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ROBINSON, J., dissenting. The defendant, Laurence V. Parnoff, said the following to Kyle Lavin, a water company employee servicing a fire hydrant located on the defendant's property: "If you go into my shed I'm going to go into my house, get my gun and [fucking] kill you."[1] Lavin's colleague, David Lathlean, testified similarly, stating that he recalled the defendant telling him and Lavin that "if [they] didn't get off his property he was going to get a gun or something like that . . . [t]o shoot [them]." I respectfully disagree with the majority's opinion, which allows the defendant to use the first amendment to the United States constitution to shield himself from what should be the obvious consequences of this unwarranted threat to two water company employees just doing their jobs. Even under the enhanced contextual focus of our recent decision in *State* v. *Baccala*, 326 Conn. 232, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017), the defendant's statement that he intended to shoot the water company employees is categorically different from even the most profane or offensive language contemplated in cases like *Baccala* and, therefore, constituted "fighting words" unprotected by the first amendment. Because these fighting words rendered sufficient the evidence supporting the defendant's conviction of disorderly conduct in violation of General Statutes § 53a-182 (a) (1),[2] which is based on a defendant's "fighting or . . . violent, tumultuous or threatening behavior," I would reverse the judgment of the Appellate Court, which reversed the trial court's judgment of conviction. See *State* v. *Parnoff*, 160 Conn. App. 270, 281, 125 A.3d 573 (2015). Accordingly, I respectfully dissent.

I begin by noting my agreement with the facts and procedural history set forth by the majority. I also agree with the standard of review stated by the majority pursuant to *State* v. *Baccala*, supra, 326 Conn. 250–51, and *State* v. *Krijger*, 313 Conn. 434, 446–47, 97 A.3d 946 (2014), requiring independent appellate review of whether the defendant's statements, as established by the facts found by the jury, were subject to first amendment protection. I repeat these points herein only as necessary to explain my resolution of the defendant's claims.

"Fundamentally, we are called upon to determine whether the defendant's speech is protected under the first amendment to the United States constitution or, rather, constitutes criminal conduct that a civilized and orderly society may punish through incarceration. The distinction has profound consequences in our constitutional republic. If there is a bedrock principle underlying the [f]irst [a]mendment, it is that the government

may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (Internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 234.

"Only certain types of narrowly defined speech are not afforded the full protections of the first amendment, including 'fighting words,' i.e., those words that 'have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.' . . . *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)." *State* v. *Baccala*, supra, 326 Conn. 234. In determining whether the words spoken by the defendant were fighting words, this court considers whether they were "likely to provoke a violent response under the circumstances in which they were uttered . . . ."[3] Id.

In this context based analysis, this court considers "the actual circumstances as perceived by a reasonable speaker and addressee to determine whether there was a likelihood of violent retaliation." Id., 240. Specifically, this court considers "a host of factors" to determine whether the words spoken "were likely to incite a violent reaction." Id. First, "the manner and circumstances in which the words were spoken bears on whether they were likely to incite a violent reaction," as "[e]ven the court in [*Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 573] acknowledged that words which are otherwise profane, obscene, or threatening might not be deemed fighting words if said with a disarming smile." (Internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 240. Second, the "situation under which the words are uttered also impacts the likelihood of a violent response," including "whether the words were preceded by a hostile exchange or accompanied by aggressive behavior . . . ." Id., 241.

In *Baccala*, we also determined that a "proper examination of context also considers 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. . . . Indeed, common sense would seem to suggest that social conventions, as well as special legal protections, could temper the likelihood of a violent response when the words are uttered by someone less capable of protecting themselves, such as a child, a frail elderly person, or a seriously disabled person." (Citations omitted.) Id., 241–42.

"[W]hen there are objectively apparent characteristics that would bear on the likelihood of such a response, many courts have considered the average person with those characteristics. Thus, courts also have taken into account the addressee's age, gender, and race." Id., 243. "[S]everal courts have considered as

part of the contextual inquiry whether the addressee's position would reasonably be expected to cause him or her to exercise a higher degree of restraint than the ordinary citizen under the circumstances." Id., 245; see also id., 243–44 (discussing higher standard of restraint for police officers). *Baccala* emphasized that cases requiring inquiry into the position of the addressee "affirm[s] the fundamental principle that there are no per se fighting words; rather, courts must determine on a case-by-case basis all of the circumstances relevant to whether a reasonable person in the position of the actual addressee would have been likely to respond with violence. This principle is consistent with the contextual approach taken when considering other categories of speech deemed to fall outside the scope of first amendment protection, such as true threats and incitement." Id., 245–46.

"Accordingly, a proper contextual analysis requires consideration of the actual circumstances, as perceived by both a reasonable speaker and addressee, to determine whether there was a likelihood of violent retaliation. This necessarily includes the manner in which the words were uttered, by whom and to whom the words were uttered, and any other attendant circumstances that were objectively apparent and bear on the question of whether a violent response was likely." Id., 250.

In *Baccala*, we applied this framework to conclude that there was insufficient evidence to sustain the conviction of a forty year-old physically impaired woman for breach of the peace in the second degree, determining that she had not uttered fighting words when she called a supermarket manager a "fat ugly bitch" and a "cunt," and said, "fuck you, you're not a manager . . . ." (Internal quotation marks omitted.) Id., 251. In concluding that these "reprehensible" and "extremely offensive" words were not "akin to dropping a match into a pool of gasoline"; (internal quotation marks omitted) id., 251–52; we emphasized that the altercation had started with a telephone call a few minutes earlier, rendering the store manager "reasonably . . . aware of the possibility that a similar barrage of insults, however unwarranted, would be directed at her," particularly given her "position of authority at the supermarket, [which] placed her in a role in which she had to approach the defendant." Id. We also noted that the store manager "was charged with handling customer service matters" and that "[s]tore managers are routinely confronted by disappointed, frustrated customers who express themselves in angry terms, although not always as crude as those used by the defendant. People in authoritative positions of management and control are expected to diffuse hostile situations, if not for the sake of the store's relationship with that particular customer, then for the sake of other customers milling about the store. Indeed, as the manager in charge of a large supermarket, [she] would be expected to model

appropriate, responsive behavior, aimed at de-escalating the situation, for her subordinates . . . .'' Id., 252–53. Finally, we observed that the ''store manager . . . would have had a degree of control over the premises where the confrontation took place. An average store manager would know as she approached the defendant that, if the defendant became abusive, the manager could demand that the defendant leave the premises, threaten to have her arrested for trespassing if she failed to comply, and make good on that threat if the defendant still refused to leave. With such lawful self-help tools at her disposal and the expectations attendant to her position, it does not appear reasonably likely that [the manager] was at risk of losing control over the confrontation.'' Id., 253; see also id. (''a different conclusion might be warranted if the defendant directed the same words at [the manager] after [she] ended her work day and left the supermarket, depending on the circumstances presented''). Ultimately, we concluded that ''the natural reaction of an average person in [the store manager's] position who is confronted with a customer's profane outburst, *unaccompanied by any threats*, would not be to strike her. We do not intend to suggest that words directed at a store manager will never constitute fighting words. Rather, we simply hold that under these circumstances the defendant's vulgar insults would not be likely to provoke violent retaliation. Because the defendant's speech does not fall within the narrow category of unprotected fighting words, her conviction of breach of the peace in the second degree on the basis of pure speech constitute[d] a violation of the first amendment to the United States constitution.'' (Emphasis added.) Id., 256.

In my view, the majority's application of *Baccala* gives short shrift to the words actually used in concluding that they were not fighting words, notwithstanding its acknowledgment that a ''reasonable person hearing [the defendant's statement] would likely recognize its threatening nature.''[4] See *State* v. *Krijger*, supra, 313 Conn. 452 (''[t]he starting point for our analysis is an examination of the statements at issue''). The jury reasonably could have found that the defendant had threatened both water company employees with a gun if they did not leave his property. One of those employees, Lathlean, testified that the defendant had said that ''if [they] didn't get off his property he was going to get a gun or something like that . . . [t]o shoot [them].'' The other employee, Lavin, testified that the defendant said that ''[i]f you go into my shed I'm going to go into my house, get my gun and [fucking] kill you.'' See footnote 1 of this dissenting opinion. The majority further acknowledges that ''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,''

positing 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."[5] See *State* v. *Pelella*, 327 Conn. 1, 16–17, 170 A.3d 647 (2017); see also *People* v. *Prisinzano*, 170 Misc. 2d 525, 532, 648 N.Y.S.2d 267 (N.Y. Crim. 1996) ("the fact that the defendant's threats were conditioned on the police first leaving the area does not rule out the likelihood of imminent violent response" with respect to fighting words). It is, however, at this point that the majority loses sight of the forest through *Baccala*'s trees.

First, the majority concludes that the defendant's statements were unlikely 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 the threat. The majority relies on the fact that the defendant appeared to be unarmed, insofar as he was clad only in shorts and carried only what appeared to be a can of worms, and was not heading in the direction of his residence—where he stated that his gun was located—at the time he made the statement. I disagree with this aspect of the majority's analysis. In my view, as soon as the defendant introduced the prospect of firearms into his exchange with the water company employees, he escalated the conflict over the apparent theft of hydrant water far beyond any possible epithets that he could have directed at Lavin and Lathlean. In contrast, the majority also suggests that Lavin and Lathlean were obligated to take the extremely angry defendant at his word—that any gun was stored in the house, well beyond his immediate reach. Indeed, Lavin understood the defendant to be concerned about his shed, which was located far closer to the location of the confrontation, insofar as Lathlean had entered the shed looking for the fire hydrant's cap. Moreover, in contrast to the store manager in *Baccala*, who exercised control over the situation in her store—a fact deemed significant by the majority in that case; see *State* v. *Baccala*, supra, 326 Conn. 253; the water company employees lacked similar control insofar as the confrontation occurred on the defendant's secluded, wooded property.

I also disagree with the majority's reliance on the apparent lack of extreme reaction by Lathlean and Lavin to the threat, insofar as both—in the words of the majority—exercised a "heightened level of professional restraint" and neither reacted violently, nor even left the defendant's property in accordance with water company policy. The lack of reaction by the addressee is "probative," but not "dispositive" of whether the words were fighting in nature. See, e.g., *State* v. *Baccala*, supra, 326 Conn. 254. Although I agree with the majority that the employees' jobs servicing fire hydrants on land owned by others without prior notice to landowners "could precipitate encounters with confrontational

property owners as part of their work," and that they would " 'reasonably be expected to . . . exercise a higher degree of restraint,' " my agreement on that point ends with the water company employees being on the receiving end of vituperative language and epithets such as those in *Baccala*. Once the defendant explicitly introduced the specter of a shooting into the already tense situation—and there was no indication that he was joking or facetious—he escalated the confrontation beyond that subject to first amendment protection. Indeed, both Lathlean and Lavin testified that they notified the police because, in Lavin's words, the "situation was starting to get out of control," given the defendant's anger and his threat to get a gun.[6]

To this end, I find instructive the decision by the Georgia Court of Appeals in *Evans* v. *State*, 241 Ga. App. 32, 32–33, 525 S.E.2d 780 (1999), which rejected a sufficiency challenge to a disorderly conduct conviction on the basis of fighting words rooted in similar threats to shoot an amusement park security officer, who, like a water company employee or store manager, is expected to interact professionally with members of the public who may be behaving very badly. In *Evans*, while at Six Flags, a major amusement park, the defendant, Evans, responded to the officer's "questions about . . . [stolen] cotton candy by repeatedly saying, '[Fuck] that, that does not have [shit] to do with us,' " and most significantly, that " 'he was going to go to his vehicle, get his "pop," while pointing his hand at [the officer] like a pistol [and saying] "pop, pop, pop" . . . . That's when [Evans] started walking [toward] his vehicle.' [The officer] felt threatened, and he called for backup." Id., 33. Citing *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 568, the Georgia court held that " 'fighting words' can include specific threats to cause violence where they tend to provoke violent resentment." *Evans* v. *State*, supra, 33. As in our decision in *Baccala*, the court emphasized that the "circumstances surrounding the incident are relevant to the determination," and stated that "Evans threatened that he was going to get a gun and shoot [the officer], and [the officer] felt threatened. But more importantly, Evans made a statement which under the circumstances was plainly designed to goad or incite the only officer present who was trying to handle a difficult situation involving several people. A rational juror could find that the statement was disrespectful of, directly challenged, and abused [the security officer's] authority. [The security officer] was a corporal with Six Flags Security and had been in the position for only one and one-half months. The fact that Evans did not get [the officer] to react is not determinative." Id., 34; see *Anderson* v. *State*, 231 Ga. App. 807, 809, 499 S.E.2d 717 (1998) ("[T]he act of appellant in calling the sheriff a 'no-good son of a bitch' and admonishing that she should kick his 'ass' constituted fighting words. Further, the fact that the sheriff might be

used to hearing this type of language is not a defense."), abrogated on other grounds by *Golden Peanut Co.* v. *Bass*, 249 Ga. App. 224, 547 S.E.2d 637 (2001), aff'd, 275 Ga. 145, 563 S. Ed. 2d 116, cert. denied, 537 U.S. 886, 123 S. Ct. 32, 154 L. Ed. 2d 146 (2002); *Person* v. *State*, 206 Ga. App. 324, 325, 425 S.E.2d 371 (1992) (concluding that defendant used fighting words when he used profane, abusive language throughout encounter with police officer and screamed in officer's face, " 'I'm not going to any [goddamned] jail and I'm not wearing any mother-[fucking] handcuffs' " and threatened to " 'blow [the officer's] head off' "); cf. *Matter of Welfare of M.A.H.*, 572 N.W.2d 752, 759 (Minn. App. 1997) (statement did not constitute fighting words when juvenile "did not directly insult the police, or overtly threaten them by word or gesture").

In sum, as soon as the defendant explicitly told the two water company employees who were on or near an easement on his property in connection with their official duties, that he would get his gun and shoot them if they did not leave, his statements transcended those of an irritated property owner expressing himself with coarse language to utility company workers who are expected to act professionally, even when the public they serve does not. Although we have stated that what constitutes a fighting word changes over time and that "public sensitivities have been dulled to some extent by the devolution of discourse"; *State* v. *Baccala*, supra, 326 Conn. 254–55; I am not prepared to say that our discourse has devolved to the point that a person's threat to use a gun during a heated confrontation with public utility workers is anything less than a specific threat of violence likely to precipitate an immediate preemptive strike or, in its place, a significant law enforcement response. Cf. *State* v. *Pallanck*, 146 Conn. 527, 530, 152 A.2d 633 (1959) ("Even if the highway employees were, at the time, committing a trespass on the property of the defendant, as claimed by her, her employment of a dangerous weapon would not be warranted. . . . A mere trespass does not justify a landowner in using a dangerous weapon in an effort to eject the trespasser." [Citation omitted.]); see also General Statutes § 53a-20 (defense of premises). Put differently, for purposes of the fighting words doctrine as explained in *Baccala*, in which this court specifically emphasized that there was a lack of a threat of harm to the store manager; *State* v. *Baccala*, supra, 256; the defendant's warning in the present case that he would resort to gun violence if Lathlean and Lavin did not leave his property was qualitatively different from even the most profane slur he could have directed at them.[7] Accordingly, I conclude that sufficient evidence supported the defendant's conviction of disorderly conduct.

Because I would reverse the judgment of the Appellate Court, which reversed the defendant's conviction of disorderly conduct, I respectfully dissent.

[1] Lavin testified that, in describing the defendant's statement in court, he censored himself out of respect for the court by substituting the term "f'n." I appreciate Lavin's respect for the tribunal, but recite the actual words the defendant used to convey the full gravity of his statements.

[2] General Statutes § 53a-182 (a) provides in relevant part: "A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior . . . ."

[3] By way of background, I note that the "fighting words exception was first articulated in the seminal case of *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 568. After noting that the right of free speech is not absolute, the United States Supreme Court broadly observed: 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any [c]onstitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.' . . .

"Unlike George Carlin's classic 1972 comedic monologue, 'Seven Words You Can Never Say on Television,' it is well settled that there are no per se fighting words. . . . Although certain language in *Chaplinsky* seemed to suggest that some words in and of themselves might be inherently likely to provoke the average person to violent retaliation, such as 'God damned racketeer' and 'damned Fascist' . . . subsequent case law eschewed the broad implications of such a per se approach. . . . Rather, 'words may or may not be "fighting words," depending upon the circumstances of their utterance.' . . .

"This context based view is a logical reflection of the way the meaning and impact of words change over time. . . . While calling someone a racketeer or a fascist might naturally have invoked a violent response in the 1940s when *Chaplinsky* was decided, those same words would be unlikely to even raise an eyebrow today. Since that time, public discourse has become more coarse. '[I]n this day and age, the notion that any set of words are so provocative that they can reasonably be expected to lead an average listener to immediately respond with physical violence is highly problematic.' " (Citations omitted; emphasis omitted; footnote omitted.) *State* v. *Baccala*, supra, 326 Conn. 237–39.

[4] Like the concurrence, I recognize that there is somewhat of a square peg, round hole aspect to this case. It would seem that the defendant's statements would more typically be prosecuted under a "true threat" theory, insofar as true threats are similarly unprotected by the first amendment. See, e.g., *State* v. *Pelella*, 327 Conn. 1, 10, 170 A.3d 647 (2017); *State* v. *Krijger*, supra, 313 Conn. 449; see also *State* v. *Krijger*, supra, 452–53 (describing most true threat cases as encompassing statements conveying "explicit threat[s]" or expressing "the defendant's intention to personally undertake a course of action that would culminate in" injury to addressee). "True threats encompass those statements [through 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 of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." (Internal quotation marks omitted.) *State* v. *Krijger*, supra, 449. "In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a [true] threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . [A]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." (Internal quotation marks omitted.) Id., 450.

The fact that the prosecutor elected to proceed under a fighting words theory with respect to the defendant's statements in this case is not necessarily fatal to the state's case because the fighting words and true threat theories are not mutually exclusive; a statement could well satisfy either or both doctrines in a given case. See *State* v. *Button*, 622 N.W.2d 480, 486 (Iowa 2001) ("[b]ecause there is no legitimate purpose behind the true threats in these circumstances, the fact that the words may not fall under the category of fighting words is of no consequence"). Thus, I respectfully disagree with the concurrence's contention that the fact that a violent response by the

addressee is motivated by a "perceived need for preemptive self-defense," rather than purely by anger at the remark, is sufficient to remove a statement from the ambit of fighting words as a matter of law insofar as "allowing the fighting words exception to encompass statements that might cause violent, preemptive self-defense would be inconsistent with the underlying theory of how fighting words work." In my view, the concurrence's attempt to compartmentalize fighting words and true threats into two neat doctrinal boxes overlooks the fact that a single statement—or different parts thereof—could, and in this matter, does, satisfy both doctrines.

[5] I respectfully disagree with the concurrence's categorical rejection of what it considers the "preemptive self-defense" theory of liability under the fighting words doctrine. First, although the concurrence posits that there is "no controlling precedent that supports such an argument," it does not cite any cases standing for the proposition that a threatening statement lacking personal insult could not constitute fighting words as a matter of law. Second, I believe that the concurrence's focus on the term "violent retaliation" as conceptually inconsistent with the legal concept of self-defense, does not account for *Chaplinsky*'s definition of fighting words, addressed in *Baccala*, as those that are likely to "cause a breach of the peace by the addressee"; *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 573; or "to provoke a violent response under the circumstances in which they were uttered . . . ." *State* v. *Baccala*, supra, 326 Conn. 234. Specifically, I understand the courts to use the phrase "violent retaliation" as synonymous with "violent response." See id., 250 ("Accordingly, a proper contextual analysis requires consideration of the actual circumstances, as perceived by both a reasonable speaker and addressee, to determine whether there was a likelihood of *violent retaliation*. This necessarily includes the manner in which the words were uttered, by whom and to whom the words were uttered, and any other attendant circumstances that were objectively apparent and bear on the question of whether a *violent response* was likely." [Emphasis added.]); compare id., 240 ("proper contextual analysis requires consideration of the actual circumstances as perceived by a reasonable speaker and addressee to determine whether there was a likelihood of violent retaliation"), and id., 243 ("because the fighting words exception is concerned with the likelihood of violent retaliation, it properly distinguishes between the average citizen and those addressees who are in a position that carries with it an expectation of exercising a greater degree of restraint"), with id., 240–41 (noting that "the manner and circumstances in which the words were spoken bears on whether they were likely to incite a violent reaction" and "[t]he situation under which the words are uttered also impacts the likelihood of a violent response"), and id., 245 ("[T]here are no per se fighting words; rather, courts must determine on a case-by-case basis all of the circumstances relevant to whether a reasonable person in the position of the actual addressee would have been likely to respond with violence.").

[6] I acknowledge Lathlean's testimony that "I don't really think I reacted to [the threat]. I just was like okay then go ahead. I didn't say that but I was just—it just bounced right off me, you know." Lathlean did, however, also state that it "sounds silly" that he was not frightened by the defendant's threat to get a gun and shoot. Giving weight to the jury's finding of the historical facts, and the fact that the water company employees nevertheless deemed it appropriate to summon the police because of the gun threat, I believe that an objective person in their situation would have deemed a response appropriate to the defendant's threat.

[7] I recognize that "it is well settled that there are no per se fighting words." *State* v. *Baccala*, supra, 326 Conn. 238. Accordingly, I do not suggest that any and all references to firearms render the statements at issue fighting words. Cf. *State* v. *Kilburn*, 151 Wn. 2d 36, 39, 84 P.3d 1215 (2004) (juvenile's statement to classmate that he was " 'going to bring a gun to school tomorrow and shoot everyone and start with you' " was not true threat, despite fact that other students and parents were later concerned by it, when statement was made in joking manner while laughing, during conversation about military books, and there was no animosity between juvenile and listener).