that they could privately interview the water company employees. When the defendant repeatedly refused to leave the immediate area, he was arrested. He was later charged with disorderly conduct in violation of § 53a-182 (a) (1) and fourth degree criminal mischief in violation of General Statutes § 53a-117a (a) (1) for tampering with the fire hydrant. The jury found the defendant not guilty of criminal mischief but found him guilty of disorderly conduct.

The defendant appealed to the Appellate Court, which reversed the judgment of conviction, remanded the case to the trial court, and directed that court to render a judgment of acquittal on the disorderly conduct charge. After reviewing the entire record, the Appellate Court concluded that the state had failed to present sufficient evidence to establish beyond a reasonable doubt that the defendant's statements were likely to provoke an immediate violent reaction, and, thus, they were not fighting words. *State* v. *Parnoff*, supra, 160 Conn. App. 281.

We granted the state's petition for certification to appeal, limited to the following question: "Did the Appellate Court correctly determine, in its de novo review of the record, that there was insufficient evidence to support the defendant's conviction of disorderly conduct pursuant to . . . § 53a-182 (a) (1) because the state's proof of that offense's threat element did not satisfy the first amendment's 'fighting words' doctrine?" *State* v. *Parnoff*, 320 Conn. 901, 901–902, 127 A.3d 185 (2015). Reviewing the record our-

selves, we agree with the Appellate Court that there was insufficient evidence to sustain the defendant's conviction.

The defendant was convicted of violating § 53a-182 (a) (1), which provides in relevant part that a person is guilty of disorderly conduct when, "with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . [e]ngages in fighting or in violent, tumultuous or threatening behavior . . . ." The "behavior" giving rise to the conviction can consist of either physical actions or pure speech not accompanied by physical actions. *State* v. *Symkiewicz*, 237 Conn. 613, 618–20, 678 A.2d 473 (1996), citing *State* v. *Indrisano*, 228 Conn. 795, 811–12, 640 A.2d 986 (1994). When the behavior giving rise to the conviction is pure speech, as in the present case, the disorderly conduct statute intersects with the first amendment, which is applicable to the states through the fourteenth amendment to the federal constitution; *State* v. *Moulton*, 310 Conn. 337, 348, 78 A.3d 55 (2013); and prohibits laws "abridging the freedom of speech . . . ." U.S. Const., amend. I.

The first amendment bars the states from criminalizing pure speech, unless that speech falls into one of a few constitutionally *unprotected* categories. *State* v. *Moulton*, supra, 310 Conn. 348–49. Therefore, the disorderly conduct statute can proscribe "[o]nly certain types of narrowly defined speech [that] are not afforded the full protections of the first amendment, including fighting words . . . ." (Internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 234.

"Fighting words" are defined as speech that has "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." (Internal quotation marks omitted.) Id. To qualify as unprotected fighting words, the speech must be "likely to provoke an *imminent* violent response from the [addressee]." (Emphasis added.) Id., 251. The imminence of a response is based on "the likelihood of actual violence, [and] not [merely] an undifferentiated fear or apprehension of disturbance . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 248. Fighting words must immediately cause the addressee to resort to violence such that the speech is "akin to dropping a match into a pool of gasoline." (Internal quotation marks omitted.) Id., 252.

The first amendment also does not protect speech that qualifies as "[t]rue threats." *State* v. *Pelella*, 327 Conn. 1, 10, 170 A.3d 647 (2017). "True threats encompass those statements [in which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group . . . ." (Internal quotation marks omitted.) Id. The state, however, did not pursue a true threats theory of criminal liability.[3] Accordingly, like

the jury, we have no occasion to determine whether the defendant's utterance qualified as a "true threat," and, therefore, we analyze this case solely under the fighting words doctrine.

In assessing whether the defendant's conviction was proper because his statements were fighting words, we undertake a two part sufficiency of the evidence test, which includes an independent review of the record due to the fact that the defendant's first amendment rights are implicated. *State* v. *Baccala*, supra, 326 Conn. 250–51. First, "we construe the evidence in the light most favorable to sustaining the verdict. . . . Second, we determine whether the trier of fact could have concluded from those facts and reasonable inferences drawn therefrom that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Citation omitted.) Id., 250.

In certain cases involving the regulation of free speech, such as this one, we "apply a de novo standard of review [as] the inquiry into the protected status of . . . speech is one of law, not fact. . . . As such, an appellate court is compelled to examine for [itself] the . . . statements [at] issue and the circumstances under which they [were] made to [determine] whether . . . they . . . are of a character [that] the principles of the [f]irst [a]mendment . . . protect [them]." (Internal quotation marks omitted.) *State* v. *Krijger*, 313 Conn. 434, 446, 97 A.3d 946 (2014). Therefore, "an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion [in] the field of free expression." (Internal quotation marks omitted.) Id.

This independent scrutiny, however, "does not authorize us to make credibility determinations regarding disputed issues of fact. Although we review de novo the trier of fact's ultimate determination that the statements at issue constituted [fighting words], we accept all subsidiary credibility determinations and findings that are not clearly erroneous." Id., 447. In determining what credibility determinations the jury likely made, we take the version of the facts that most supports the verdict. See id., 447–48. In this case, the jury found the defendant guilty of disorderly conduct, so we may presume that the jury credited either Lavin's or Lathlean's testimony, which was consistent with the defendant's statement to police admitting that he had uttered words of a threatening nature. See *State* v. *Parnoff*, supra, 169 Conn. App. 273–74.

We recently undertook such an analysis and expounded on the scope of the fighting words doctrine in *State* v. *Baccala*, supra, 326 Conn. 238,[4] explaining that "there are no per se fighting words." Instead, we must consider "the quality of the words themselves," as well as "the manner and circumstances in which the

words were spoken . . . .” (Internal quotation marks omitted.) Id., 239–40. In *Baccala*, a grocery store customer berated a store manager using extremely vulgar terms, including “fat ugly bitch,” “cunt,” and “fuck you . . . .” (Internal quotation marks omitted.) Id., 235, 236. We stated that, “[e]ven when words are threatening on their face, careful attention must be paid to the context . . . to determine if the words may be objectively perceived as threatening.” (Internal quotation marks omitted.) Id., 246. Our decision in *Baccala* further emphasized that we must undertake a fighting words analysis with a “case-by-case,” “contextual” examination; id., 245–46; that requires “consideration of the actual circumstances as perceived by a reasonable speaker and addressee to determine whether there was a likelihood of violent retaliation.” Id., 240.

This analysis “necessarily includes a consideration of a host of factors.” Id. One factor is “those personal attributes of the speaker and the addressee that are reasonably apparent because they are necessarily a part of the objective situation in which the speech was made. . . . Courts have, for example, considered the age, gender, race, and status of the speaker.” (Citations omitted.) Id., 241–42. In other words, the reasonable person standard includes an analysis of the “objectively apparent characteristics” of a speaker and addressee that would bear on the likelihood of an imminently violent response to the speaker’s words. Id., 243. The context also includes consideration of the “attendant circumstances,” such as “the manner in which the words were uttered, [and] by whom and to whom the words were uttered . . . .” Id., 250. Particularly, this objective standard “properly distinguishes between the average citizen”; id., 243; and someone in a position who “would reasonably be expected to . . . exercise a higher degree of restratint . . . .” Id., 245; see id., 250 (concluding that objective “inquiry must focus on the perspective of an average store manager”).

Applying these principles to the present case, we are not persuaded that the defendant’s threatening words, unaccompanied by any effectuating action, were likely to provoke an imminent and violent reaction from the water company employees at whom those words were directed.

We examine first the nature and “quality of the words” that the defendant used and how that bears on the likelihood of imminent violence. (Internal quotation marks omitted.) Id., 239. The defendant’s statement, even though conditional, could no doubt be understood as threatening. See *State* v. *Pelella*, supra, 327 Conn. 16 n.15 (conditional nature of threat does not preclude it from being considered threat for first amendment purposes). In the context of true threats, conditioning an intentional threat to do harm on some uncertain act or omission does not necessarily cleanse it of its

threatening nature. Instead, "[t]o the extent that a threat's conditionality is relevant, we look to whether the threat nonetheless constitutes a serious expression of intent to harm." Id. We believe this proposition is also instructive in the fighting words context, as we examine how a reasonable addressee would have interpreted and reacted to the defendant's utterance. See *State* v. *Baccala*, supra, 326 Conn. 245.

In this case, it is reasonable to presume that an addressee in the position of the water company employees would understand the defendant's statement to be threatening, even though it was conditioned on further action or inaction by the water company employees. The defendant indicated he was going to retrieve a gun and either "shoot" or "[fucking] kill" the employees if they remained on his property or went into his shed. A reasonable person hearing either version would likely recognize its threatening nature. Therefore, we do not doubt that, under certain circumstances, such a statement could provoke a reasonable person to retaliate with physical violence to prevent the threat from being carried out.

Nevertheless, even though threatening, we do not believe that the defendant's statement, considered in context, was likely to provoke an immediate and violent reaction because the objectively apparent circumstances did not indicate any immediate intent or ability on the part of the defendant to carry out that threat. The evidence established that the defendant was walking around, wearing only shorts, carrying what appeared to be a can of worms, and otherwise appeared to be unarmed. These facts indicate that the defendant would need to retrieve a gun to carry out his threat, suggesting his gun was at a different location and decreasing the likelihood that an addressee would consider any danger so imminent that he would feel compelled to react with violence to dispel it. The defendant was not heading in the direction of his residence, which was located approximately 100 feet away, where, by one account of the defendant's statement, he had said his gun was located. Instead, the defendant began walking toward his animal pen while searching for worms. Given that the defendant was in the presence of his family and did not appear to have the immediate ability to carry out his threat, his utterance was unlikely to constitute a serious expression of intent to harm. Therefore, we doubt that the defendant's statements, considered in context, would be viewed as so threatening that they would incite the average person in the water company employees' positions to imminent violence.

The improbability of a violent response is further supported by examining the "personal attributes of the . . . addressee[s] that are reasonably apparent . . . ." *State* v. *Baccala*, supra, 326 Conn. 241. In this case, Lavin and Lathlean were professionals performing duties on

behalf of the water company and acting within the scope of their employment. Their status as employees was readily identifiable, as they wore "bright yellow safety shirt[s]" with "Aquarion Water Company" printed on them and openly visible identification badges. As professionals, the nature of their daily work required them to service hydrants using easements over private land without prior notice. This could precipitate encounters with confrontational property owners as part of their work. But because they were acting as professionals representing the water company, they "would reasonably be expected to . . . exercise a higher degree of restraint than the ordinary citizen" and, thus, would be unlikely to react violently when faced with angry property owners. *State* v. *Baccala*, supra, 245; see id., 250, 252–53 (concluding that objective "inquiry must focus on the perspective of an average store manager").

Lathlean's and Lavin's heightened level of professional restraint undercuts the state's contention that the average employee in either of their positions would strike the defendant first to either forestall violence or, under the state's more strained argument, to respond to the "humiliating" and "insulting" nature of the threat. In *Baccala*, we noted that the store manager's role required her to handle customer service matters and thus she was "routinely confronted by disappointed, frustrated customers who express themselves in angry terms . . . ." *State* v. *Baccala*, supra, 326 Conn. 253. We then concluded that the average manager would be "expected to defuse hostile situations . . . [and] model appropriate . . . behavior, aimed at de-escalating the situation . . . ." Id. Although the addressees in the present case were not in direct customer service roles, they too would be accustomed to interacting with confrontational property owners—the water company's customers—and, similarly, be expected to model appropriate, de-escalating behavior.

The concurrence contends that our analysis "focuses too heavily" on the "job duties of the addressees . . . effectively extending one of the holdings of *Baccala*," which the concurrence finds "distinguishable from the present case . . . ." See part II of the concurring opinion. We agree with the concurrence that this case is different from *Baccala* in that the addressees in the present case "had little control over the premises," but we find that difference does not militate against *any* consideration of the addressees' job performance as part of the required contextual analysis. After all, the fighting words doctrine dictates that we consider the context of the speech and the "attendant circumstances" when deciding whether the utterance would cause immediate violence from the average addressees. *State* v. *Baccala*, supra, 326 Conn. 250.[5] Notably, this objective standard "properly distinguishes between the average citizen" and someone in an employment position; id., 243; who "would reasonably be expected to

. . . exercise a higher degree of restraint . . . .'' Id., 245. Thus, our analysis does not attempt to ''equat[e]'' the two employment circumstances as the concurrence claims, but, rather, it simply considers—properly—as one of the ''objectively apparent characteristics'' of the addressees; *State* v. *Baccala*, supra, 243; that they were water company employees, tasked with entering strangers' properties, who would ''be expected to . . . exercise a higher degree of restraint,'' though perhaps to a lesser extent than the average grocery store manager. Id., 244.

The state argues that the average addressee would have reacted with immediate violence because of the secluded, wooded nature of the defendant's property. The state contends this would cause the average addressee to feel ''vulnerable'' and ''exposed,'' and, thus, more likely to strike the defendant to forestall violence. It is true that, in *Baccala*, we considered it significant that the store manager had ''a degree of control over the premises where the confrontation took place.'' *State* v. *Baccala*, supra, 326 Conn. 253. Seclusion alone, however, does not in our view elevate the circumstances in the present case so as to satisfy the imminent violence threshold. An average water company employee working in the field in Connecticut would routinely be present on private property in many settings, including in wooded areas, while interacting with irritable property owners. The mere secluded nature of the defendant's property does not convince us that the employees were likely to react with imminent violence, particularly given that there were two of them present and a third on her way.

The state also contends that the average addressee would have been provoked to violence in order to '' 'beat [the defendant] to the punch,' '' or, in other words, preemptively forestall the defendant from carrying out his threat. We recognize that, although the imminent violence standard is objective, of course certain individuals might, under these circumstances, physically react to forestall gun violence. Although this type of preemptive self-defense is feasible, so are a variety of other responses, such as retreat or de-escalating the confrontation. Ultimately, we conclude that the defendant's utterance falls short of provoking the *average* person in these workers' positions to react with immediate violence.[6]

A subjective analysis of the addressees' actual reactions confirms our conclusion that it was unlikely that imminent violence would follow from the defendant's words. Though the fighting words standard is an objective inquiry, our decision in *Baccala* underscored that examining the subjective reaction of an addressee, although ''not dispositive,'' may be ''probative of the likelihood of a violent reaction.'' *State* v. *Baccala*, supra, 326 Conn. 254. Here, Lathlean gave no reaction whatso-

ever—let alone a violent one. He testified that, not only was he not frightened by the defendant's words, but, rather, they "bounced right off" him, stating that, "I just stood there and was like, okay then, you know, let's see what happens." Lathlean then proceeded to follow the defendant around the property, even though he was trained to retreat in the event that he encountered an angry property owner. In fact, when Lathlean called the police, he characterized the defendant as merely " 'a little crabby' " and made no mention at all of the defendant's gun threat. Although Lavin acknowledged that the defendant's words caused him "alarm" and "trepidation," he too did not outwardly react or leave the premises. Given that the addressees' subjective reactions amounted to no reaction at all, their dispassion supports our independent conclusion that average water company employees in Lathlean's and Lavin's circumstances who were confronted by the defendant's threatening words, unaccompanied by any effectuating action, and who are trained to retreat from hostile situations, would not likely be incited to react imminently and violently. Therefore, the defendant's comments do not qualify as unprotected fighting words, and there is insufficient evidence to sustain his conviction.

The state also asserts that the Appellate Court erroneously failed to consider the defendant's visible volatility and, thus, failed to recognize the similarities between this case and, among others, *State* v. *Symkiewicz*, supra, 237 Conn. 613. We recognize that the testimony in this case reflects that the defendant was in fact "irate," "throwing his arms up and down, yelling," and "very upset." Visible manifestations of anger, however, coupled with the defendant's threatening comments, do not, under these particular circumstances, meet the high threshold of imminence required for the fighting words exception. In *Symkiewicz*, the defendant did make threatening comments that contributed to our conclusion that they were fighting words, but that case is not analogous to the present one because, in *Symkiewicz*, there was additional inflammatory speech and circumstances. *State* v. *Symkiewicz*, supra, 615–16.

In addition to making a threat, the defendant in *Symkiewicz* also loudly cursed, shouted epithets, and sparked significant commotion in a gathering crowd. Id., 615–16, 623. Specifically, the defendant loudly barked "[f]uck you" several times and said, "[y]ou fucking bitch. I hope you burn in hell for all eternity." (Internal quotation marks omitted.) Id., 615–16. The defendant also made a threat, and caused a crowd to form and a commotion among the crowd. Id. Unlike in the present case, it was the "cumulative force" of "[t]he combination" of words and, particularly, the consequent crowd commotion that elevated those comments to fighting words. Id., 623. Notably, these collective elements "could have aroused a violent reaction by not only [the addressee], but also the *crowd*"; (emphasis

added) id.; and, thus, the present case is not controlled by *Symkiewicz* despite sharing the common element of threatening words.

We emphasize, as we did in *Baccala*, that we do not suggest that threatening words directed at a water company employee, or anyone else, may never constitute fighting words.[7] *State* v. *Baccala*, supra, 326 Conn. 256. We also do not suggest that these particular threatening words would not otherwise be criminal as a true threat.[8] But given that this utterance was not fighting words and the state did not pursue a true threats theory of liability in the present case, we cannot conclude that the words uttered by the defendant in this context were criminal.

The dissent concludes that the defendant's utterance constitutes fighting words because he "introduced the prospect of firearms into [the] exchange," and, thus, "he escalated the confrontation beyond [servicing the hydrant] to first amendment protection." We agree that the defendant's words are of a different character than those in *Baccala*, and we understand and appreciate the dissent's efforts to signal the potentially criminal nature of gun threats. As we have discussed, a true threat has no value in the marketplace of ideas, and we do not mean to convey that the defendant's words, therefore, necessarily enjoy absolute first amendment protection.

To use the dissent's phrase, however, we are unwilling to force a "square peg [into a] round hole" by using an ill-fitting legal doctrine. See footnote 4 of the dissenting opinion. The state pursued this case as a fighting words case—not a true threats case—and the jury was not charged under the true threats doctrine.[9] See text accompanying footnote 3 of this opinion. Whatever vitality remains to the fighting words doctrine; see, e.g., S. Gard, "Fighting Words as Free Speech," 58 Wash. U. L.Q. 531, 580–81 (1980); we conclude that the threat in this particular case—by a shirtless man collecting worms with his wife and daughter nearby— simply did not rise to *Baccala*'s necessarily high standard of being "*likely*" to provoke "*immediate*" violence. (Emphasis added; internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 239.

Consistent with the first amendment, therefore, we cannot conclude those statements constituted fighting words. Accordingly, we affirm the judgment of the Appellate Court and its remand order, directing the trial court to render a judgment of acquittal as to the charge of disorderly conduct.

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, McDONALD and MULLINS, Js., concurred.

* This case was originally argued before a panel of this court consisting of former Chief Justice Rogers and Justices Palmer, McDonald, Robinson and D'Auria. Thereafter, Chief Justice Rogers retired from this court and

did not participate in the consideration of this decision. Justices Mullins and Kahn were added to the panel and have read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision. The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] Lavin admitted that, at one point, he exceeded the bounds of the easement, although, at the time, the defendant never precisely raised this issue to him.

[2] Lathlean's exact testimony was that the defendant said he was going to " 'f'n kill you,' " but Lathlean clarified that he was censoring himself because of his presence in the courtroom.

[3] Also, the defendant was originally charged with second degree threatening in violation of General Statutes (Rev. to 2011) § 53a-62, disorderly conduct, interfering with an officer in violation of General Statutes § 53a-167a, and first degree criminal mischief in violation of General Statutes § 53a-115. The state later filed a long form information eliminating the threatening and interfering with an officer charges and, instead, alleging fourth degree criminal mischief, disorderly conduct, and sixth degree larceny by theft of utility service in violation of General Statutes §§ 53a-119 (15) (B) and 53a-125b (a). The larceny charge alleged that the defendant had sought to obtain water service from the water company by tampering with equipment without the consent of the supplier in order to avoid payment, but the trial court dismissed that charge on statute of limitations grounds. Thus, the state filed a substitute long form information and proceeded to trial on only the charges of disorderly conduct and fourth degree criminal mischief.

[4] This court in *Baccala* addressed the fighting words doctrine within the context of a conviction of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (5), which prohibits using "abusive or obscene language . . . or . . . an obscene gesture" in a public place in order to cause inconvenience, annoyance or alarm. Although *Baccala* can be distinguished in this respect, our discussion of Connecticut's contemporary fighting words standard in that case nonetheless controls.

[5] Totality of the circumstances tests can in fact be difficult to administer. In our view, however, the concurrence's observation that consideration of an addressee's employment position can lead to "troubling line drawing issues" might be an argument in favor of abolishing the fighting words doctrine, as some have advocated. See, e.g., W. Reilly, "Fighting the Fighting Words Standard: A Call for Its Destruction," 52 Rutgers L. Rev. 947, 947–49 (2000); Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1140–46 (1993). We do not, however, believe this difficulty entitles us to ignore one among the totality of the attendant circumstances.

[6] We note that the concurrence argues "that preemptive self-defense is inconsistent with the fighting words exception in general" and, therefore, would eliminate it entirely from a fighting words analysis. We decline to take a position on whether preemptive self-defense can or should ever be considered as part of the analysis in a fighting words case, as that question is not necessary to resolving this case.

[7] We recognize, as we have in the past, that our constitutional inquiry does not seek to determine whether the words in question were offensive, reprehensible, or calculated to cause mental harm. *State* v. *Baccala*, supra, 326 Conn. 251–52. Rather, our inquiry focuses squarely on whether the words would tend to provoke a reasonable person in the addressee's position to immediately retaliate with violence under the circumstances. Here, that high threshold is not met.

[8] The concurrence goes so far as to decide that the utterance was in fact a true threat. We take no position on that issue, as that was not the theory the state pursued at trial or on appeal. See text accompanying footnote 3 of this opinion.

[9] We do not read the dissent to rely on or defer to the jury's determination of whether any violent response by Lathlean and Lavin was likely or immediate. It is worth pointing out, however, that any inclination to defer to the jury in this case is potentially complicated by the trial court's instruction. "[I]t is . . . constitutionally axiomatic that the jury be [properly] instructed on the essential elements of a crime charged." (Internal quotation marks omitted.) *State* v. *Johnson*, 316 Conn. 45, 58, 111 A.3d 436 (2015); see also *State* v. *Baccala*, supra, 326 Conn. 309 (*Eveleigh*, *J.*, concurring in part and dissenting in part) (emphasizing that "[t]he federal constitution . . . demands that a finding with respect to . . . whether the speech would provoke an ordinary person . . . to respond with immediate violence . . .

be made, in the first instance, by a *properly instructed* jury" [emphasis added]). In *Baccala*, the concurring and dissenting opinion deemed "manifestly unjust" the trial court's charge to the jury on fighting words because, among other reasons, it "fail[ed] to convey that the jury must find that such violence be imminent." (Emphasis omitted.) *State* v. *Baccala*, supra, 307–308 (*Eveleigh*, *J.*, concurring in part and dissenting in part). The justices who joined in the concurring and dissenting opinion in *Baccala*, therefore, would have reversed the defendant's conviction under the plain error doctrine, even though his claim regarding the jury instruction was unpreserved. Id., 302–305 (*Eveleigh*, *J.*, concurring in part and dissenting in part); see *State* v. *McClain*, 324 Conn. 802, 815, 155 A.3d 209 (2017) (plain error review of jury instruction claim not precluded by waiver pursuant to *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 [2011]). The jury charge in this case arguably suffers from the same flaw. Nor did the state's closing argument communicate to the jury an accurate understanding of either the imminent violence element or, for that matter, against whom the violence might be directed. Like the majority in *Baccala*, we do not consider any instructional issue but, instead, have undertaken our own scrupulous examination of the record, leading us to conclude that the state's evidence did not make out a fighting words case. See *State* v. *Baccala*, supra, 235 n.2.