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.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

The People's opening brief established that the evidence was sufficient to convict defendant of nonconsensual dissemination of private sexual images. 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 the person depicted in the image is depicted engaged in a sexual act or with her intimate parts exposed and is "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 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 J.S.'s phone number. Therefore, the evidence was sufficient to prove that defendant knowingly disseminated J.S.'s private sexual images without her consent.

There is no merit to defendant's argument that he did not disseminate J.S.'s private sexual images within the meaning of Section 11-23.5 because, although he sent them to someone without J.S.'s consent, he sent them to himself rather than someone else. In support, he relies on select portions of

this Court's opinion in *Austin*, opinions of other state courts addressing other States' statutes, and an Illinois statute concerning civil remedies for nonconsensual dissemination of private sexual images. But that reliance is misplaced. Defendant's position is irreconcilable with the plain language and purpose of Section 11-23.5, which protected J.S.'s right to privacy in her private sexual images by giving her sole authority to consent to their distribution and imposing criminal sanctions on any distribution exceeding the scope of that consent. Nor is there any merit to defendant's argument that J.S. was not identifiable from her images and the information that accompanied them, notwithstanding her testimony and the trial court's factual findings to the contrary. Accordingly, this Court should reverse the judgment of the appellate court and affirm defendant's conviction because his proven violation of J.S.'s right to privacy by distributing her private sexual images to himself without her consent fell squarely under the prohibition in Section 11-23.5.

I. Section 11-23.5 Prohibits Sending an Individual's Private Sexual Images to Anyone Without Her Consent, Including to the Defendant Himself.

As the People explained in their opening brief, 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). This Court held in *People v. Austin* that, in this statutory context, "disseminate" means "'to spread.'" 2019 IL 123910, ¶ 115 (quoting

Webster's Third New International Dictionary 656, 2208 (1993) (defining "disseminate" and "spread," respectively)). The statute focuses solely on the nonconsensual nature of the act of spreading the victim's private sexual images, without regard to the identity of the recipient. 720 ILCS 5/11-23.5(b)(1), (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" without requiring that the images be disseminated to anyone in particular). Accordingly, when defendant knowingly sent the private sexual images from J.S.'s phone to himself without her consent, he engaged in the nonconsensual dissemination of those images.

A. This Court's reasoning in *Austin* supports the People's construction of the term "dissemination."

Although defendant argues that "dissemination" requires that a private sexual image be sent to a third party — someone other than the victim or the defendant — the language on which he relies instead supports the People's construction of that term. Defendant notes that this Court recognized that "'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.'" Def. Br. 8-9 (quoting *Austin*, 2019 IL 123910, ¶ 18). While true, this recognition that Section 11-23.5 is intended to prohibit a defendant from distributing a victim's private sexual images beyond the scope of her consent

does not suggest an intent to allow a defendant to distribute a victim's private sexual images beyond the scope of her consent so long as he does not also disseminate them to a third party. Certainly, there is no reason to believe that the General Assembly intended to privilege violations of a victim's privacy if committed in service of the defendant's own prurient interests rather than those of others.

Defendant's reliance on *Austin* also omits the complete definition of "disseminate" that is discussed in that case, focusing on the portion that means to "foster general knowledge of, broadcast, [or] publicize," *see* Def. Br. 11-12, while ignoring the portion — which controlled in *Austin* itself — that means "spread." 2019 IL 123910, ¶ 115. Based on this elided definition, defendant asserts that "the purpose of the statute is to prevent the embarrassment and humiliation accompanying the nonconsensual public dissemination of sexual images," Def. Br. 10 (emphasis in original), and that a defendant does not disseminate photos unless he spreads them to at least one person other than himself, *id.* at 12. Not so.

Austin did not concern dissemination that "fostered general knowledge" of the victim's private sexual images. In *Austin*, the defendant and her fiancé shared an iCloud account to which private sexual images that the victim had shared with the defendant's fiancé had been uploaded. 2019 IL 123910, ¶¶ 3-4. After their engagement ended, the defendant mailed a letter to a cousin of her former fiancé, providing her side of the story and

enclosing copies of the victim's private sexual images. *Id.* ¶ 6. This Court held that the defendant's conduct "clearly fell within the statutory proscription," even though the images were knowingly distributed to only a single person without the victim's consent. *Id.* ¶ 115. Thus, *Austin* demonstrates that public access to the image is unnecessary under Section 11-23.5.

To the extent that dissemination of a private sexual image may be described as making the image "public," it is in the sense that the private sexual image has been distributed to a person whom the victim did not intend to be privy to it, such that the person's acquisition of the images reflects an invasion of the victim's privacy and a violation of her right to protect that privacy by withholding consent. Accordingly, "the crux" of Section 11-23.4 is the victim's lack of consent to the distribution of her private sexual images to at least one person with whom it was shared. *Austin*, 2019 IL 123910, ¶ 18.

Contrary to defendant's argument, this Court's description of the offense in *Austin* as generally involving "'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,'" Def. Br. 8 (quoting *Austin*, 2019 IL 123910, ¶ 17), does not preclude prosecution for offenses like defendant's. Indeed, defendant indisputably "originally obtained [J.S.'s private sexual images] without consent." *Austin*, 2019 IL 123910, ¶ 17. The fact that J.S. created

the images herself (or consented to their creation) is irrelevant, for she did not consent to *defendant* gaining possession of them. In other words, the scope of the victim's consent marks the boundaries of the prohibition under Section 11-23.5. Many "revenge porn" cases begin with an initial, consensual dissemination of images from the victim to the defendant (where the victim created the images) or from the defendant to the victim (where the defendant created the images with the victim's consent), "usually within the context of a private or confidential relationship." *Austin*, 2019 IL 123910, ¶ 17. This initial dissemination is not criminal because it is consensual. Only if the partner subsequently distributes — or disseminates — those private sexual images "without consent" is a crime committed under Section 11-23.5. *See id.* And where, as here, the *initial* dissemination from victim to defendant is nonconsensual, that initial dissemination violates Section 11-23.5.

B. Other jurisdictions criminalize conduct like defendant's.

Defendant relies on *State v. Katz*, 179 N.E.2d 431 (Ind. 2022), and other out-of-state cases to argue that Section 11-23.5 allows a defendant to distribute a victim's private sexual images to himself without consent, but that reliance is misplaced. *See* Def. Br. 13-14. These foreign cases address First Amendment challenges to the constitutionality of other States' statutes, and not whether, as a matter of statutory interpretation, those statutes apply to conduct like defendant's. In addition, these foreign statutes contain

different statutory language, and so provide no insight into the General Assembly's intent when it enacted Section 11-23.5.

These distinctions aside, the only case that defendant discusses in any depth — *Katz* — does not suggest that the Indiana Supreme Court "anticipated that Indiana's dissemination statute requires dissemination of an explicit image to persons other than the defendant." *See* Def. Br. 14. To the contrary, the *Katz* Court noted that "[t]he invasion of privacy [under the Indiana dissemination statute] is similar to the invasion from nonconsensual pornography — that is, an individual should be able to control and consent to the situations in which their private areas are viewed and captured by another person." 179 N.E. 3d at 458. Relying on *Austin*, the *Katz* Court then explained that "[c]onsent is contextual, and the 'consent to create and send a photo or the consent to be photographed by another is one act of consent that cannot be equated with consenting to distribute that photo to others outside of the private relationship.'" *Id.* (quoting *Austin*, 2019 IL 123910, ¶ 21).

In short, the touchstone of the analysis of the Indiana statute in *Katz*, like that of Section 11-23.5 in *Austin*, was the scope of the victim's consent with respect to an image's distribution. If conduct such as defendant's were to fall outside the scope of the nonconsensual dissemination statute, then victims would lose the ability to control when their private areas are viewed and captured by another. It would be a crime for a defendant to photograph a victim's private areas without the victim's consent. And it would be a crime

for a defendant to send an existing image of the victim's private areas to another person without the victim's consent. But it would not be a crime for a defendant to send an existing image of the victim's private areas to himself without the victim's consent, even though doing so no less violates the victim's right to limit the distribution of her private sexual images. The reasoning of *Katz* suggests that the Indiana Supreme Court did not intend this result (though *Katz* did not address the question directly). More importantly, the Illinois General Assembly certainly did not intend this result (as made clear by the plain language and purpose of Section 11-23.5). *See, e.g.*, *People v. Davidson*, 2023 IL 127538, ¶ 18 (interpreting statute to avoid "absurd result" of allowing certain culpable offenders to escape prosecution).

In addition to inapposite foreign authority, defendant relies on the absence of authority from other jurisdictions, suggesting that Section 11-23.5 must not apply to his nonconsensual dissemination of J.S.'s private sexual image to himself because he "was unable to find even one other case" that did not involve dissemination to a third party. Def. Br. 14. But other jurisdictions have enacted laws to punish conduct nearly identical to defendant's. *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 May 10, 2023) (cellphone store employee in Utah charged with felony for sending naked

photos from customer's phone to his own cellphone); Jackie Callaway, *Store employees steal private pics during trade*, WFTS (Mar. 31, 2016), available at https://tinyurl.com/3ct7ywtj (last visited May 10, 2023) (same in Florida); Ben Weitzenkorn, *Verizon Wireless Staffers Busted for Stealing Nude Photos*, NBC News (Nov. 5, 2012), available at https://tinyurl.com/bdrsnu87 (last visited May 10, 2023) (same). Thus, defendant's suggestion that the supposed tolerance of his conduct in other jurisdictions indicates that the General Assembly intended to exclude such conduct from criminal liability under Section 11-23.5 is not only legally irrelevant as a matter of statutory interpretation but also factually incorrect.

C. "Revenge Porn" is about far more than publicly distributing private sexual images for revenge.

Defendant's assertion that Section 11-23.5 should not apply to his conduct because the provision's purpose is to "combat[ ] revenge porn," Def. Br. 12, rests on a misunderstanding of the nature of the offense prohibited by Section 11-23.5, for "[t]he colloquial term 'revenge porn' obscures the gist of the crime." *Austin*, 2019 IL 123910, ¶ 18. As this Court explained in *Austin*, "[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." *Id.* ¶ 99. In other words, the General Assembly sought to prevent at least two distinct harms suffered by victims whose private sexual images are disseminated without

their consent: (1) the emotional trauma of knowing that their private sexual images have been spread without their consent and that they are now powerless to prevent the images from further dissemination; and (2) the risk that they will be subjected to harassment, discrimination, or violence as a result of their private sexual images having been disseminated.

Defendant's conduct implicates these two harms even more than that of the defendant in *Austin*. The evidence established that J.S. suffered emotional trauma from knowing that someone had wrested control over the distribution of her private sexual images: when she saw that defendant had texted himself five photographs of her "private parts," she "freaked out." R20-21. And because the images were digital rather than physical, the risk that they could be spread more widely was far greater than the risk in *Austin* that the ex-fiance's cousin would create additional physical copies of the victim's photographs to further disseminate them. Moreover, because defendant knew J.S.'s identity and phone number, the risk that she would be harassed as a result of his actions was substantial. In other words, defendant caused precisely the harms that the General Assembly sought to prevent by engaging in the conduct that the General Assembly sought to deter: disseminating the private sexual images knowing that the victim did not consent. The General Assembly could not have intended to protect J.S. from these harms unless and until defendant engaged in a second or subsequent act of nonconsensual dissemination.

For similar reasons, defendant's argument that cases and examples offered in the People's opening brief to demonstrate the harms of nonconsensual dissemination of private sexual images "involved the dissemination of private images to persons other than the defendant," Def. Br. 13, misses the point: the loss of control over when and with whom one's private sexual images are shared may cause emotional harm, regardless of whether or how widely one's images are spread.

Consider, for example, the role nonconsensual pornography can play in domestic violence, with abusive partners using the threat of dissemination to keep their victims from leaving or reporting the abuse to law enforcement. Jack Simpson, *Revenge Porn: What is it and how widespread is the problem?*, The Independent (July 2, 2014), https://tinyurl.com/y8aze8bs (last visited May 10, 2023); Annmarie Chiarini, *"I was a victim of revenge porn. I don't want anyone else to face this,"* The Guardian (Nov. 19, 2013), https://tinyurl.com/nadwv5z (last visited May 10, 2023). Sex traffickers and pimps also use the threat of revenge porn to trap unwilling victims in the sex trade. Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 Vand. J. Ent. & Tech. L. 799, 818 (2008); Marion Brooks, *The World of Human Trafficking: One Woman's Story*, NBC Chicago (Feb. 22, 2013), https://tinyurl.com/c76vc4f (last visited May 10, 2023). And some rapists now record their assaults, both to inflict additional pain and humiliation on their victims and to discourage them from reporting the crimes. *See*, *e.g.*, Charlotte Alter, *16-Year Old Gives*

Television Interview After Alleged Rape Photos Went Viral, TIME (July 11, 2014), https://tinyurl.com/cx7y754c (last visited May 10, 2023). Discouraging a victim of domestic abuse, sex trafficking, or rape from reporting the crime does not require the perpetrator to distribute the victim's private sexual images any further after initially obtaining them without her consent; the mere threat of doing so may be sufficient. Accordingly, the State has a compelling interest in deterring precisely that act: stealing the victim's right to consent or withhold consent. And that is exactly what defendant did here when he disseminated J.S.'a private sexual images from her phone to his own phone.

D. The Civil Remedies for Nonconsensual Dissemination of Private Sexual Images Act is consistent with the People's construction of Section 11-23.5.

Defendant also errs in relying on the definition of "dissemination" in Section 5 of the Civil Remedies for Nonconsensual Dissemination of Private Sexual Images Act (Civil Remedies Act) as a basis to shield him from liability under Section 11-23.5. First, the definitions in the Civil Remedies Act do not apply to Section 11-23.5; by definition, they apply only "[a]s used in [the Civil Remedies Act]." 740 ILCS 190/5. Second, and in any event, defendant's conduct constituted "dissemination" as defined in the Civil Remedies Act.

To be sure, as defendant emphasizes, dissemination under the Civil Remedies Act "means publication or distribution to another person." Def. Br. 11 (quoting 740 ILCS § 190/5(4). But defendant here *did* distribute J.S.'s

private sexual images to another person: himself. The images were in the sole possession of J.S. Then defendant distributed them — knowing that J.S. did not consent to that distribution — from the person who possessed them (J.S.) to another person (himself). Defendant would not have "either sent the images to another person or otherwise distributed those images to another person," Def. Br. 11, if he had merely sent the images from himself to himself — such as from his own phone to his own email address so that he could save the images on his home computer. But causing the private sexual images of one person to be spread to another person without the first person's consent violates Section 11-23.5 as a nonconsensual dissemination of the first person's private sexual images, regardless of the recipient's identity.

For similar reasons, defendant is wrong that "mere possession of such an image, after consent is revoked, would violate the statute." Def. Br. 15. The plain language of Section 11-23.5 requires that the defendant "disseminate" the image. 720 ILCS 5/11-23.5(b)(1). Accordingly, no one could be charged with nonconsensual dissemination of a private sexual image simply for receiving or possessing an image, for the act of receiving or possessing the image did not cause that image to be spread to a new person. Indeed, defendant's offense in this case was not receiving or possessing J.S.'s images on his phone; it was his act of sending the images from J.S.'s phone to his phone, knowing that J.S. did not consent to such distribution.

In sum, as this Court has noted, the crux of the offense under Section 11-23.5 is the nonconsensual nature of the dissemination, and not how the images were created or to whom they are disseminated. *See Austin*, 2019 IL 123910, ¶ 18.

II. The State Proved the Victim Was Identifiable From the Photographs and Accompanying Information.

While Section 11-23.5 does not define "identifiable," 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 May 10, 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 himself from her phone, and the trial court found that defendant was also able to identify her from those images and the accompanying phone number. Therefore, the evidence was sufficient to prove that J.S. was identifiable from the images and the information displayed with them.

Defendant's challenge to the sufficiency of this evidence relies on the Civil Remedies Act's definition of "identifiable." Def. Br. 16. But defendant's reliance on that Act is again misplaced because the Civil Remedy Act's definition applies only "[a]s used in [The Civil Remedies Act]." 740 ILCS

190/5. In any event, the evidence was sufficient to prove that J.S. was identifiable even under the definition in the Civil Remedies Act.

The Civil Remedies Act defines "identifiable" as "recognizable by a person other than the depicted individual" either from the image itself or from "identifying characteristics" displayed in connection with the image. 790 ILCS 190/5(6). "Identifying characteristic" is defined as "information that may be used to identify a depicted individual." 790 ILCS 190/5(7).

The evidence at trial, viewed in the light most favorable to the prosecution, was sufficient to prove that at least J.S. and defendant were capable of identifying J.S. from the photos and the associated identifying information. As the trial court found, the evidence showed that defendant was able to identify J.S. from the photographs because he had sent them from her phone and she was wearing the same distinctive nail polish in the store that she was wearing in the photographs. Additionally, the evidence showed that J.S. was identifiable from "information that may be used to identify [her]": 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 also could be used to identify her by means of a simple Internet search. The identifying characteristic of J.S.'s phone number, along with her private sexual images themselves, was enough to make J.S. recognizable by defendant. Accordingly, the evidence, viewed in the light most favorable to the People, showed that J.S. was identifiable both

to herself and to defendant from her private sexual images and information connected with them. *See People v. Brand*, 2021 IL 125945, ¶ 58 ("When reviewing the sufficiency of the evidence, the relevant question is whether, after viewing all the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

Thus, contrary to defendant's argument, it is irrelevant that the investigating officers and the trial court were unable to identify J.S. *See* Def. Br. 17. Nor is it true that the trial court "veered away from both the statute and the *Austin* case" when it held that Section 11-23.5 does not require that the image be "'generally identifiable to anybody who might pick up the pictures.'" Def. Br. 17-18 (quoting R116). As explained, consistent with the dictionary definition of "identifiable," so long as the victim is capable of being identified by at least one person, she is identifiable from the image and its attached information. The trial court thus correctly held that the People had proved the element beyond a reasonable doubt because the image "was identifiable to . . . defendant." R116.

For his part, defendant erroneously contends that it "is patently absurd" to suggest that the General Assembly intended the nonconsensual dissemination of private sexual images statute to apply so long as at least one person can identify the person in the image. Def. Br. 19. On the contrary, this Court has already recognized that the harms associated with image-

based sexual abuse may exist even where only one person can identify the victim. In *People v. Hollins*, 2012 IL 112754, this Court upheld a conviction for child pornography in which the defendant took photos of himself having consensual sex with a 17-year-old. 2012 IL 112754, ¶ 5. Although the images were close-up photos of sexual penetration, the victim's mother was able to identify the victim from the photographs "because [her] pubic area was shaved." *Id.*

While the images in *Hollins* were identifiable by the victim's mother, they did not allow the general public to identify the victim. Nevertheless, this Court rejected the defendant's argument that "there was no danger of impugning [the victim's] reputational interest." *Id.* ¶ 25. As the Court explained, "[m]emorialization of the sexual act makes permanent an intimate encounter that can then be distributed to third parties," and "[t]hese concerns are exacerbated in the modern digital age, where once a picture or video is uploaded to the Internet, it . . . will always be out there, hanging over the head of the person depicted performing the sexual act." *Id.* Indeed, J.S. clearly was aware of the reputational risk she faced when defendant disseminated her images without her consent — she was extremely distraught when she discovered it — and accordingly suffered the emotional harm from which the nonconsensual dissemination statute was intended to protect her. *See Austin*, 2019 IL 123910, ¶¶ 96, 99 (General Assembly intended to protect people from embarrassment and fear associated with

having privacy invaded through nonconsensual dissemination of private sexual images). Defendant's cramped interpretation of 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.

CONCLUSION

For these reasons, and those stated in the People's opening brief, this Court should reverse the judgment of the appellate court.

May 10, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. 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(c) certificate of compliance, and the certificate of service, is 18 pages.

/s/ Garson S. Fischer
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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned certifies that on May 10, 2023, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by via Odyssey:

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