

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2013

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CHAD EDWARD LAKEY,

Appellant,

v.

Case No. 5D11-4231

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed May 3, 2013

Appeal from the Circuit Court
for Osceola County,
Scott Polodna, Judge.

William R. Ponall of Snure & Ponall, P.A.,
Winter Park, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Rebecca Roark Wall,
Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

Chad Edward Lakey appeals from the judgment and sentence entered after a jury convicted him of sexual battery on a child by a person in a position of familial or custodial authority, attempted sexual battery on a child by a person in a position of familial or custodial authority, and child abuse. On appeal, Lakey asserts the trial court committed fundamental error in failing to properly instruct the jury on attempted sexual battery. We agree and reverse.

As to the attempted sexual battery charge, the information alleged that Lakey “rubbed” the victim’s genitals. In order to obtain a conviction for attempted sexual battery, the State must prove that the defendant attempted to commit an act whereby (1) either the defendant’s or victim’s sexual organ penetrated or had union with the anus, vagina or mouth of the other, or (2) the anus or vagina of the victim was penetrated by an object. § 794.011(1)(h), (8)(b), Fla. Stat. (2008); Fla. Std. Jury Instr. (Crim.) 11.6. A defendant’s finger is considered an “object” within the meaning of the statute, and therefore “must penetrate and not merely have union with the relevant [body] part.” Holmes v. State, 842 So. 2d 187, 188 (Fla. 2d DCA 2003) (quotation omitted).

In this case, the trial court instructed the jury as follows: “To prove the crime of Attempted Sexual [Battery on] a Child, the State must prove . . . Chad Lakey attempted to penetrate or have union with the sexual organ of [the victim].” This instruction improperly permitted the jury to convict Lakey of attempted sexual battery based on a finding that he attempted a digital union with the sexual organ of the victim. See Holmes, 842 So. 2d at 188; see also Gill v. State, 586 So. 2d 471, 472 (Fla. 4th DCA 1991) (holding trial court committed fundamental error in instructing jury that union with an object was an alternative to penetration by an object on the charge of sexual battery). Finding the instruction was fundamentally erroneous, we reverse and remand

for a new trial on the attempted sexual battery charge. We affirm as to the remaining two counts.

AFFIRMED in part; REVERSED in part; and REMANDED.

EVANDER¹ and COHEN, JJ., and MENDOZA, C.E., Associate Judge, concur.

¹Subsequent to oral argument, Judge Lawson determined that he should recuse himself from further consideration of the case. Judge Evander was assigned to the panel and reviewed the file, the briefs, and the video recording of the oral argument prior to participating in the decision-making process.