No. 128438

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. JUSTIN DEVINE, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, Second District, No. 2-21-0162 There on Appeal from the Circuit Court of Kane County, Illinois, No. 18 CF 2047 Honorable David P. Kliment, Judge Presiding.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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TABLE OF CONTENTS

POINTS AND AUTHORITIES

NATURE OF THE CASE

A Kane County trial court found defendant, Justin Devine, guilty of nonconsensual dissemination of sexual images in violation of 720 ILCS 5/11-23.5 and sentenced him to 18 months of probation and 180 days in jail; the court stayed defendant's jail term pending compliance with probation. Defendant appealed, and the appellate court held that the People had failed to prove defendant guilty beyond a reasonable doubt. The court reduced defendant's conviction to disorderly conduct and remanded for resentencing. The People now appeal from the appellate court's judgment. No issue is raised on the pleadings.

ISSUE PRESENTED

The issue presented is whether the evidence at trial was sufficient to sustain defendant's conviction for nonconsensual dissemination of private sexual images. To answer that question, this Court must determine, as a matter of statutory interpretation: (1) whether defendant "disseminated" the victim's private sexual images when he distributed them from one person's phone — the victim's — to another person's phone — the defendant's; and (2) whether the victim was identifiable from the image and information displayed in connection with the images where the victim testified she could identify herself from the images and the trial court reasonably could infer that defendant could also identify the victim from the images and the phone number that he knew to be associated with the victim.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 602. This Court allowed leave to appeal on September 28, 2022. *People v. Devine*, 459 Ill. Dec. 236 (2022) (Table).

STATUTORY PROVISION INVOLVED

720 ILCS 5/11-23.5(b) provides, in relevant part, that:

> (b) A person commits nonconsensual dissemination of private sexual images when he or she:
>
> (1) intentionally disseminates an image of another person:
>
> (A) who is at least 18 years of age; and
>
> (B) who is identifiable from the image itself or information displayed in connection with the image; and
>
> (C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and
>
> (2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and
>
> (3) knows or should have known that the person in the image has not consented to the dissemination.

720 ILCS 5/11-23.5(b).

STATEMENT OF FACTS

Defendant was charged with one count of nonconsensual dissemination of private sexual images under 720 ILCS 5/11-23.5(b), for transferring photographs of the victim's genitals from her cell phone to his cell phone without her consent or knowledge. C35.[1]

In September 2018, J.S., a 32-year-old woman, visited the Verizon store where defendant worked, seeking to switch cellular phone providers. R12-13, 16. Defendant took J.S.'s cell phone, ostensibly so that he could assist her with this switch, R16, then moved his fingers across the phone before handing it back to her about two minutes later, R18; J.S. could not see what defendant was doing, R16. When defendant handed the phone back to J.S., she saw that there was a new outgoing text message from her phone to a number she did not recognize. *Id.* When she saw that the message contained five photographs of her "private parts" that she had taken a couple of evenings earlier, she "freaked out." R20-21.

J.S. was able to identify herself from the photographs based on the appearance of both her genitals and her fingers (in the photographs, her fingernails were painted with the same red nail polish that she was wearing at the Verizon store). R21, 26-27. J.S. wrote down the unfamiliar number,

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[1] Citations to this brief's appendix, the common law record, and the report of proceedings appear as "A_," "C_," and "R_," respectively.

then deleted the outgoing text message in an unsuccessful effort to stop the photos from being sent. R18.

That evening, J.S. and her parents searched for the phone number using the Google search engine, which led her to defendant's Facebook page. R29-30. She realized that the phone number to which the images had been sent belonged to defendant, the person who had assisted her at the Verizon store, and she called the police. R29-30. When officers later extracted and downloaded the data from defendant's phone, they found the five photographs of J.S.'s genitals that defendant had sent himself from J.S.'s phone. R65-67, R81. Defendant admitted to police that he deliberately sent the images from J.S.'s phone to his own. R52, 60, 85. J.S. did not give defendant permission to go through her photos or send himself the images. R21, 27.

The trial court found defendant guilty of nonconsensual dissemination of private sexual images. R117; C84. The court found that defendant had disseminated the photographs from J.S.'s phone when he sent them to his own phone: "For me to construe the statute any other way would condone or ignore what the defendant did in this case and I think the statute is written more broadly to encompass revenge porn, but I think it fits the circumstances in this case as well." R116-17. The trial court further found that J.S. was identifiable from the photographs and the information displayed in connection with them because, although the court itself could not identify J.S.

from the photographs, defendant could identify her from the photographs because he had sent himself the photographs from her phone, and she was wearing the same nail polish in the photographs as she had that day at the phone store. R115-16.

On appeal, the appellate court held that the evidence was insufficient to prove defendant guilty of nonconsensual dissemination of private sexual images because, according to the court, the evidence did not prove that (1) defendant disseminated the photographs of J.S.'s genitals and (2) J.S. was identifiable from the photographs. A20-21. Specifically, the appellate court held, the evidence was insufficient to prove that defendant disseminated the photographs because he had used J.S.'s phone to send the images to himself rather than to a third party. A12-20. And, the appellate court held, the evidence was insufficient to prove that J.S. was identifiable from the photographs because the trial court stated that it was unable to identify her, A20-21, and the information displayed in connection with the photographs — that is, J.S.'s phone number and the "metadata embedded within [the] photos" — could not cure this insufficiency because "even if a Google search of the phone number revealed that the images were connected to J.S.'s cell phone or metadata revealed where the image was taken, . . . this would not prove beyond a reasonable doubt that the person in the image is identifiable as J.S.," A21.

Because "the parties conceded [at oral argument] that the evidence was sufficient to prove defendant's guilt beyond a reasonable doubt of disorderly conduct," the appellate court entered a conviction on that offense, which it determined was a lesser-included offense. A25-26.

STANDARDS OF REVIEW

This Court reviews the sufficiency of the evidence that defendant committed nonconsensual dissemination of private sexual images by considering whether, after viewing the evidence in the light most favorable to the People, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *People v. Brand*, 2021 IL 125945, ¶ 58.

The proper construction of the elements of the offense defined by the statute prohibiting nonconsensual dissemination of private sexual images presents questions of law, which this Court reviews de novo. *In re Jarquan B.*, 2017 IL 121483, ¶ 21.

ARGUMENT

This Court should hold that the evidence was sufficient to convict defendant of nonconsensual dissemination of private sexual images because the evidence was sufficient to establish each element of the offense beyond a reasonable doubt.

A person commits nonconsensual dissemination of private sexual images if he "intentionally disseminates an image of another person," knowing that the person intended the image to remain private and did not

consent to its dissemination, and if the person depicted in the image is at least 18 years old, depicted while engaged in a sexual act or with her intimate parts exposed, and "identifiable from the image itself or information displayed in connection with the image." 720 ILCS 5/11-23.5(b). There is no question that the evidence showed that defendant intentionally sent copies of J.S.'s private sexual images from her phone to his own, knowing that she intended the images to remain private and that he did not have her consent to send them. Nor is there any question that both J.S. and defendant were able to identify her from the photographs sent to defendant's phone, which were accompanied by the victim's phone number.

Thus, the question is whether (1) defendant's act of sending copies of J.S.'s private sexual images from her phone to his own constituted "disseminating" those images within the meaning of the Section 11-23.5, and (2) J.S. was "identifiable" from the images and accompanying information within the meaning of the statute. Review of the plain language of Section 11-23.5 in light of the General Assembly's purpose in prohibiting the nonconsensual dissemination of private sexual images makes clear that defendant's conduct fell squarely within the statutory prohibition.

Specifically, the plain language of Section 11-23.5 unambiguously provides that the People need prove only that defendant conveyed the images to someone without J.S.'s consent, which defendant did when he sent the images from her phone to his own. Construing Section 11-23.5 to exclude

conduct like defendant's would not only read a limitation into the statute that is not provided by its plain language, but also would thwart the General Assembly's intention to protect victims from exactly the harm inflicted by defendant in this case: the emotional distress of being wrongfully deprived of control over who has access to one's private, intimate images and the accompanying risk of harassment, discrimination, embarrassment, and possible violence.

Additionally, the People proved beyond a reasonable doubt that J.S. was identifiable from the photographs and accompanying information that defendant sent himself from her phone. J.S. testified that she was able to identify herself from the photographs. And, the trial court reasonably inferred that defendant was also able to identify J.S. from the photographs, which showed her wearing the same nail polish she was wearing at the store and which were accompanied by information that showed the photos had been sent from the J.S.'s phone number at the time while she was in the store and her phone was in defendant's possession.

Accordingly, the People proved each element of nonconsensual dissemination of private sexual images beyond a reasonable doubt. This Court should reverse the judgment of the appellate court and affirm defendant's conviction.

I. The Evidence Was Sufficient to Prove That Defendant Disseminated J.S.'s Private Sexual Images Because His Act of Sending the Photographs from Her Phone to His Own Without Her Consent Constituted "Dissemination" Under the Statute.

Defendant's act of sending copies of J.S.'s private sexual images from her phone to his own constituted "disseminating" those images within the meaning of Section 11-23.5. Therefore, the evidence showing that defendant intentionally sent images from the J.S.'s phone to his own without her consent was sufficient to prove that he disseminated the images.

A. The statute prohibiting nonconsensual dissemination of private sexual images prohibits a person from disseminating a victim's private sexual images to anyone, including himself, without the victim's consent.

The plain language of Section 11-23.5 demonstrates that the General Assembly intended the statute to criminalize conduct like defendant's, where a defendant sends copies of his victim's private sexual images from the victim to himself and where he knew the victim intended the images to remain private and had not consented to their dissemination.

Section 11-23.5 provides that a person commits nonconsensual dissemination of private sexual images when he "intentionally disseminates an image of another person." 720 ILCS 5/11-23.5(b)(1). As the Court held in *People v. Austin*, in this statutory context, the term "disseminate" means "'to spread'" or "'to make more widely known.'" 2019 IL 123910, ¶ 115 (quoting *Webster's Third New International Dictionary* 656, 2208 (1993)). The statute does not require that the private sexual images be disseminated to any particular person or persons. *See* 720 ILCS 11-23.5(b)(1) (requiring only that

a person "intentionally disseminate an image of another person," without reference to the identity of recipient or recipients of images). Instead, the statute focuses solely on the nonconsensual nature of the act of dissemination. 720 ILCS 5/11-23.5(b)(3) (prohibiting dissemination of private sexual images if the defendant "knows or should have known that the person in the image has not consented to the dissemination"). Accordingly, in *Austin*, this Court found that the defendant had disseminated the victim's private sexual images within the meaning of Section 11-23.5 when she "sent a letter to at least one other person that included the private sexual images of the victim without her consent" because, due to the defendant's actions, the images were spread to a person who did not already possess them without the victim's consent. *Austin*, 2019 IL 123910, ¶ 115.

Here, defendant unquestionably "disseminated" the five images of J.S.'s genitals when he sent copies of the images from J.S.'s phone to his own. As in *Austin*, due to defendant's actions, the images were sent without J.S.'s consent to a person who did not already have them. That the person to whom defendant sent J.S.'s images happened to be defendant himself does not take defendant's conduct out of the reach of the statute, for his act resulted in spreading the images more widely than they had previously been spread. Whereas before defendant's act, only J.S. possessed the images, following defendant's act, defendant also possessed the images, a state of affairs to which J.S. plainly had not consented. Accordingly, defendant's act of sending

the images from J.S.'s phone to his own was an act of dissemination under Section 11-23.5.

B. Construing Section 11-23.5 to exempt defendant's conduct is contrary to the plain language of the statute.

The appellate court's holding that a person does "disseminate" a victim's private sexual images for purposes of Section 11-23.5 when he sends the images to himself is contrary to the plain language of the statute. Nothing in the plain text of Section 11-23.5 suggests that the General Assembly intended to exclude from its application cases in which the nonconsensual dissemination of the images is to the defendant. *See People v. Shinaul*, 2017 IL 120162, ¶ 17 ("Absent express language in the statute providing an exception, we will not depart from the plain language and read into the statute exceptions, limitations, or conditions that the legislature did not express."). To the contrary, the statute is silent regarding the identity of the person to whom the private sexual image is spread, *see* 720 ILCS 5/11-23.5(b)(1), (3), reflecting the General Assembly's intent to prohibit a person from sending a victim's private sexual image to *anyone* without the victim's consent.

Indeed, the appellate court acknowledged that "there is no dispute that J.S. did not consent to defendant's distribution of the images, whether to himself or to another." A14. The basis for the appellate court's departure from the plain language of Section 11-23.5 appears to have been its focus on a portion of the definition of "disseminate" that this Court adopted in *Austin*:

to make "'more widely known.'" A14-15 (quoting *Austin*, 2019 IL 123910, ¶ 115). The appellate court reasoned that because defendant "already had knowledge" of J.S.'s private sexual images, inasmuch as he knew they existed from the moment he surreptitiously accessed them on her phone, the act of sending the images to himself did not make them "more widely known." A15. But the appellate court's selective parsing of this Court's definition of "disseminate" neglects not only the entirety of that definition but also the rest of the statute. The plain language of Section 11-23.5 prohibits the dissemination of "images of another person," not of "knowledge of images of another person." *See* 720 ILCS 5/11-23.5(b)(1). In other words, a person does not violate Section 11-23.5 by merely talking about a victim's private sexual images without the victim's consent. And, conversely, a person violates Section 11-23.5 by sending a victim's private sexual images without the victim's consent regardless of whether the recipient already knows the images exist.

The appellate court's construction of "disseminate" in Section 11-23.5 to exclude circumstances where a defendant sends a victim's private sexual images to himself without her consent thus is contrary to the plain language of the statute.

C. Construing Section 11-23.5 to exempt defendant's conduct is contrary to the purpose of the statute.

The appellate court's narrow interpretation of "disseminate" to exclude a defendant's act of sending copies of a victim's private sexual images to

himself without the victim's consent is also contrary to the purpose of Section 11-23.5. "When a statute is silent on a particular point," the Court "focus[es] on the legislature's intent, and . . . will not interpret statutory silence in a way that defeats the purpose of that provision." *People v. Fiveash*, 2015 IL 117669, ¶ 34.

As this Court has explained, "[t]he animating purpose of section 11-23.5(b) is to protect living persons from being victimized by harassment, discrimination, embarrassment, and possible violence resulting from the privacy violation occasioned by the nonconsensual dissemination of private sexual images." *Austin*, 2019 IL 123910, ¶ 99. Thus, by criminalizing the nonconsensual dissemination of private sexual images, the General Assembly sought to prevent two distinct harms suffered by victims of such nonconsensual dissemination. The first is the emotional trauma suffered by victims — the embarrassment associated with knowing that their private sexual images have been spread without their consent and the fear that they cannot prevent the images from being spread more widely. The second is the risk to victims of actually being subjected to harassment, discrimination, or violence as a result of their private sexual images having been disseminated.

While the typical nonconsensual dissemination case might involve the victim's consensual dissemination of an image to a second party (the defendant) who then disseminates the image to a third party without the victim's consent, nonconsensual dissemination of private sexual images

inflicts the same harms where, as here, the initial dissemination from the victim to the defendant is nonconsensual and there is no evidence of further dissemination. For that reason, the term "revenge porn," which is often used colloquially to refer to the nonconsensual dissemination of private sexual images, "obscures" the true scope and definition of the crime. *Austin*, 2019 IL 123910, ¶ 18. Although "revenge porn" calls to mind cases where the victim sent images to the defendant who then sent those images to third parties, "'the crux of the definition of revenge porn lies in the fact that the victim did not consent to [the images'] *distribution*.'" *Id.* (quoting Christian Nisttáhuz, *Fifty States of Gray: A Comparative Analysis of 'Revenge-Porn' Legislation Throughout the United States and Texas's Relationship Privacy Act*, 50 Tex. Tech. L. Rev. 333, 337 (2018)); *see id.* ¶ 21 ("'[I]t is the absence of consent to the image's distribution that renders the perpetrator in violation of the law.'") (quoting Ava Schein, Note, *When Sharing Is Not Caring: Creating an Effective Criminal Framework Free From Specific Intent Provisions to Better Achieve Justice for Victims of Revenge Pornography*, 40 Cardozo L. Rev. 1953, 1955-56 (2019)). In a case such as this one, where the victim did not consent to the distribution of her private sexual images to the defendant, the offense has been committed, and the harm inflicted, regardless of whether the defendant further disseminates the images.

Indeed, this case confirms that the emotional distress and fear associated with the nonconsensual dissemination of private sexual images

occurs regardless of whether the defendant already possessed the images and sent copies to a third party without the victim's consent or did not possess them and sent copies to himself without the victim's consent. When J.S. realized that defendant had texted her private sexual images from her phone to his, she "freaked out," tried to stop the text from sending, immediately deleted the images, and contacted the police. The emotional trauma that J.S. suffered as a result of the discovery that her private sexual images were no longer hers to control is no different from that suffered by victims of what has traditionally been described as "revenge porn." Nearly all revenge porn victims (93%) report suffering significant emotional distress as a consequence of learning that their private sexual images have been disseminated without their consent. *See* Mary Anne Franks, *"Revenge Porn" Reform: A View from The Front Lines*, 69 Fla. L. Rev. 1251, 1263 (Sep. 2017); *see also* Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, Oxford Journal of Legal Studies 12 (2017), *available at* https://tinyurl.com/ycoj96rw (last visited Feb. 15, 2023) (describing US Cyber Civil Rights Initiative study, which found that 80% of victims suffered "severe emotional stress and anxiety"). Moreover, 82% of victims "said they suffered significant impairment in social, occupational, or other important areas of functioning." Franks, *supra.* These threatened and actual harms are no different in circumstances like this one, where a defendant sent his victim's images to himself without her consent, rather than to a third party.

And the potential harms extend beyond psychological or emotional harm. "The professional costs to victim-survivors are also potentially severe," for "[m]any are dismissed from their current employment . . . as a result of an online presence dominated by private sexual images and abuse." McGlynn & Rackley, *supra*, at 12. In addition, when private sexual images are sent with identifying information about the victim — "a practice known as 'doxing'" — their dissemination can lead to harassment or stalking. McGlynn & Rackley, *supra*, at 12; *see also* Franks, *supra*, at 1263 (noting that one-half of all victims reported being stalked online or harassed by users who had seen the disseminated material, and one-third reported stalking that extended beyond the Internet). For example, in this case, the photographs were accompanied by J.S.'s phone number from which one could determine her name, address, and other personal identifying information. Thus, the dissemination of J.S.'s private sexual images exposed her to the risk of harassment by defendant (or anyone else to whom he might show the images).

In the most serious cases, victims suffer significant physical harm. In one case, a woman was raped at knifepoint after her ex-boyfriend posted her photograph and contact information online. Caroline Black, *Ex-marine Jebediah James Stipe Gets 60 Years for Craigslist Rape Plot*, CBS NEWS (June 29, 2010), *available at* https://tinyurl.com/2s3myhtm (last visited Feb. 15, 2023). The risk of such an incident is no less under the facts presented here. J.S. had no way of knowing whether defendant himself might subject

her to harm (he had, after all, already invaded her privacy by sending the photographs of her genitals to himself without her knowledge or consent), or whether he might send or otherwise make available the images to others who might physically harm her.

Finally, the harms associated with the nonconsensual dissemination of private sexual images extend beyond the individual victims to society generally. Such conduct "sends a message to all women that they are not equal, that they should not get too comfortable, . . . that it might happen to them." McGlynn & Rackley, *supra*, at 12. For example, when Marines posted more than 130,000 explicit photos of female service members online without their permission, the message to women in uniform was that they were not equal to their male colleagues or safe in their professional lives. David Martin, *Secret military site posts explicit images of female service members*, CBS News (Mar. 9, 2018), *available at* https://tinyurl.com/3t9a68zy (last visited Feb. 15, 2023). And a failure to deter all forms of this conduct "legitimates the attitudes of those who might not yet have participated directly in the abuse but who have similar attitudes towards women, or who think that the abuse is 'just a bit of fun' and that it is therefore acceptable to disregard the dignity of the individual." McGlynn & Rackley, *supra*, at 13-14.

J.S.'s experience is unfortunately not unique. *See, e.g.*, Rick Aaron, *'Shocked': Park City cell phone store employee accused of stealing customers nude photos*, ABC4 News (Nov. 4, 2019), available at

https://tinyurl.com/2vbk24d9 (last visited Feb. 15, 2023); Jackie Callaway, *Store employees steal private pics during trade*, WFTS (Mar. 31, 2016), available at https://tinyurl.com/3ct7ywtj (last visited Feb. 15, 2023); Ben Weitzenkorn, *Verizon Wireless Staffers Busted for Stealing Nude Photos*, NBC News (Nov. 5, 2012), available at https://tinyurl.com/bdrsnu87 (last visited Feb. 15, 2023). Thus, the appellate court's overly cramped interpretation of Section 11-23.5 would allow offenders like defendant to evade criminal penalties even though their conduct inflicts precisely the harm the General Assembly sought to prevent and in precisely the manner the legislature sought to deter. This is an absurd result, and the statute should be construed to avoid it. *See, e.g.*, *People v. Davidson*, 2023 IL 127538, ¶ 18 (interpreting statute to avoid "absurd result" of allowing certain offenders to escape prosecution).

Nor does the appellate court's holding that defendant committed the offense of disorderly conduct, A26, alter the analysis. A person commits disorderly conduct if he "does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." 720 ILCS 5-26-1(a)(1). The appellate court's holding that defendant could be convicted of disorderly conduct as a lesser-included offense turned on the fact that J.S. happened to see the outgoing text message, "freaked out," and called the police. A25. By this reasoning, if defendant had succeeded in disseminating the images to himself without J.S. discovering his conduct — or if her

immediate response had been more muted — he would have committed no crime at all.

The perpetrators of the offense of nonconsensual dissemination of private sexual images often prefer that their victims never discover their conduct. For example, when it was discovered that members of the Penn State chapter of the Kappa Delta Rho fraternity had uploaded photos of unconscious, naked women to a members-only Facebook page, a fraternity brother explained that the conduct "wasn't intended to hurt" the victims but rather was intended to be "funny" to the members. Holly Otterbein, *Member of Penn State's Kappa Delta Rho Defends Fraternity*, Philadelphia Magazine (Mar. 18, 2015), *available at* https://tinyurl.com/3wk3uach (last visited Feb. 15, 2023). But the fact that defendants may not intended to cause their victims distress (or may seek to keep their conduct secret to avoid apprehension) in no way diminishes the harm to the victims, or the General Assembly's interest in protecting them from it. Interpreting Section 11-23.5 to exempt a defendant from criminal liability because he manages to commit his crime without discovery is, again, an absurd result.

D. The Civil Remedies for Nonconsensual Dissemination of Private Sexual Images Act does not support a different outcome.

The appellate court's reliance on the definition of "dissemination" in the Civil Remedies for Nonconsensual Dissemination of Private Sexual Images Act (Civil Remedies Act) as a basis to exclude defendant from liability under Section 11-23.5 is misplaced. As an initial matter, the definitions in

Section 5 of The Civil Remedies Act apply only "[a]s used in [The Civil Remedies Act]." 740 ILCS 190/5. In any event, even if this Court follows the appellate court's lead and looks for guidance to the Civil Remedies Act under the doctrine of *in pari materia*, *see* A15-16, defendant's conduct satisfies the definition of dissemination in both the criminal statute and the Civil Remedies Act

The Civil Remedies Act, enacted five years after Section 11-23.5, defines "disseminate" and "dissemination" "for the purposes of [the Civil Remedies Act]" as "publication or distribution to another person with the intent to disclose." 740 ILCS 190/5(4). Here, as the People explained below, *see* A17, J.S. possessed her private sexual images, and defendant distributed them to another person, namely himself, without her consent. In other words, he disseminated the images as that term is defined in the Civil Remedies Act.

The appellate court dismissed this point because the "State provide[d] no support for this interpretation." But the State's interpretation is consistent with the plain language of the statute, whereas the appellate court's interpretation rests on a single clause of the Civil Remedies Act read in isolation and contravenes the purpose of that Act. The appellate court noted that Section 10(a) of the Civil Remedies Act creates a cause of action to remedy harm caused by the "dissemination by *a person* over the age of 18." A17 (emphasis added by appellate court). The court then replaced

"dissemination" in Section 10(a) with the Civil Remedies Act's definition – "publication or distribution to *another* person," A17 (emphasis added by appellate court) – to produce the clause "publication or distribution to *another* person by a *person* over the age of 18.". Only by picking and choosing language from different parts of the Act in this way was the appellate court able to reason that, "the disseminator, 'a person,' must publish or distribute to 'another person' other than the disseminator." A17.

The appellate court's reasoning is flawed. Section 10(a) of the Civil Remedies Act provides that "if a depicted individual is identifiable to a reasonable person and suffers harm from the intentional dissemination or threatened dissemination by a person over the age of 18 of a private sexual image without the depicted individual's consent, the depicted individual has a cause of action against the person." 740 ILCS 190/10(a). Properly viewing this section of the statute as a whole, and replacing "dissemination" with its statutory definition (from 740 ILCS 190/5(4)), makes clear that the appellate court's interpretation is erroneous: "If a depicted individual is identifiable to a reasonable person and suffers harm from the intentional [publication or distribution to another person] . . . by a person over the age of 18 of a private sexual image without the depicted individual's consent, the depicted individual has a cause of action against the person." 740 ILCS 190/5(4), 10(a). The unambiguous meaning of this sentence is that the Civil Remedies Act creates a cause of action when someone suffers harm caused by the

distribution of her private sexual images to another person. *See From,* Merriam-Webster Dictionary, *available at* https://tinyurl.com/3jyrvnzh (last visited Feb. 8, 2023) (defining "from" as "a function word to indicate . . . cause"). In other words, the recipient must be "another person" than the "depicted individual," not than the disseminator.

This reading is also consistent with the purpose of the Civil Remedies Act because civil liability is contingent on harm, and distribution of a depicted individual's private sexual images to a person other than the depicted individual is the act that causes the depicted individual to suffer harm. In sum, the plain language of Civil Remedies Act requires distribution to a person other than the depicted individual (in other words, the victim) by someone 18 or older. The trial court's interpretation of Section 11-23.5 to prohibit defendant's conduct thus is consistent with the Civil Remedies Act, and the appellate court erred in concluding otherwise.

* * *

In sum, a person disseminates a victim's private sexual images as proscribed by Section 11-23.5 if he sends them to someone who does not already have them, including himself. This construction of "disseminate" gives effect to the statute's plain language and purpose, which is to protect people from the embarrassment and fear that occurs when they are wrongfully deprived of control over their private sexual images. Because there is no dispute that defendant sent the photographs from the J.S.'s phone

to his own without her consent, the evidence was sufficient to prove the "dissemination" element of the offense.

II. The Evidence Was Sufficient To Prove That J.S. Was Identifiable from the Photographs and Associated Information.

The evidence was also sufficient to show that J.S. was identifiable from the images and the information connected to the images because both J.S. and defendant were able to identify her. Section 11-23.5 does not define "identifiable," but the term is presumed to carry its common meaning, *see Austin*, 2019 IL 123910, ¶ 115, which is "capable of being identified," *Webster's Third New International Dictionary* 1123 (2002); *see Merriam-Webster Dictionary*, *available at* https://tinyurl.com/nhk5zj4b (last visited Feb. 15, 2023) (same). Thus, a person is "identifiable from [an] image or information displayed in connection with the image" if she is capable of being identified from that image or the associated information.

Here, J.S. testified that she was able to identify herself from the images that defendant sent from her phone because she recognized the genitals and hands in the photographs as her own. Moreover, as the trial court found, the evidence showed that defendant was also able to identify J.S. from the photographs because he had sent them to himself from her phone and she was wearing the same nail polish in the store that she was wearing in the photographs. Additionally, the evidence showed that J.S. was identifiable from her phone number, which was displayed in connection with the text message containing the photographs. Not only could the phone

number be used to contact J.S. directly, but it could be used to identify her suing a simple Internet search, just as J.S. had identified defendant by conducting a Google search using his phone number. For these reasons, the evidence, viewed in the light most favorable to the People, showed that at least two people could identify J.S. from the images and information connected with them. The evidence thus was sufficient to prove that the victim was identifiable from the photographs and information. *See Brand*, 2021 IL 125945, ¶ 58.

The appellate court concluded otherwise only by speculating that J.S. might have had photographs of a different woman's genitals on her phone. A21. The appellate court thus failed to view the evidence in the light most favorable to the People and to draw all reasonable inferences in the People's favor, as is required. *See Brand*, 2021 IL 125945, ¶ 58. The appellate court also incorrectly held that J.S. was not "identifiable" for purposes of Section 11-23.5(b) even though she was identifiable to both herself and defendant, because the *trial judge* was unable to identify her from the photographs. But Section 11-23.5(b) includes no language requiring that a person be identifiable to *everyone* who views an image. Rather, the plain language of Section 11-23.5(b) requires simply that the victim be "identifiable," which, as explained, means merely that she is "capable of being identified."

The appellate court's interpretation is not only inconsistent with the dictionary definition of "identifiable," it is also inconsistent with the General

Assembly's intention to protect people from the embarrassment and fear associated with having their privacy invaded through the nonconsensual dissemination of their private sexual images. *See Austin*, 2019 IL 123910, ¶¶ 96, 99. The fact that not everyone can identify a victim from an image and its associated information does not mean that the victim is incapable of being identified, and thus that the victim cannot be harmed by the dissemination of the image. For example, if a defendant sends a photograph of a victim's genitals and the distinctive tattoo on the inside of her thigh to the victim's former intimate partners, or posts the photograph on the Internet and one or more of the partners sees it, *see* Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 Fla. L. Rev. 1251 (2017), 1260-61 (noting that "as many as 10,000 websites" are dedicated to the public consumption of "revenge porn"), those intimate partners would be able to identify the victim from the photos even though the general public would not, and the victim may be harmed as a result. The appellate court's cramped interpretation of the Section 11-23.5(b) – construing "identifiable" as "capable of being identified by everyone" rather than "capable of being identified" – thus undermines the statute's purpose.

Here, the undisputed evidence demonstrated that both J.S. and defendant were able to identify J.S. from the images and accompanying information. Nevertheless, the appellate court held that the People had failed to prove that J.S. was identifiable. This holding was contrary to the

plain language of the statute, which requires only that the victim be capable of being identified, and failed to properly apply the sufficiency standard by viewing the evidence in the light most favorable to the People. Accordingly, the appellate court erred in holding that the evidence was insufficient.

CONCLUSION

This Court should reverse the appellate court's judgment and affirm defendant's conviction for nonconsensual dissemination of private sexual images.

February 15, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twenty-six pages.

/s/ Garson S. Fischer
GARSON S. FISCHER
Assistant Attorney General

APPENDIX

TABLE OF CONTENTS TO APPENDIX

Table of Contents

APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

PEOPLE OF ILLINOIS
Plaintiff/Petitioner

Reviewing Court No: 2-21-0162
Circuit Court/Agency No: 2018CF002047
Trial Judge/Hearing Officer: HONORABLE DAVID P. KLIMENT

v.

JUSTIN DEVINE
Defendant/Respondent

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 3

Table of Contents

COMMON LAW RECORD - TABLE OF CONTENTS

Table of Contents

COMMON LAW RECORD - TABLE OF CONTENTS

Page 3 of 3

INDEX

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

Case No. 18CF2047

People of State of Illinois Plaintiff(s)	Justin Devine Defendant(s)
Plaintiff(s) Atty. Flannigan/Belshan	Defendant(s) Atty. Haiduk
Judge Klument / Court Reporter Jill K / Deputy Clerk	Clerk of the Circuit Court, Kane County, IL MAR 24 2021 FILED 115 ENTERED
A copy of this order ☐ should be sent ☐ has been sent ☐ Plaintiff Atty. ☐ Defense Atty. ☐ Other	File Stamp

JUDGMENT ORDER (JGMTO)

☒ The Court/Jury having found the defendant guilty of: nonconsensual dissemination of sexual image (Ct 1)
☒ Original ☐ Lesser/Incl. ☐ Amended Statute: 720 ILCS 5/11-23.5(b)

☐ A motor vehicle was involved in the commission of the felony
☐ This is an Illinois Domestic Violence Related Case (ILDVCR)
☒ Judgment entered on conviction and sentence
☒ Defendant must surrender FOID/Concealed Carry Card and/or firearms and ammunition
☐ Nolle Prosequi Count(s) _____

UPON THE DEFENDANT'S PLEA/VERDICT OF GUILTY, THE FOLLOWING SENTENCE IS HEREBY IMPOSED

The Defendant is placed on the below through..... Date 9/23/22 Time 5PM

	Months	Days
☐ 208 - Withhold Judgment - Court Supervision		
☐ 215 - Withhold Judgment - 720 ILCS 550/710 Probation		
☐ 216 - Withhold Judgment - 720 ILCS 570/410 Probation		
☒ 204 - Probation	18	
☐ 206 - Conditional Discharge		
☐ 213 - Electronic Monitoring		
☐ 209 - Perform public service _____ hours, to be completed by _____		

The Defendant is to report to: ☐ Judge ☒ Court Services ☐ Judge and Court Services ☐ Non-Reporting

☐ Complete a 26 week ILDHS approved Domestic Violence Counseling Program, and follow all treatment recommendations at:
ILDHS Provider Name: _____ Phone Number: _____

THE DEFENDANT TO SERVE THE FOLLOWING PERIODS OF INCARCERATION

	Years	Months	Days
☐ 201 - Department of Corrections			
☒ 202 - Kane County Jail ☒ Good time to apply ☐ No good time to apply			180
☐ 203 - Periodic Imprisonment (weekend equals 3 days)			
☒ 350 - Credit for time served 1 actual day			

☐ The sentence of _____ shall run ☐ consecutive ☐ concurrent to the term imposed by the Circuit Court of _____ County, case number _____
☐ Defendant to begin incarceration on _____

THE DEFENDANT TO COMPLY WITH THE FOLLOWING CONDITIONS:

☒ All conditions of the Financial Sentencing Order
☒ Follow all rules of ☒ Probation ☐ Conditional Discharge ☐ Electronic Home Monitoring ☐ Community Service ☐ TASC
☐ Alcohol/Drug Evaluation (OPAO) / Treatment ☒ KCDC Evaluation/Treatment (OPKC) ☒ No further criminal violations (NOCO)
☐ Waives personal service of Petition to Revoke (WPSOP) ☒ No Contact/Abusive Contact with victim J.S.
☐ Refrain from entering the premises of (NEASA) _____
☒ Other: Kane County Jail sentence is stayed pending the defendants compliance w/ probation
☐ Cause continued to _____ at _____ m. in room _____ for _____

IN MATTERS OF DOMESTIC VIOLENCE THE DEFENDANT MUST SIGN THE BELOW WAIVER

I hereby waive any confidentiality and authorize the counseling agency (previously stated) to release to the Court and the Kane County State's Atty. Office copies of any and all evaluations and reports concerning my counseling.

Date: _____ Defendant's Signature: _____

Date: 3/24/21 Judge: _____

P1-CR-045 (06/19) White - Clerk Green - Probation Yellow - SAO Pink - Defendant Gold - Defendant Attorney

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
)
vs.) Case Number 18CF2047
)
JUSTIN DEVINE)

Theresa F. Barreiro
Clerk of the Circuit Court
Kane County, Illinois
3/26/2021 1:47 PM
FILED/IMAGED

NOTICE OF APPEAL

☐ **Joining Prior Appeal** ☑ **Separate Appeal** ☐ **Cross Appeal**

An appeal is taken from the order or judgment described below:

1. Court to which appeal is taken: Second District Appellate Court
2. Name of appellant and address to which notices shall be sent:
   Name: Justin D. Devine
   Address: 6N550 Juniper Ct.
   Telephone: (815) 871-0295 Email: _____
3. Name and address of appellant's attorney on appeal:
   Name: John Gaffney
   Address: 67 N. Ayer Street, Harvard, Illinois 60033
   Telephone: (815) 943-0900 Email: _____

If appellant is indigent and has no attorney, does he want one appointed? _____

4. Date of judgment or order: 3/24/21
5. Offense of which convicted: Nonconsensual dissemination of a private image
6. Sentence: Probation
7. If appeal is not from a conviction, nature of order appealed from: _____
8. If the appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal.

Signed _____
(May be signed by Appellant, Attorney for Appellant, or Clerk of the Circuit Court)

2022 IL App (2d) 210162
No. 2-21-0162
Opinion filed March 28, 2022

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JUSTIN D. DEVINE, Defendant-Appellant.	) from the Circuit Court) of Kane County.)))) No. 18-CF-2047)) Honorable) David P. Kliment,) Presiding Judge.	Appeal

JUSTICE BIRKETT delivered the judgment of the court, with opinion.
Justices Schostok and Hudson concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Justin D. Devine, appeals from his conviction, following a bench trial, of nonconsensual dissemination of sexual images, a Class 4 felony (720 ILCS 5/11-23.5(b), (f) (West 2018)). Defendant argues that the State failed to prove beyond a reasonable doubt (1) that he "disseminate[d]" the sexual images (*id.* § 11-23.5(b)(1)) and (2) that the person in the images was "identifiable" (*id.* § 11-23.5(b)(1)(B)). We agree. However, we find that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of disorderly conduct (*id.* § 26-1(a)(1)), a lesser included offense. Accordingly, using our authority under Illinois Supreme Court Rule 615(b)(3) (eff. Jan. 1, 1967), we reduce defendant's conviction of nonconsensual

dissemination of sexual images to a conviction of disorderly conduct, and we remand for resentencing.

¶ 2 I. BACKGROUND

¶ 3 On October 16, 2018, defendant was indicted on one count of nonconsensual dissemination of sexual images. The indictment charged that defendant

> "intentionally disseminated 5 images of a female vagina, of another person, being J.S., who is at least 18 years of age and identifiable from information displayed in connection with the image, and whose intimate parts were exposed in whole in the image, and defendant knew that J.S. did not consent to the dissemination."

¶ 4 The following relevant facts were established at defendant's bench trial and are not in dispute. On September 19, 2018, defendant, who was 23 years old, worked at a Verizon store in Huntley. On that day, J.S., who was 32 years old, went to the Verizon store to transfer her cellular service from Sprint to Verizon, and defendant assisted her. Defendant asked J.S. if he could see her cell phone to check certain settings, and J.S. handed her phone to him. J.S. could see defendant's fingers were moving across the screen, but she could not see the screen. Defendant had J.S.'s cell phone in his possession "for less than two minutes."

¶ 5 When defendant handed the cell phone back to J.S., J.S. saw that a text message had been sent from her cell phone to a phone number that she did not recognize. Attached to the text message were five photographs J.S. had taken of her "private parts" one or two evenings earlier. The photographs depicted a woman's vagina and were stored in J.S.'s cell phone's "recent photos section." When J.S. opened the text and saw what it was, she "freaked out." She testified:

> "I asked [defendant] for a Post-It Note very quickly where I wrote down the phone number that it was sending to. The little green bar that shows that the text message is in process of

sending was still going, so at that point, after I wrote the phone number down, I deleted the text messages hopefully stopping them from completing."

When asked why she panicked, she stated: "Because the image, the images of the text message that were sending were very personal." After she tried to stop the message from sending, she "went into [her] phone and deleted all of the photos." She stated: "I had absolutely no idea at that time what was going on and I just had to get them off of my phone because they were sending to a number I didn't know." The store manager noticed that J.S. "was panicked about something" and asked her what was wrong. When she told him that her phone was sending messages to an unfamiliar number, he told that "that's been happening a lot lately." Defendant added, "[Y]eah, that happens sometimes, there's a glitch, or something."

¶ 6 When J.S. got home that evening, she told her dad and her stepmom what had happened at the Verizon store. They typed the phone number into "Google," located defendant's Facebook page, and determined that the phone number belonged to defendant—the person who had helped her at the store. They immediately called the police and then met with them over several days.

¶ 7 J.S. identified People's exhibit Nos. 3 through 7 as copies of the images on her cell phone. She identified the images as photographs that she had taken of her vaginal area. Fingernails can also be seen in some of the images. When asked how she could identify herself from the images, J.S. testified: "One, because I took the pictures, and I know what I look like down there. And number two, because the fingernail polish that I had on, I recognize my fingers, my hands, my nail polish." J.S. testified that she was wearing that nail polish when she went to the Verizon store.

¶ 8 The trial court found defendant guilty of nonconsensual dissemination of sexual images. The court found that defendant obtained the images when he "access[ed] the photo roll" and that

"he disseminated them by sending them to himself." According to the court, defendant "ma[de] [the images] more widely known." The court stated:

> "For me to construe the statute any other way would condone or ignore what the defendant did in this case and I think the statute is written more broadly to encompass revenge porn, but I think it fits the circumstances in this case as well. I believe this defendant violated the statute by taking these pictures. He knew he was taking them from her phone. He knew when he sent them to himself that he was going to have them. And whether he lost his nerve afterwards or not, I don't know if that is true or not."

Concerning identification, the court stated: "I did look at the photographs and there is—it could be any female and there is no way to identify the person with red nails or anything from those." However, the court went on to state that J.S. was identifiable to defendant, because "[s]he was sitting in front of him. She gave him her phone. The pictures were on her photo roll. And she had her red nails that day and they were the red nails in the photograph, so he knew who it was. The defendant knew who it was."

¶ 9 Defendant filed a motion for entry of an acquittal or for a new trial, which the trial court denied. A sentencing hearing took place on March 24, 2021. Defendant's presentence investigation report (PSI) included a letter from defendant to the court. In it, he took full responsibility for his actions. He stated that "[w]ithin seconds of the wrong doing [*sic*] I had realized how horrible my actions were" and, further, that he "can't express how much [he'd] like to apologize to [J.S.]" In the section addressing the defendant's "criminal attitudes," he stated "that he [did] not disagree that he was wrong and that he should face consequences." The court sentenced defendant to 18 months' probation and 180 days' jail. The court stayed the jail sentence pending compliance with probation.

¶ 10 Defendant timely appealed.

¶ 11 II. ANALYSIS

¶ 12 Although neither party requested oral argument, we scheduled oral argument on our own motion, directing the parties to be prepared to argue whether defendant's conduct more accurately fell under the provisions of the disorderly conduct statute and whether it would be appropriate for this court to reduce the degree of the offense. At the outset of oral argument, defense counsel conceded that we had the authority to reduce defendant's conviction and that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of disorderly conduct. The State agreed. (Nevertheless, the State did not concede that the evidence was insufficient to prove defendant guilty beyond a reasonable doubt of nonconsensual dissemination of sexual images.)

¶ 13 A. Nonconsensual Dissemination of Sexual Images

¶ 14 Defendant contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt of nonconsensual dissemination of sexual images. We agree.

¶ 15 Under section 11-23.5(b) of the Criminal Code of 2012 (Code) (720 ILCS 5/11-23.5(b) (West 2018)):

> "(b) A person commits non-consensual dissemination of sexual images when he or she:
>
> (1) intentionally disseminates an image of another person:
>
> (A) who is at least 18 years of age; and
>
> (B) who is identifiable from the image itself or information displayed in connection with the image; and
>
> (C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and

(2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and

(3) knows or should have known that the person in the image has not consented to the dissemination."

¶ 16 Defendant argues that the State failed to prove beyond a reasonable doubt that (1) he "disseminate[d]" the sexual images (*id.* § 11-23.5(b)(1)) because there was no evidence that he sent the images to another person or otherwise distributed them and (2) J.S. was "identifiable from the image itself or information displayed in connection with the image" because there was nothing about the images that would allow anyone to identify her (*id.* § 11-23.5(b)(1)(B)).

¶ 17 Defendant's argument presents both an issue of statutory construction, specifically the meaning of "dissemination," and a challenge to the sufficiency of the evidence. We review *de novo* questions of statutory construction. *People v. Robinson*, 172 Ill. 2d 452, 457 (1996). The court's primary objective in construing a statute is to ascertain and give effect to the legislature's intent. *People v. Austin*, 2019 IL 123910, ¶ 15. The best indication of the legislature's intent is the statute's language. *Id.* "In the absence of a statutory definition, courts presume that the words used in a statute have their ordinary and popularly understood meanings." *Id.* ¶ 115."When reviewing the sufficiency of the evidence, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Bishop*, 218 Ill. 2d 232, 249 (2006) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 18 We first address the element of dissemination. Defendant argues that, to prove dissemination, the State was required to prove that defendant either sent the images to another

person or otherwise distributed them. On the other hand, the State maintains that defendant disseminated the images when he distributed them to himself.

¶ 19 The seminal (and only) case addressing section 11-23.5(b) of the Code, and the meaning of "disseminate," is *Austin*. *Austin*, 2019 IL 123910, ¶¶ 114-15. In *Austin*, the defendant shared an iCloud account with her fiancé Matthew. *Id.* ¶ 3. As a result, when Matthew received text messages, they also appeared on the defendant's iPad. *Id.* The victim, a neighbor of Matthew, sent naked pictures of herself to him. *Id.* ¶ 4. Although the victim knew that the defendant could, at one time, see Matthew's text messages, she thought that the shared account was deactivated when she sent the pictures, which were solely intended for Matthew. *Id.* ¶ 7. When the defendant and Matthew broke up, the defendant wrote a letter to Matthew's cousin detailing her version of the events that precipitated the breakup, attaching four naked pictures of the victim to the letter. *Id.* ¶¶ 5, 6. When Matthew learned about the letter, he notified the police. *Id.* ¶ 7. The defendant was charged with violating section 11-23.5(b) of the Code. *Id.* ¶ 8. The defendant moved to dismiss the charge, asserting, among other things, that the statute was facially unconstitutional because it was a content-based restriction of speech that was not narrowly tailored to serve a compelling government interest. *Id.* The trial court agreed. *Id.* ¶ 9. The State appealed to the supreme court. *Id.* ¶ 10.

¶ 20 On appeal, one of the defendant's arguments was that section 11-23.5(b) was unconstitutionally vague because the term "disseminate" was not defined in the statute, in that it did not expressly state to whom, when, where, or how to accomplish dissemination. *Id.* ¶ 114. The court rejected this contention, stating:

> "In the absence of a statutory definition, courts presume that the words used in a statute have their ordinary and popularly understood meanings. [Citation.] The term

> 'disseminate' is defined as 'to foster general knowledge of.' [Citation.] In addition, its synonyms include 'BROADCAST,' 'PUBLICIZE,' and 'SPREAD.' [Citation.] The same dictionary defines 'spread' as 'to make more widely known.' [Citation.] In this case, defendant sent a letter to at least one other person that included the private sexual images of the victim without her consent. That conduct unquestionably 'foster[ed] general knowledge of' the victim's image and made it 'more widely known.' Therefore, defendant's conduct clearly fell within the statutory proscription, and she cannot claim that it was vague for lack of notice as to her circumstances." *Id.* ¶ 115.

¶ 21 Given the statute's plain language, as construed by our supreme court in *Austin*, defendant did not disseminate the images when he texted them to his own cell phone. To be sure, as the trial court found, defendant obtained the images when J.S. handed him her phone, and he accessed the photo roll. We note that, for purposes of the statute, it does not matter whether defendant had J.S.'s consent to obtain the images. All that is required is that he "obtain[ed] the image under circumstances in which a reasonable person would know or understand that the image was to remain private" (720 ILCS 5/11-23.5(b)(2) (West 2018)). The State must also prove that the defendant "kn[ew] or should have known that the person in the image has not consented to the dissemination." *Id.* § 11-23.5(b)(3). Here, there is no dispute that J.S. did not consent to defendant's distribution of the images, whether to himself or another. Rather, the issue is whether defendant, in texting the images to himself, indeed "disseminated" the images, that is, whether he " 'foster[ed] general knowledge of' " the images or made them " 'more widely known.' " *Austin*, 2019 IL 123910, ¶ 115 (quoting Webster's Third New International Dictionary 656, 2208 (1993)). He did not.

¶ 22 Unlike in *Austin*, where the defendant sent the images "to at least one other person" (*id.*), defendant's act here of sending the images to himself—images of which he already had knowledge—did not foster general knowledge of the images or make them more widely known, because he did not send them to anyone else. Nor did he " 'BROADCAST' " or " 'PUBLICIZE' " them. *Id.* (quoting Websters Third New International Dictionary 656 (1993)). The trial court stated that "defendant violated the statute by taking these pictures. He knew he was taking them from [J.S.'s] phone. He knew when he sent them to himself that he was going to have them." The court's focus seemed to be on defendant's "taking" of the images. While we certainly do not condone defendant's actions, his "taking" of the images is not an offense under the statute.

¶ 23 The State "rejects defendant's position that, to be found guilty, the image had to be distributed to 'another person.' " The State argues that images can be disseminated without the involvement of another person; for instance, the images can be posted on a website, blog, or social media account. We do not dispute that the statute could be violated in such a manner. Indeed, as noted in *Austin*: " 'Dedicated "revenge porn" sites and other forums openly solicit private intimate images and expose them to millions of viewers, while allowing the posters themselves to hide in the shadows.' " *Id.* ¶ 19. But, even though a "poster" is not directly sharing the images with another person in that situation, the poster is nevertheless indirectly "expos[ing] [the images] to millions of viewers" (*id.*) and thereby making them " 'more widely known.' " *Id.* ¶ 115 (quoting Webster's Third New International Dictionary 2208 (1993)). Here, defendant did not expose the images to anyone, indirectly or directly.

¶ 24 To the extent there is any ambiguity in the meaning of the term "disseminate"—more specifically, whether dissemination required that defendant distribute the images to another person—we may turn to other aids of statutory construction, such as the doctrine of *in pari materia*,

to ascertain the meaning of a provision. *People v. Taylor*, 221 Ill. 2d 157, 163 (2006). Under the doctrine of *in pari materia*, two statutes dealing with the same subject will be considered relative to one another to give them harmonious effect. *Id.* at 161 n.1.

¶ 25 As defendant points out, after the legislature passed section 11-23.5(b) of the Code, it passed a civil statute, entitled "Civil Remedies for Nonconsensual Dissemination of Private Sexual Images Act" (Civil Remedies Act) (Pub. Act 101-556 (eff. Jan. 1, 2020) (adding 740 ILCS 190/1 *et seq.*))), which provides, in relevant part, as follows:

> "(a) Except as otherwise provided in Section 15, if a depicted individual is identifiable to a reasonable person and suffers harm from the intentional dissemination or threatened dissemination by a person over the age of 18 of a private sexual image without the depicted individual's consent, the depicted individual has a cause of action against the person if the person knew:
>
> (1) the depicted individual did not consent to the dissemination;
>
> (2) the image was a private sexual image; and
>
> (3) the depicted individual was identifiable.
>
> (b) The following conduct by a depicted individual does not establish by itself that the individual consented to the nonconsensual dissemination of a private sexual image that is the subject of an action under this Act or that the individual lacked a reasonable expectation of privacy:
>
> (1) consent to creation of the image; or
>
> (2) previous consensual disclosure of the image." 740 ILCS 190/10(a), (b) (West 2020).

Unlike section 11-23.5(b) of the Code, which does not define "disseminate," the Civil Remedies Act expressly provides: " 'Dissemination' or 'disseminate' means publication or *distribution to another person* with intent to disclose." (Emphasis added.) 740 ILCS 190/5(4) (West 2020). This definition clarifies that dissemination requires either "publication" of the images—for instance, by posting on social media—or "distribution to another person." *Id.* Defendant did neither.

¶ 26 The State's brief does not address the Civil Remedies Act. Instead, the State simply asserts that " 'another person' includes the person(s) depicted within the distributed image(s), and not 'another person' other than defendant (the disseminator)." Thus, according to the State, when defendant texted the images to himself, he disseminated J.S.'s images to "another person" other than J.S. The State provides no support for this interpretation. In any event, the language of the Civil Remedies Act refutes it. The Civil Remedies Act provides for a cause of action for harm suffered by the "dissemination by *a person* over the age of 18" (emphasis added) (*id.* § 10(a)) and defines dissemination as "publication or distribution to *another* person" (emphasis added) (*id.* § 5(4)). Thus, the disseminator, "a person," must publish or distribute to "another person" other than the disseminator.

¶ 27 The State also purports to support its position by citing two out-of-state cases—*People v. Iniguez*, 202 Cal. Rptr. 3d 237 (App. Dep't Super. Ct. 2016), and *Morehead v. Commonwealth*, 784 S.E.2d 301 (Va. Ct. App. 2016)—contending that they are "[i]nstructive." Unfortunately, the State does little more than briefly summarize these cases with no explanation of how they inform our decision here. In any event, we do not find either case persuasive.

¶ 28 The State relies on *Iniguez* for the following statement made by the California court: "Completely absent from the legislative history is any indication that the statute should be limited to situations where a person delivered or transferred an image to another specific person." *Iniguez*,

202 Cal. Rptr. 3d at 245. However, when considered in context, the statement provides no support for the State's position that, here, defendant need not have disseminated the images to another person to be found guilty. In *Iniguez*, the defendant was charged with " 'distribut[ing]' " a private image, based on his act of posting a topless picture of the victim on her employer's Facebook page. *Id.* at 240-42 (quoting Cal. Penal Code § 647(j)(4)(A) (West 2014)). The defendant argued that the court should (1) adopt the dictionary definition of "distributes," defining it to mean " '[t]o deliver,' " or (2) use the meaning contained in the federal and state statutes barring distribution of child pornography—the federal statute requiring transfer of the pornography to another person and the state statutes requiring transfer of possession. *Id.* at 245 (quoting Black's Law Dictionary 543 (9th ed. 2009)). According to the defendant, because "posting an image on a social media site such as Facebook does not effectuate delivery of the image or transfer to a specific person," he could not be found guilty of distributing a private image. *Id.* The reviewing court disagreed. The court found no indication in the statutory language that the term " 'distribute[s]' was intended to have a technical legal meaning, or to mean anything other than its commonly used and known definition of 'to give or deliver (something) to people.' " *Id.* (quoting Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/distribute (last visited Mar. 4, 2016) [https://perma.cc/3KAS-J3VA]). The court further found that, to the extent the term was ambiguous, legislative history was "replete with indications that posting images on public Web sites was *precisely* one of the evils the statute sought to remedy." (Emphasis in original.) *Id.* The court concluded: "Completely absent from the legislative history is any indication that the statute should be limited to situations where a person delivered or transferred an image to another specific person." *Id.* Indeed, *Iniguez* states that the image need not be transferred to another specific person. However, this statement was in the context of determining whether a posting on Facebook, which

is not a transfer to a specific person, was otherwise sufficient to establish that the defendant distributed the image. The analysis in *Iniguez* assumed that distribution under the California statute entailed, at a minimum, that the defendant shared the image with a third party; the question was whether posting to a website was sufficient. Here, by contrast, the very issue is whether (under Illinois law) dissemination requires sharing with a third party.

¶ 29 In *Morehead*, the defendant posted sexual images of his wife, from whom he was separated, on a website called "myex.com" and posted links to the images on his wife's employer's Facebook page. *Morehead*, 784 S.E.2d at 302. The defendant e-mailed and texted his wife, letting her know what he had done. *Id.* Two of the e-mails included screenshots of the images such that she did not have to use the link to see them. *Id.* The defendant was charged under a Virginia statute and found guilty of " 'disseminat[ing]' " the images. *Id.* at 303 (quoting Va. Code Ann. § 18.2-386.2(A) (West 2014)). The sole issue on appeal was whether venue was proper in James City County, where the wife received the e-mails and viewed the website. The statute under which the defendant was charged contained a separate venue provision, which provided that venue was proper where the criminal act occurred " 'or' where the images were 'produced, reproduced, found, stored, received, or possessed in violation of the statute.' " *Id.* (quoting Va. Code Ann. § 18.2-386.2(B) (West 2014)). The trial court found that, because the wife received the e-mails while in James City County, venue in that county was proper. The defendant argued that "emails to one person, specifically the subject of the images, do not constitute dissemination in violation of the statute because it is not a widespread communication." *Id.* The court stated that the defendant's "narrow argument *** belies the evidence produced at trial. The malicious dissemination in violation of the statute occurred when [the defendant] posted the images on the website for others to see; thus, completing the crime." *Id.* The court went on to reject the defendant's argument that, based on the

use of the word " received' " in the venue provision of the statute, the State was required to prove receipt of the images as an element of the offense. *Id.* at 303-04. The court stated that "[the venue provision] merely directs where to prosecute the offense, and it does not create additional crimes. Thus, receiving the images is not a crime; what is a violation of the statute is the crime of the unauthorized, malicious, dissemination of the images." *Id.* at 304.

¶ 30 As noted, the State does not explain why it believes *Morehead* is "instructive." We presume that the State relies on *Morehead* to establish that defendant's text containing the images did not need to be received by another person to constitute dissemination. *Morehead*, however, assumed that Virginia law required that the defendant shared the images with a third party. We do not make that assumption for Illinois law; rather, the very issue here is whether defendant's text needed to be sent to another person.

¶ 31 Based on the foregoing, we hold that the evidence was insufficient to establish that defendant disseminated the sexual images.

¶ 32 We next consider defendant's argument that the evidence was insufficient to prove beyond a reasonable doubt that J.S. was "identifiable." 720 ILCS 5/11-23.5(b)(1)(B) (West 2018).

¶ 33 The trial court found that J.S. was identifiable to defendant because "[s]he was sitting in front of him. She gave him her phone. The pictures were on her photo roll. And she had her red nails that day and they were the red nails in the photograph, so he knew who it was. The defendant knew who it was." However, that is not what the statute requires. The statute requires that the person in the image be "identifiable from the image itself or information displayed in connection with the image." *Id.*

¶ 34 Here, J.S. was not identifiable from the image itself. The trial court specifically noted as much stating: "it could be any female and there is no way to identify the person with red nails or

anything from those." That determination should have ended the analysis. However, the court erroneously concluded that J.S. was identifiable because defendant knew it was her. In making this determination, the court relied on the fact that J.S. was standing in front of defendant when she handed him her cell phone, that the images were on J.S.'s cell phone, and that J.S. was wearing nail polish similar to that seen in the images. This reasoning goes beyond the language of the statute. While these additional facts may have suggested to defendant that J.S. was the person depicted in the images, the images themselves were anonymous. As the trial court noted, "it could be any female." Indeed, simply because the images were on J.S.'s cell phone does not mean that the images depicted J.S. Thus, the evidence was insufficient to prove beyond a reasonable doubt that J.S. was "identifiable from the image itself." *Id.*

¶ 35 We reject the State's argument (raised for the first time on appeal) that J.S. was identifiable based on "information displayed in connection with the image," specifically (1) "her personal phone number *** connected to the photos with the outgoing text message" and (2) the "metadata embedded within [the] photos." According to the State, a Google search of J.S.'s phone number would reveal her name, age, relatives, current and past addresses, and e-mail address. Metadata would reveal "coordinates of where the picture was taken, along with the date and camera settings." However, even if a Google search of the phone number revealed that the images were connected to J.S.'s cell phone or metadata revealed where the image was taken, as already noted, this would not prove beyond a reasonable doubt that the person in the image is identifiable as J.S. Given that "the image does not contain sufficient information to identify the person depicted," the statute does not apply. See *Austin*, 2019 IL 123910, ¶ 80.

¶ 36 Accordingly, we hold that the evidence was insufficient to prove defendant guilty beyond a reasonable doubt of nonconsensual dissemination of sexual images.

¶ 37 B. Conviction of the Lesser Included Offense

¶ 38 Rule 615(b)(3) empowers this court to "reduce the degree of the offense of which the appellant was convicted." Ill. S. Ct. R. 615(b)(3) (eff. Jan. 1, 1967). Our authority under this rule is "broad" and applies "even when the lesser offense is not charged and the State did not request an instruction on the lesser offense at trial." *People v. Kennebrew*, 2013 IL 113998, ¶ 25. In this case, given the unique facts and the parties' concession that defendant is guilty of the lesser-included offense, we exercise our authority under Rule 615(b)(3). See *People v. Guerrero*, 2018 IL App (2d) 160920, ¶ 71.

¶ 39 Section 2-9(a) of the Code (720 ILCS 5/2-9(a) (West 2018)) defines a lesser included offense as one that "[i]s established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." Imposition of an uncharged lesser included offense is proper if "the defendant had sufficient notice of the uncharged offense." *Kennebrew*, 2013 IL 113998, ¶ 53. " '[T]he lesser offense need not be a necessary part of the greater offense, but the facts alleged in the charging instrument must contain a broad foundation or main outline of the lesser offense.' " *People v. Figuero*, 2020 IL App (2d) 160650, ¶ 78 (quoting *Kennebrew*, 2013 IL 113998, ¶ 30). " 'The indictment need not explicitly state all of the elements of the lesser offense as long as any missing element can be reasonably inferred from the indictment allegations.' " *Id.* (quoting *Kennebrew*, 2013 IL 113998, ¶ 30).

¶ 40 The indictment charged nonconsensual dissemination of sexual images (720 ILCS 5/11-23.5(b) (West 2018)) "in that defendant intentionally disseminated 5 images of a female vagina, of another person, being J.S., who is at least 18 years of age and identifiable from information displayed in connection with the image, and whose intimate parts were exposed in whole in the

image, and defendant knew that J.S. did not consent to the dissemination." Under section 26-1(a)(1) of the Code, "A person commits disorderly conduct when he or she knowingly: (1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace[.]" 720 ILCS 5/26-1(a)(1) (West 2018).

¶ 41 Here, the act of intentional dissemination as alleged in the indictment was sufficient to establish the element of an "act" done "an unreasonable manner" for purposes of disorderly conduct. *Id.* The remaining elements—alarm or disturb another and to provoke a breach of the peace—have also been established by the evidence. See *People v. Kolton*, 219 Ill. 2d 353 (2006) (holding that, although the indictment alleged predatory criminal sexual assault of a child based on the defendant's act of placing his finger into the victim's vagina, it could be reasonably inferred that the defendant acted for sexual gratification or arousal, as required for the uncharged offense of aggravated criminal sexual abuse). Based on the foregoing, and in light of the parties' concessions, we hold that defendant had sufficient notice of the uncharged offense of disorderly conduct.

¶ 42 We next address the sufficiency of the evidence as to that offense. We find instructive *People v. Pence*, 2018 IL App (2d) 151102, and *People v. Singer*, 2021 IL App (2d) 200314.

¶ 43 In *Pence*, we considered whether the defendant was proved guilty beyond a reasonable doubt of disorderly conduct, based on his act of sending a Facebook message to 16-year-old D.K., saying " 'Hey. Long time no talk. How have you been?' " *Pence*, 2018 IL App (2d) 151102, ¶ 3. There was a history between D.K. and the defendant, which involved inappropriate sexual activity between the then-19-year-old defendant and the then-12-year-old D.K., and the defendant was ultimately convicted of traveling to meet a minor and grooming. *Id.* ¶¶ 4, 18. When D.K. received the Facebook message while at school, she was " 'scared' " and immediately contacted her mom.

Id. ¶ 5. D.K. and her mom met with police and requested extra police presence at their home. *Id.* ¶ 9. The defendant argued that his " 'innocuous greeting' " could not constitute disorderly conduct. *Id.* ¶ 18. In considering the sufficiency of the evidence, we noted:

> "The purpose of the disorderly-conduct statute is to protect against ' "an invasion of the right of others not to be molested or harassed, either mentally or physically, without justification." ' [Citation.] The types of conduct included within the scope of the offense of disorderly conduct ' "almost defy definition." ' [Citation.] 'As a highly fact-specific inquiry, it "embraces a wide variety of conduct serving to destroy or menace the public order and tranquility." ' [Citation.] '[C]ulpability *** revolves not only around the type of conduct, but is equally dependent upon the surrounding circumstances.' [Citation.] 'Generally, to breach the peace, a defendant's conduct must threaten another or have an effect on the surrounding crowd.' [Citation.] 'However, a breach of the peace can occur without overt threats or profane and abusive language.' [Citation.] In addition, it 'need not occur in public.' " *Id.* ¶ 17.

We held that, given the context, "a rational trier of fact could have found that [the] defendant's attempt to reconnect with his victim was unreasonable and threatening to D.K. and [her mom]. Without a doubt, [the] defendant's conduct invaded the right of D.K. and [her mom] to not be mentally harassed." *Id.* ¶ 18.

¶ 44 In *Singer*, the defendant, a youth pastor, sent sexually inappropriate text messages to J.S., a minor. *Singer*, 2021 IL App (2d) 200314, ¶¶ 17-18. When J.S.'s father, D.S., learned of the messages, he contacted D.S. to discuss the texts with him but took no further action. *Id.* ¶ 23. When D.S. later learned that the defendant had been fired from the church, D.S. met with the pastor and disclosed the text messages to him. *Id.* ¶ 24. The defendant argued the State failed to prove that

his conduct provoked a breach of the peace because "he did not threaten, molest, or harass anyone and *** his conduct did not menace public order or tranquility." *Id.* ¶ 51. We disagreed. Relying on *Pence*, we noted that a breach of the peace can occur without overt threats and that it need not occur in public. *Id.* We emphasized that "[c]ulpability is equally dependent upon the type of conduct and the surrounding circumstances." *Id.* We noted that, in *People v. Albert*, 243 Ill. App. 3d 23, 27 (1993), the defendant was convicted of disorderly conduct based on her act of screaming at 2 a.m., which woke and disturbed one neighbor, and in *People v. Ellis*, 141 Ill. App. 3d 632, 633 (1986), the defendant was convicted of disorderly conduct based on his act of tearing down Christmas decorations outside a store while the two store owners watched and then called the police. We concluded:

> "[The] defendant's texts to J.S. were inappropriately sexual and threatened J.S. because they were grooming in nature. Looking at the surrounding circumstances, defendant was J.S.'s spiritual mentor and was in a position of trust, not only to J.S. but also to his entire family. Those texts caused D.S. to confront defendant verbally and then to involve the larger church community." *Singer*, 2021 IL App (2d) 200314, ¶ 52.

¶ 45 As noted, at oral argument the parties conceded that the evidence was sufficient to prove defendant's guilt beyond a reasonable doubt of disorderly conduct. Indeed, defense counsel stated that the elements of disorderly conduct were "absolutely" established. We agree. As in *Pence*, defendant invaded J.S.'s right not to be mentally harassed. J.S. testified that, when defendant handed the phone back to her and she saw the outgoing text, she "freaked out" due to the personal nature of the images attached to the outgoing text. She quickly wrote down the phone number to which the images had been sent and quickly attempted to stop the outgoing text. The store manager noticed that J.S. "was panicked about something" and asked her what was wrong. Defendant

himself admitted that what he did was "horrible." As in *Singer*, defendant's actions impacted others. When J.S. got home that evening, she had to tell her dad and her stepmom what had happened. They investigated the phone number J.S. wrote on the Post-It note and discovered that it belonged to defendant. They immediately called the police and then met with them over several days.

¶ 46 As our supreme court noted in *Kennebrew*, a defendant "has no right to an acquittal when the evidence, while insufficient to establish the greater offense, is sufficient to establish the lesser offense. To do otherwise would be unjust." *Kennebrew*, 2013 IL 113998, ¶ 43. Defendant acknowledged as much when he stated that what he did was "horrible" and "that he should face consequences." Accordingly, given our authority under Rule 615(b)(3), the parties' concessions, the compelling evidence that defendant was guilty of disorderly conduct, and the interests of justice, we reduce defendant's conviction of nonconsensual dissemination of sexual images to a conviction of disorderly conduct. We remand for sentencing on that offense.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we reduce defendant's conviction of nonconsensual dissemination of sexual images to a conviction of disorderly conduct. We remand the matter to the circuit court of Kane County for sentencing.

¶ 49 Judgment modified.

¶ 50 Cause remanded with directions.

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and c orrect. On February 15, 2023, the foregoing **Appellant's Brief and Appendix** was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following:

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