

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

JANUARY TERM 2012

STATE OF FLORIDA,

Appellant,

v.

Case No. 5D10-4223

ROBERTO ROSARIO,

Appellee.

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Opinion filed January 27, 2012

Appeal from the Circuit Court
for Volusia County,
Patrick Kennedy, Judge.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Kristen L. Davenport,
Assistant Attorney General, Daytona
Beach, for Appellant.

No Appearance for Appellee.

PER CURIAM.

The State appeals the Order vacating a jury verdict that found Roberto Rosario to be guilty of sexual battery on a physically helpless person in violation of section 794.011(4)(a), Florida Statutes (2008). Rosario has not filed an answer brief. We reverse the Order because the jury verdict finding that Rosario did commit a sexual battery on the victim was not based on an erroneous jury instruction. See State v. Pate,

656 So. 2d 1323, 1325 (Fla. 5th DCA 1995) (holding that pursuant to the definition of sexual battery in section 794.011(1)(h), Florida Statutes, “the state is not required to prove penetration in order to establish a sexual battery. Rather, ‘oral . . . union with, the sexual organ of another . . .’ constitutes sexual battery” (quoting § 794.011(1)(h), Fla. Stat.)).

Accordingly, we reverse the Order under review and remand this case to the trial court to enter judgment in accord with the jury verdict and for sentencing.

REVERSED AND REMANDED.

SAWAYA, MONACO, and COHEN, JJ., concur.