

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

JULY TERM 2008

JOSEPH A. UNDERWOOD, II,

Appellant,

v.

Case No. 5D07-1998

STATE OF FLORIDA,

Appellee.

/

Opinion filed July 11, 2008

Appeal from the Circuit Court
for Orange County,
Jose R. Rodriguez, Judge.

James S. Purdy, Public Defender, and
Nancy Ryan and Edward J. Weiss,
Assistant Public Defenders, Daytona
Beach, for Appellant.

Bill McCollum, Attorney General,
Tallahassee, and Wesley Heidt, Assistant
Attorney General, Daytona Beach, for
Appellee.

SAWAYA, J.

Joseph Underwood appeals his conviction and sentence for sexual activity with a minor while in familial authority in violation of section 794.011(8)(b), Florida Statutes (2005), and false imprisonment in violation of section 787.02(1), (2), Florida Statutes (2005). We affirm the false imprisonment conviction and sentence.

Regarding the sexual activity conviction, Underwood claims the jury instructions were erroneous because the jury was not instructed that in order to convict him of sexual battery by union, the jury had to find that Underwood's sexual organ had been in union with the victim's vagina. See § 794.011(1)(h), Fla. Stat. (2005) (defining "sexual battery" as the "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object . . ."); Fla. Std. Jury Instr. (Crim) 11.6.¹ The State concedes this error, but argues that the error was not properly preserved. We have reviewed the record and it is clear that Underwood did timely object to the erroneous jury instruction, and he did properly preserve the error for our review. Accordingly, we reverse the conviction and sentence imposed for the sexual activity charge and remand for a new trial on that charge.

AFFIRMED in part; REVERSED in part; and REMANDED.

GRiffin and PLEUS, JJ., concur.

¹Florida Standard Jury Instruction (Criminal) 11.6 provides in pertinent part that one of the elements the state needs to prove beyond a reasonable doubt in order to convict an individual of sexual battery by union is that

(Defendant) committed an act upon (victim) in which:

- a. [the sexual organ of the [(defendant)] [(victim)] . . . had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)]].