VERMONT SUPERIOR COURT

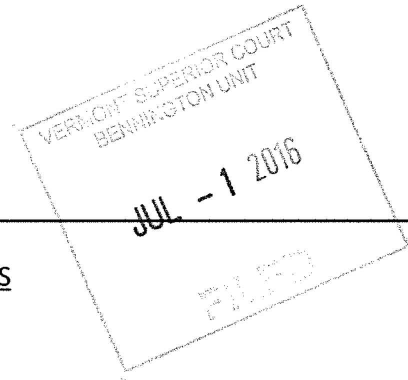
SUPERIOR COURT
Bennington Unit

CRIMINAL DIVISION
Docket No. 1144-12-15Bncr

State of Vermont

v.

REBEKAH VANBUREN
Defendant



DECISION ON MOTION TO DISMISS

This case is before the court on Defendant's Motion to Dismiss. The parties agreed the court could determine the motion on the alleged facts of the affidavits filed and the additional stipulated facts filed in response to the court's request for more information. Defendant argues even with those facts accepted, the statute involved is unconstitutionally vague as applied and generally. The State opposes the motion. The court grants the motion.

Factual Basis

The female complainant had taken photographs of herself that were nude or partially nude and sent them to the Facebook account of Anthony Coon, with whom she had a prior relationship.[1] At the time she sent them, complainant was not still in a relationship with Mr. Coon. She sent them on October 7, 2015. Defendant had a relationship with Mr. Coon also. Defendant managed to access this private part of the Facebook account. She apparently did this by having the password in her telephone, but Mr. Coon would testify Defendant did not have permission to access his account. It is not evident how she had the password if this is the case. On October 8, 2015, the photographs were posted by Defendant on a public Facebook page, Mr. Coon's, and she tagged the complainant in them. A number of people saw the photographs in this manner. The complainant learned of the posting and sought to have it taken down.

For purposes of this motion, Defendant made admissions that she did the above and that she did it to exact revenge or to get back at the complainant for the prior relationship with Mr. Coon and

[1] The photographs themselves have not been introduced as evidence. The court relies on the limited description in the affidavits and the agreement they meet the definition of "nude" in § 2606(a)(3), but not necessarily oobscene.

sending him these sexual photographs. She told complainant she did it and told her she was seeking to harm her reputation in her work and did it for revenge. Defendant allegedly told officers she wondered if complainant had "learned her lesson".

Defendant has been charged under 13 V.S.A. § 2606(b)(1).

Analysis and Conclusions of Law

13 V.S.A. § 2606(b)(1) prohibits "knowingly disclos[ing] a visual image of an identifiable person who was nude or was engaged in a sexual conduct, without his or her consent, with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm." It is a relatively new statute passed in 2015 and Vermont case law has not addressed its constitutionality or scope.

Defendant argues the statute is unconstitutional under the First Amendment to the United States Constitution in that it is an overbroad restraint on a protected form of speech or expression and not tailored to a compelling or important governmental purpose. Defendant also argues the Thirteenth Amendment to the Vermont Constitution would make this statute unconstitutional on state grounds.

The First Amendment broadly protects free speech and expression, but it is not "absolute" in its protection and it has been "long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003). There are "narrow and well-defined classes of expression " that are seen to carry "so little social value ... that the State can prohibit and punish such expression." *Connick v. Myers*, 461 U.S. 138, 147 (1983).

The categories that are found to all into this exception are obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *United State v. Stevens*, 559 U.S. 460, 468 (2010). There has not been a ruling that this list is exhaustive, but there is doubt any new category will find approval. See *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 792 (2011). The Vermont Supreme Court has followed such an approach. *State v. Tracy*, 2015 VT 111, ¶ ¶ 15, 17.

If speech or expression falls into one of these categories, a statute criminalizing it is subject only to a rational basis scrutiny. *Brown v. Ent'm Merch. Ass'n*, 546 U.S. at 793-94. Otherwise, it is subject to strict scrutiny. *id.* at 799.

The initial issue is whether the so called "revenge porn" falls into the obscenity category. There is a three part test for this determination. The court must determine (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole,

lacks serous literary, artistic, political, or scientific value. *Miller v. California*, 13 U.S. 15, 24 (1973) (quotation marks and citations omitted).

On this first issue, Defendant argues the statute fails the test in that many images of a nude person would not be obscene as defined in not appealing to prurient interests. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 495-505 (1985) ("prurience" for purposes of obscenity is "that which appeals to a shameful or morbid interest in sex" versus to "lust" or "normal sexual appetites.").[2] Nudity cannot be automatically equated to obscenity. See *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974).

The court must agree with Defendant that merely "nude" photographs cannot be considered obscene and thus subject to the lower standard of review and protection. Nude photographs may not involve any depiction of a sexual act or be prurient. A person might send such photographs with no intent to appeal to such interests. Although § 2606(a)(3) attempts to define nude to only include specific depictions, they could still fit those categories and not be obscene under the constitutional definition. What would have been clearer would have been to prohibit the disclosure of "obscene" photographs and depictions and then define that term in line with constitutional definitions.[3]

While there is argument that such revenge pornography should be considered obscene simply because of the intent it is used, there is no present authoritative law that would allow this court to take such a step in enlarging the area of unprotected speech under the First Amendment. See Samantha Scheller, *A Picture is Worth a Thousand Words: The Legal Implication of Revenge Porn*, 93 N.C.L. Rev. 551, 568-69 (2015), for this argument and its limitations.

This finding requires the court review the statute and its prohibitions under a "strict scrutiny" basis as this is a content discrimination case since the statute does not apply to all images disclosed with the required intent, but only to nude images as defined or ones depicting sexual conduct. See *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811-13 (2000) (holding a statute that focuses on one type of speech and its impact on listeners is the essence of content based regulation and subject to strict scrutiny test).

Such a statute "must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.* 529 U.S. at 813 (internal citation omitted). It is the State's burden here to demonstrate

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[2] The State answered this argument with a citation to a law review article that discusses the second prong of *Miller*, but actually does not address this question.

[3] See Aubrey Barris, *Hell Hath No Fury Like a Woman Porned: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 Florida Law Rev. 2351-52, for an example of such an approach.

this statute withstands this analysis. *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1665-66 (2015). It is a "rare case" in which the State meets this burden. *id.*

Even if the court assumes the State meets its burden of a compelling governmental interest, being protecting its citizens privacy rights and perhaps reputational rights, it does not meet its burden of showing there are no less restrictive alternatives, such as civil penalties as set out in 13 V.S.A. § 2606(e), that would be as effective. The State here does not even address why those alternatives are not reasonable and effective.[4]

There is some case law that suggests there is a mid-level of scrutiny between the two noted above. In *Snyder v. Phelps*, 562 U.S. 443 (2011) the court suggested that matters of "purely private significance" might have "less rigourous" First Amendment protections. 562 U.S. at 452. See also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-60 ((___); *State v. Tracey*, 2015 VT 111, ¶ 15 fn. 8. But the court in the cases found the conduct involved did involve matters of public concern, so did not clearly rule that it was establishing an intermediate level of scrutiny test for such private matters. Since § 2606(d)(3) explicitly states that § 2606(b)(1) does not apply to "[d]isclosures of materials that would constitute a matter of public concern", such an intermediate test of scrutiny could be important in the constitutionality of the statute. Without a firm ruling, though, that such a mid-level test is established, this trial court does not believe it can apply one here.

Defendant also raised Article 13 of the Vermont Constitution as grounds for finding § 2606 violates that instrument and is overbroad, but she does not provide support for this argument. A defendant bears the burden of explaining how and why the Vermont Constitution provides greater or different protection than the federal one. *State v. Tracey*, 2015 VT 111, ¶ 13 fn. 7; *State v. Read*, 165 Vt. 141, 153 (1996). Defendant has not done so here, so the court does not address that issue.

Similarly, a defendant bears the burden of demonstrating substantial overbreadth exists. *Hicks*, 539 U.S. at 122. Defendant again fails to make a supporting argument for this claim for this court to address it.

Lastly, the court has concerns that the facts of this case are not a clear example of the typical revenge porn case described in many articles and mentioned in support of such statutes. This is not a case of photographs sent or exchanged during a relationship and then used after the relationship ends, usually unpleasantly. Complainant sent the photographs to a person with whom she had a past relationship, but was not presently in a relationship with. She would not have known who might have

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[4] The court notes § 2606(e)(1) & (2) actually provide for civil remedies to such disclosures, including injunctions and a private cause of action.

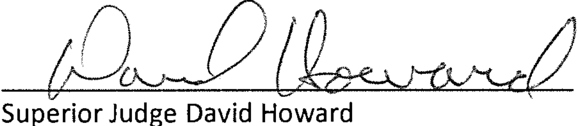
access to his Facebook account or what relationship he was in presently and the effect of such photographs in that situation. It was not the former partner who disclosed them, but rather a third party. The statute would not only criminalize this situation, it would apparently criminalize disclosure by a party who never had any relationship with complainant and who received such unsolicited sexual photographs and decided to disclose them to convince complainant not to send any more or out of anger for being the recipient. It would appear to criminalize that person's spouse who might find such unsolicited images and forward them out of anger and disgust.

The court does not have to reach this issue on the present state of the case, but the possible overbreadth of the statute is of concern.

ORDER

The Motion to Dismiss is **granted**.

Dated at Bennington, VT, this 30th day of June 2016.



Superior Judge David Howard