Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-105

APRIL TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Rutland Circuit
	}	
Paul Graham	}	DOCKET NO. 1907-11-06 Rdcr
		Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Defendant appeals from his conviction of disorderly conduct following a jury trial. He argues that the evidence was insufficient to support his conviction. We affirm.

The record indicates the following. Police broke up a squabble at the Vermont State Fair after one individual apparently threw a milkshake on another. They escorted one of the individuals out of the fair. Defendant, who lived with both individuals, confronted a police officers at the fair exit, demanding to know why his roommate was kicked out. The officer attempted to explain what happened, but defendant became angry and verbally abusive. When the officer asked defendant for his address, defendant told him to "[expletive] look it up." Defendant was also yelling at his girlfriend, who had been involved in the milkshake throwing incident and was still inside the fair. There were numerous people around, including children. Defendant continued yelling at the officer. He called the officer a "bald-headed dick with ears" and asked the officer if he was going to "pepper spray [him] and put the pillow case on [his] head and kill [him] like [he] did the other guy," apparently referring to an earlier incident that occurred in Rutland. Several other officers arrived, and defendant continued to yell. He asked one officer why he needed to "call all of his [expletive] boyfriends" for assistance. After the officer again told defendant to calm down and defendant kept yelling, the officer took him into custody and placed him under arrest for disorderly conduct. At the close of trial, defendant moved for a judgment of acquittal, which the court denied. A jury found defendant guilty, and this appeal followed.

Defendant argues that the evidence was insufficient to support his conviction. He asserts that the entire encounter with police lasted no more than a few minutes, and his comments were intended as a protest against his friend's exclusion from the fair, not as insults directed at the police officers. He maintains that he did not in act in a threatening way, he

engaged in nothing more than "colorful name-calling," and his comments would not cause an average citizen to respond violently.

On review, we must determine "whether, taking the evidence in the light most favorable to the [S]tate and excluding modifying evidence, the [S]tate has produced evidence fairly and reasonably tending to show the defendant guilty beyond a reasonable doubt. State v. Carrasquillo, 173 Vt. 557, 559 (2002) (mem.) (brackets, internal quotation marks, and citation omitted). To establish defendant's guilt, the State needed to show that defendant was a person who recklessly created a risk of public inconvenience or annoyance by using abusive language in a public place. 13 V.S.A. § 1026(3). As defendant notes, this Court has "limited the reach of the 'abusive language' component of the disorderly conduct statute to 'fighting words,' i.e., spoken words which, when directed to another in a public place, 'tend to incite an immediate breach of the peace.' " State v. Allcock, 2004 VT 52, ¶ 6, 177 Vt. 467 (mem.) (citations omitted). Stated another way, "fighting words" are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Id. (citation omitted). The focus is "on the nature of the words spoken, considered in light of the surrounding circumstances, and 'not on the subjective response of the actual addressee.' " Id. (citations omitted).

In this case, the State produced sufficient evidence to meet its burden of proof. As recounted above, defendant was in a public place, yelling for an extended period of time at the police. His comments were hardly "colorful name-calling." They were personal insults tinged with gay baiting aimed directly at the police officers. In addition to calling one officer a "bald-headed dick with ears," and asking why the officer called his "boyfriends" for backup, he also taunted the officers, asking if they were going to kill him just like they had killed another individual. He swore at police when they asked for identifying information, and refused to leave the fair, continuing his tirade.

Defendant's abusive comments, considered in light of the surrounding circumstances, were not protected speech, but rather "fighting words" as defined above. See Allcock, 2004 VT 52, ¶ 8 (upholding disorderly conduct conviction where the defendant directed extremely vulgar and personally offensive insults at individual, hurled items around room in fit of anger, and acted in a way that alarmed other individuals in the area); State v. Read, 165 Vt. 141, 153 (1996) (upholding disorderly conduct conviction of individual who directed tirade of invective at police officer and did so while flexing his arms, clenching his fists, and grinding his teeth) (and citing with approval State v. Weber, 505 A.2d 1266, 1270 (Conn. App. Ct. 1986) (where invectives are shouted by an obviously intoxicated person in a hostile and challenging confrontation and in front of a crowd of people, they may constitute the abusive language and breach of the peace proscribed by statute) and Commonwealth v. Pringle, 450 A.2d 103, 104, 107 (Pa. Super. Ct. 1982) (defendant who "looked directly at" arresting officer and "repeatedly shouted 'goddamn fucking pigs' " engaged in "fighting words" and "created a risk of public inconvenience, annoyance [and] alarm" in violation of disorderly conduct statute)). The evidence amply supports a finding that the comments made by defendant would incite an ordinary citizen to react violently. See id. at 149-51 (explaining that police officers

are not obligated to withstand greater verbal abuse than ordinary citizen). We thus find no error in the court's denial of defendant's motion for judgment of acquittal.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice