No. 128438

IN THE SUPREME COURT OF ILLINOIS

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

BRIEF FOR DEFENDANT-APPELLEE JUSTIN DEVINE

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TABLE OF POINTS AND AUTHORITIES

Statutory Authority

Case Law

TABLE OF CONTENTS

ISSUES PRESENTED FOR REVIEW

1) Whether the trial court erred in finding that the State had proven the element of dissemination beyond a reasonable doubt when the Defendant uploaded private images to his cell phone, but did not foster a "general knowledge" of the pictures by distributing them to any other person;

2) Whether the trial court erred in finding that the State had proven that the victim was identifiable solely from an image of her genitals without any other other identifying information

ARGUMENT

I. 720. I.L.C.S. § 5/11-23.5(b) Requires That The Nonconsensual Dissemination of Sex Image Both Be Disseminated And That Victim Be Identifiable From The Image Itself

The issues before this Court are relatively straightforward. 720 I.L.C.S. §5/11-23.5(b) states:

A person commits non-consensual 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 I.L.C.S. §5/11-23.5(b)

As in the Appellate Court, Defendant concedes here that the State met it's burden as to element 1(A) and 1(C). The Defendant also conceded that the State has met it's burden as to elements 2 and 3. However, as ruled by the Second District Appellate Court, the State has not met it's burden to show that the images in question were ever disseminated, as required by statute, nor that the victim was identifiable from the image itself or information displayed in connection with the image as required by 1(B).

SUMMARY OF THE APPELLATE COURT'S DECISION

Although the Appellate Court's decision is included in the State's appendix, the Defendant would like to highlight the relevant parts of that Court's decision. The Appellate Court overruled the trial court on two of it's most basic findings, 1) that the Defendant had disseminated images in violation of 720 I.L.C.S. §5/11-23.5(b); and 2) that J.S. was identifiable from those images based solely upon the nail polish on her fingers in the image. The Appellate Court relied extensively on this Court's decision in People v. Austin, 2019 IL 123910 (2019), noting that it was the seminal (and indeed only)

case addressing section 11-23.5(b) of the Code, and the meaning of "disseminate" as contemplated by the statute. In discussing the meaning of the word disseminate as used under 720 I.L.C.S. §5/11-23.5(b), the Appellate Court stated:

> 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..... 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.....Here, defendant did not expose the images to anyone, indirectly or directly.

Appendix, p. 15.

The Appellate Court further went on to dispel any ambiguity as to the meaning of "disseminate". Applying the doctrine of in pari materia, the Appellate Court examined the use of "disseminate" as employed in a companion statute, the Civil Remedies for Nonconsensual Dissemination of Private Sexual Images Act, 740 ILCS 190/1 et seq. which expressly provides: " 'Dissemination' or 'disseminate' means publication or distribution to another person with intent to disclose." As stated by the Appellate Court:

> This definition clarifies that dissemination requires either "publication" of the images—for instance, by posting on social media—or "distribution to another person".... Defendant did neither.

Appendix, p. 17.

The Appellate Court went on to discuss the requirement that the images be identifiable from the image or information displayed in connection with the image. As noted by the Court:

> 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."

Appendix, p. 20-21.

Last, the Appellate Court addressed an argument raised by the State for the first time on appeal, ie. that information connected with the photos (that being the cell phone number and the metadata embedded in the phone) was sufficient to bring the Defendant's actions within the purview of the statute. The Appellate Court held:

> 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, 440 Ill.Dec. 669, 155 N.E.3d 439.

Appendix, p. 21.

II. This Court's Decision In People v. Austin Holds That Dissemination Under 720 I.L.C.S. § 5/11-23.5(b) Requires The Image To Be Publicized Or Spread To Foster General Knowledge Of The Image

As noted by the Appellate Court, the seminal case addressing the application of 720 I.L.C.S. § 5/11-23.5(b) is this Court's decision in People v. Austin, 2019 IL 123910 (Ill. 2019). In that case, the Defendant was accused of Nonconsensual Dissemination of Sex Image under the instant statute. The Defendant had obtained explicit images of another woman who was having an affair with her fiancé and had distributed those images along with a letter detailing the affair to her fiancé's friends and family. Austin, 2019 IL 123910, ¶ 6. The Defendant challenged the constitutionality of the statute and the Circuit Court of McHenry County dismissed the charge. In ruling the statute constitutional, this Court specifically discussed the purpose behind the statute and what it was designed to prevent. As stated by the Court:

Section 11-23.5 addresses the problem of nonconsensual dissemination of private sexual images, which is colloquially referred to as "revenge porn." Generally, the crime involves images originally obtained without consent, such as by use of hidden cameras or victim coercion, and images originally obtained with consent, usually within the context of a private or confidential relationship. Once obtained, these images are subsequently distributed without consent.

Austin, 2019 IL 123910, ¶ 17 (emphasis added).

The Court went on to state:

"In essence, the crux of the definition of revenge porn lies in the fact that the victim did not consent to its distribution—though the victim may have consented to its recording or

may have taken the photo or video themselves. As a result, the rise of revenge porn has (unsurprisingly) gone hand-in-hand with the increasing use of social media and the Internet, on which people constantly exchange ideas and images without asking permission from the originator"

Austin, 2019 IL 123910, ¶ 18 (citing 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)).

The Defendant in Austin contended that section 11-23.5 was facially invalid as unconstitutionally vague because the term "disseminate" is not defined in the statute and does not expressly state to whom, when, where, or how the dissemination must be accomplished. This Court found that contention without merit. In doing so, the Court held:

[C]ourts presume that the words used in a statute have their ordinary and popularly understood meanings. The term "disseminate" is defined as to foster general knowledge of, broadcast, publicize, spread or make more widely known.

Austin, 2019 IL 123910, ¶ 115 (citing, Webster's Third New International Dictionary 656 (1993)). In Austin, this Court found that the Defendant's act in sending a letter to at least one other person that included the private sexual images of the victim without her consent unquestionably fostered general knowledge of the victim's image, made it "more widely known" and thereby fell within the statute. Id. Such an interpretation is consistent with the purpose of the statute, ie. combatting "revenge porn". As the Austin Court stated, "It is also proper for the court to consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another".Austin, 2019 IL 123910, ¶ 15. This Court went on to discuss the need for dissemination of the image.

> The manner of the image's acquisition and publication, and not its content, is thus crucial to the illegality of its dissemination…….Applying these principles to the instant case, we have no difficulty in concluding that the nonconsensual dissemination of the victim's private sexual images was not an issue of public concern. Matthew was telling his and defendant's families and friends that it was defendant's fault that their relationship ended. Defendant responded with a letter, in which she explained her version of events. To this letter defendant attached the victim's private sexual images along with text messages between the victim and Matthew. The victim's private sexual images, in context with her and Matthew's text messages, were never in the public domain. They do not relate to any broad issue of interest to society at large. The message they convey is not a matter of public import. Cf. id. (holding that messages on protest signs at a private funeral related to broad issues of interest to society at large and were matters of public import). Rather, the public has no legitimate interest in the private sexual activities of the victim or in the embarrassing facts revealed about her life. See, United States v. Petrovic, 701 F.3d 849, 856 (8th Cir. 2012) (nonconsensual dissemination of a victim's private nude photos "may be proscribed consistent with the First Amendment").
>
> Austin, 2019 IL 123910, ¶ , 56.

Central to the Appellate Court's decision, and inherent in this Court's examination of the facts in Austin, was a requirement that the sexual images be published or otherwise distributed into the public domain, as the purpose of the statute is to prevent the embarrassment and humiliation accompanying the nonconsensual public dissemination of sexual images.

As well, as properly determined by the Second District, further support for the requirement of publication to another person comes from the Illinois legislature in a related statute. After it passed 720 I.L.C.S. § 5/11-23.5(b), the Illinois legislature also passed a civil remedies statute related to that criminal offense, The Civil Remedies for Nonconsensual Dissemination of Private Sexual Images Act, 740 I.L.C.S. §190/10. That statute states:

> 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.

740 I.L.C.S. §190/10(a).

Importantly, the definitional section of that statute defines dissemination:

4) "Dissemination" or "disseminate" means publication or distribution to another person with intent to disclose.

740 I.L.C.S. § 190/5(4).

Therefore, it is clear that both this Court in Austin and the legislature contemplated that a violation of 720 I.L.C.S. § 5/11-23.5(b) requires that a sexual image be published or otherwise distributed to another person or persons in order to foster general knowledge of the victim's image.

Applying the definition of dissemination as set forth both in Austin as well as the civil analog of the criminal statute at bar, it is clear that the State failed to produce any evidence that Mr. Devine either sent any images to another person or otherwise distributed those images to another person or persons in order to foster general knowledge of the victim's image. The State's own witness, Sergeant Bruening, testified that there was no evidence that any of the five images Mr. Devine texted to his phone were ever sent to another person or otherwise distributed in any manner. Cross Examination of Sgt. Bruning, p. 86, 13-24, p. 87, l. 1-5.

The trial court's colloquy in regards to this element reveals the flaw in Judge Kliment's decision to find the State met it's burden of proof on that element of the offense. As stated by the trial court:

The other issue is dissemination versus obtain. So he gets the phone, accesses the photo roll and he has these pictures. He obtained them. Then, he disseminated them by sending them to himself. The Austin case does not require the broad dissemination. It does not require that the general public has access to these. It makes them more widely known. He did not -- she did not give him permission….. 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. There is no evidence to that other than his word to the police. R. 116, l. 11-20, R. 117, L. 4-15.

Even a cursory reading of the Austin case, as well as the companion civil statute, makes it abundantly clear that a threshold requirement of the criminal statute is the publication or distribution of sexually explicit images so as to make those images known to other persons in order to foster general knowledge of the victim's image. In Austin, this Court was explicit in finding that the Defendant's act of sending a letter to at least one other person that included the private sexual images of the victim without her consent brought the Defendant's conduct within the purview of the statute. Austin, 2019 IL 123910, ¶ 115. The trial court's finding that Austin does not require that the general public has access to sexually explicit photos wholly ignores this Court's finding that the photos must be disseminated to at least one other person by the Defendant to come within the purview of the statute. To hold otherwise turns both the intent of the statute as well as the purpose of the statute (that being combating revenge porn) on it's head. While well

intentioned, the trial court's interpretation of Austin and the statute was clearly erroneous, as the Appellate Court determined. Without some evidence of publication or distribution of sexually explicit images so as to make those images known to other persons in order to foster general knowledge of the victim's image, the Defendant's conduct is not within the purview of the statute and the State did not meet it's burden of proving dissemination beyond a reasonable doubt.

It should be noted that much of the State's brief cites to anecdotal evidence regarding the intent of the Legislature in passing the Act and the dilatory effects the dissemination of private images may have upon the victim. While not deprecating the effect of doing so in other cases, the State's argument here fatally ignores two important points. First, every single case or anecdotal example invoked by the State involved the dissemination of private images to persons other than the defendant. For example, the State cites to the posting of explicit images involving female service members. However such images were posted online and were accessible to the general public. State's Brief, p. 17. In another example, the State cites to an anecdote where the victim's private image was posted publicly, along with her address, leading to her assault. State's Brief, p. 16. However, the crucial factor in both of those cases was again the public dissemination of the images. Such dissemination simply did not occur here.

Indeed, a number of courts in other states have cited Austin favorably since it's publication. Every one of those cases, referencing Austin as support, involved a factual situation where the accused shared the images with others, either by posting online or to another person through a messaging app. For example, in State v. Katz, 179 N.E.2d 431

(2022), the defendant recorded an explicit video involving his girlfriend engaged in an intimate act and subsequently sent a copy to a friend via a social media app. In referencing Austin, the Katz Court emphasized:

> With the click of a button, these images and videos can be directly disseminated to the victim's friends, family and employers or posted and tagged so they are particularly visible to members of a victim's own community…… the distribution of these images on the internet means they potentially reach thousands, even millions of strangers.

Katz, 179 N.E.2d at 449.

Clearly, the Katz Court anticipated that Indiana's dissemination statute requires dissemination of an explicit image to persons other than the defendant to fall within the purview of the statute. Indeed, counsel's research was unable to find even one other case that did not involve such dissemination or applied a similar statute in the manner suggested by the State here. See, State v. Vanburen, 210 Vt. 293, 214 A.3d 791 (2019) (explicit photos were published on a publicly accessible Facebook account); People v. Roebuck, 2021 WL 409157 (V.I. Super. 2021) (Defendant recorded indecent video and distributed it on social media app); State v. Casillas, 925 N.W. 2d 629 (2020) (explicit photo taken from private cloud account distributed to 44 other people and posted online).

Second, the State cites to these same anecdotes to argue that the harm caused by "revenge porn" causes distress, embarrassment and potential harm to the victim. However, the crucial element in all of the State's examples is the ability to identify the victim through an image disseminated publicly. As will be addressed further below, nothing in the images involved here were personally identifiable to J.S. The images

consisted solely of close up images of female genitalia with hands that had red fingernail polish. As noted by the Appellate Court:

> [T]he 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."

Appendix, p. 21.

The State's appeal to emotion threatens to expand the scope of the statute well beyond what the Legislature intended, leading to absurd results. For example, an individual could consent to the taking of an explicit image by a partner, but then later revoke that consent. If such an image were later disseminated to the public, such conduct would certainly fall within the purview of the statute and is indeed the very conduct the Legislature sought to prohibit. However, under the rubric set forth by the State, the mere possession of such an image, after consent is revoked, would violate the statute, regardless of whether the image was disseminated or not. Nothing in either the legislative history or interpretation of the Act even remotely suggests that the Legislature intended to bring such conduct within the statute.

III. The State Wholly Failed To Produce Any Evidence That The Images, In And Of Themselves, Were Capable Of Identifying The Victim, As No Identifying Information Was Contained In The Images

As found by the Appellate Court, it is also abundantly clear that the State failed to produce sufficient evidence that the images in question were sufficiently identifiable as being images of the victim. Austin is again instructive on this point. In discussing the

elements of 720 I.L.C.S. § 5/11-23.5(b), this Court stated:

Second, the person portrayed in the image must be over the age of 18 and identifiable from the image or information displayed in connection with the image. 720 ILCS 5/11-23.5(b)(1)(A)-(B) (West 2016). The statute is inapplicable if the image does not contain sufficient information to identify the person depicted.

Austin, 2019 IL 123910, ¶ 80

Therefore, a generic sexual image which does not contain sufficient information or identification as to the specific person in the image falls outside the purview of the statute. Such interpretation also finds support in the civil companion to the criminal statute. 790 I.L.C.S § 190/5 states:

(6) "Identifiable" means recognizable by a person other than the depicted individual:
(A) from a private sexual image itself; or
(B) from a private sexual image and identifying characteristic displayed in connection with the image.

(7) "Identifying characteristic" means information that may be used to identify a depicted individual.

740 ILCS 190/5(6), (7).

The purpose of this element is patent, as the statute was designed to prevent the harassment and embarrassment attendant on the nonconsensual publication of sexual images which can be connected to a specific person. Again, as stated in Austin, "[S]ection 11-23.5(b) burdens only speech that targets a specific person". Austin, 2019 IL 123910, ¶ 80. Therefore, it logically follows that, if nothing in the image identifies the specific person, the statute does not apply, as the sharing of private information and subsequent embarrassment which the statute seeks to prevent cannot occur if the individual depicted in the photo cannot be identified.

In the present case, the testimony elicited at trial demonstrates that the images in question were completely devoid of any information which would have made identification of the subject in the images possible. As testified to by J.S., the only reason she was able to identify the images as being of herself was because she took them. Direct Examination of J.S. p. 26, l. 22-24, p. 27, l. 1-5. As well, she testified that the only other identifying information in the images was that the fingernails were painted red and she recalled having that color on her nails when she took the photos. Id. Indeed, Sergeant McGrath testified that he had to take additional photos at the police station in order to correlate the identity of the victim with the images found on the cell phone. Sergeant McGrath testified, "the photographs that I took were of her hands and of her face and showing the correlation between the photos that I located on the phone and her hands and her nail polish, along with her face to show that the hands actually belong to her face." Direct Examination of Sgt. Bruening. 70, l. 1-8.

Even looking at the evidence presented in the light most favorable to the prosecution, it is apparent that nothing in the images would have allowed anyone other than the victim to identify her as the subject of those images. As a matter of fact, the trial court came to that very conclusion, stating "I'm going to start with the identification issue, and yes, 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". R. 115, l. 7-11. However, the trial court then veered away from both the statute and the Austin case, stating:

Statue does not have to say it is generally identifiable to anybody who might pick up the pictures. It just says – – well, I will get the exact language. Who is identifiable from the image itself or information displayed in connection with the image. Well, it was identifiable to Mr. Devine, the defendant in this case, so I believe the state has proved this element beyond a reasonable doubt. And I don't know that the statue calls for a broader interpretation of that identifiable element.

R. 116, l. 1-10.

In comparison to both the statute and the holding in Austin, the trial court's holding is without support, as the trial court completely misreads both. The trial court goes beyond the language of the statute (ie. "identifiable from the image itself or information displayed in connection with the image") and grafts on the Defendant's personal knowledge of J.S. in order to find that the images identified a specific person. Both the statute and the Court's holding in Austin require that the images themselves and/or information in those images be capable of identifying a specific individual. Nothing in either allows the trial court to interpret the images themselves with other information not contained therein in order to find that those images identified a specific individual. Nothing in the evidence presented by the State would allow a person receiving those images to determine the identity of the person in the images. Quite simply, as found by the trial court, it could be any female and there is no way to identify the person with red nails from the images and/or the information in those images. As stated in Austin, "The statute is inapplicable if the image does not contain sufficient information to identify the person depicted". Therefore, the State has failed to present sufficient evidence beyond a reasonable doubt to meet it's burden under 1(B) to prove who is identifiable from the image itself or information displayed in connection with the image.

In an attempt to blunt the plain reading of Austin, the State argues "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." States' Brief, p. 24. Such an argument is patently absurd. In essence, the State argues that any explicit image falls within the reach of the State, so long as someone (even the victim herself) is able to identify the person in the picture, even if no one else can. Such an interpretation would in essence bring ALL explicit photos within the reach of the statute, as at least one person (the person taking the picture) will always be able to identify the image. Nothing in the statute or case law would lead this Court to believe such a result was intended or even contemplated by the Legislature.

CONCLUSION

For all of the reasons set forth above, it is clear that the prosecution in this case wholly failed to provide proof beyond a reasonable doubt that the images in question were ever distributed by the Defendant or that those images contain sufficient information to identify the person in the photos, as required by 720 I.L.C.S. § 5/11-23.5(b). Therefore, the Defendant-Appellant respectfully requests this Honorable Court to uphold the decision of the Appellate Court finding the Defendant not guilty.

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 or words contained in 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 22 pages or words.

_____

John W. Gaffney

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 correct. On March 10, 2023, the foregoing Appellant's Brief was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following electronically through the Odyssey EFile system:

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