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SEXUAL BATTERY STATUTES

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CHAPTER 794: SEXUAL BATTERY

***Statutory Definitions*:**

***Consent (794.011(1)(a))*:**

Consent means intelligent, knowing, and voluntary consent and does not include coerced submission. Consent shall not bee deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender.

The Standard Jury Instructions adds that "Evidence of the victim's mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing and voluntary consent.

F.S. 794.011(9) states that when the offender is a law enforcement officer, correctional officer, or correctional probation officer, acquiescence of a person reasonable believed by the victim to be in a position of authority or control does not constitute consent, and it is not a defense that the perpetrator was not actually in a position of control or authority if the circumstances were such as to lead the victim to reasonably believe that the person was in such a position.

Statler v. State, 2020 WL 7690347 (Fla.App. 1 Dist., 2020)

> Defendant argued Florida's sexual battery statute is facially unconstitutional or must be read to include a requirement that the State prove that a criminal defendant knew or should have known the victim did not consent to sexual intercourse. The appellate court rejected this argument and refused to certified it to the Florida Supreme Court.

State v. Miller, 2015 WL 477599 (Fla.App. 5 Dist.):

> Court erred in granting a sworn motion to dismiss based upon victim’s consent to the sexual activity. State’s traverse on consent issue was sufficient.

Williams v. State, 32 Fla. L. Weekly S347 (Fla. 2007)

> Evidence of victim's pregnancy was sufficiently relevant in first-degree felony murder trial to totality of the circumstances and to

specifically proving the underlying felony, attempted sexual battery; defendant was not the father of victim's child, and thus evidence of victim's pregnancy was probative to demonstrate victim's lack of consent to any type of sexual conduct with, or sexual advance by, defendant.

Evidence was sufficient to support first-degree felony murder charge based on underlying felony of attempted sexual battery; evidence showed that victim voluntarily opened the door for the attacker, and given her advanced state of pregnancy, was likely clothed when she did so, yet when police arrived, victim appeared at the door completely nude and was attempting to cover her nudity, police discovered at the crime scene victim's blood-stained shorts and panties on the bed under some bloody sheets in a condition that indicated they were removed either during or in close proximity to the attack, victim had bite marks on her bare breast and back, and in the general area of her groin, and victim had made an unsolicited statement to officer that she had been "raped."

Khianthalat v. State, 31 Fla. L. Weekly D2067 (Fla. 2d DCA 2006):

Defendant was not entitled to jury instruction on simple battery as permissive lesser-included offense of committing a lewd, lascivious, or indecent act upon a child under 16 years of age but over 12 years of age, even though defendant argued that, despite no evidence that he touched victim against her will, victim was not legally capable of consenting to sexual activity; statute under which defendant was charged did not apply to children under 12 years of age, and, accordingly, presumption of incapacity to consent was not applicable to offense.

In a prosecution for sexual battery on a child 11 years of age or younger, lack of consent is always an element because of the conclusive presumption that a child that age cannot consent.

Statute prohibiting a lewd, lascivious, or indecent act upon a child under 16 years of age but over 12 years of age is intended to criminalize sexual activity with a child in that age range even where the activity is consensual.

Holcomb v. State, 25 Fla. L. Weekly D1560 (Fla. 3rd DCA June 28, 2000):

Failure to instruct on essential element of lack of consent constituted fundamental error, which requires reversal even in absence of objection in trial court.

Discussion: There is little legal discussion in this opinion.

Melton v. State, 746 So.2d 1188 (Fla. 4th DCA 1999):

Verdict of guilt in sexual battery case not contrary to manifest weight of evidence. No abuse of discretion in denial of motion for new trial.

Discussion: The factual basis for this case, which was found in the trial court's order, indicates it was a pretty weak case. The victim was staying at the same hotel as members of the New York Mets baseball team while they down here for spring training. She evidently had consensual sex with one of the players the day she met him in the presence of others. She had sex with him for about a week. She then went up to a player's room and let him kiss her and undress her in front of his roommate, but objected to anymore sex.

Fletcher v. State, 698 So.2d 579 (Fla. 3rd DCA 1997):

Evidence conclusively established that defendant was guilty of sexual battery where state introduced testimony of victim that defendant forcibly engaged in sexual intercourse with her despite her objections and testimony of witnesses that defendant told them that victim had said "no" to defendant's advances, and defendant testified that victim had said "no" three times prior to sexual intercourse.

"The '…her lips said 'no' , but her eyes said 'yes'…' position of the defendant cannot be condoned by this Court nor will it be accepted as a legal defense to a charge of sexual battery."

Although record does not relate exactly how much time passed between sexual assault and time of victim's reporting of assault to apartment manager, fair reading of record suggested that it was not an unduly long period, indicating that it was not error to admit apartment manager's testimony.

Bullington v. State, 616 So.2d 1036 (Fla. 3d DCA 1993):

"Consent" such as will prelude conviction for sexual battery on

person physically helpless to resist, may be either actual or implied.

Defendant who engaged in sexual intercourse with 15 year old girl whose hands had been tied to bed did so with her consent, so as to preclude conviction for sexual battery on person physically helpless to resist, where girl had herself requested that her hands be tied in initially agreeing to participate in group sex act, and no evidence was presented that she ever communicated a withdrawal of that consent.

Russell v. State, 576 So.2d 389 (Fla. 1st DCA 1991):

Evidence on lack of consent, in prosecution for sexual battery, presented question for jury, based on victim's testimony that she repeatedly told defendant to stop, that defendant placed his heavy body on top of her, and that victim bit defendant's tongue, despite contention that victim's failure to communicate her lack of consent was cause of sexual intercourse.

Robinson v. State, 575 So.2d 699 (Fla. 1st DCA 1991):

Evidence that victim engaged in prostitution may have bearing on issue of consent if defendant's defense is that sexual encounter with victim was in connection with act of prostitution.

Trial court engages in balancing test to weigh probative value of evidence against unfair prejudice to victim to determine if evidence of victim's prostitution should be admitted, if defendant makes sufficient showing that evidence of prostitution bears materially on issue of consent and that without opportunity to elicit that evidence defendant's ability to present defense will be critically hampered.

Evidence of violence directed against rape victim weighed heavily against defendant's contention that victim's reputation as prostitute would have had significant bearing on issue of consent.

Discussion: Prostitutes are frequently the objects of sexual battery. By virtue of their professions, they are accessible to sexual predators. Occasionally, they are the objects of forced sexual intercourse because the offender knows that no one will believe the victim. If you should get a case in which the victim has a criminal record of prostitution, you should discuss the situation with her and try to make the determination up front if that fact will be

admissible in trial. The Rape Shield Law generally excludes such a reference, but as the above case illustrates, there is a competing balance of interests wherein the victim's rights may be subservient to those of the defendant. If there is evidence of significant force or violence used in the offense, this case will help you to exclude the fact. The case also notes that if a defense attorney wants to admit the fact of the victim's prostitution, he must proffer the relevance beforehand. If he does not offer a complete proffer, the appellate court will not consider it on appeal.

State v. Rhone, 566 So.2d 1367 (Fla. 4th DCA 1990):

Psychological examination of sexual assault victim by defense expert was permissible where state planned to use psychological evidence gleaned from its own examination of the victim to prove essential element of crime that victim lacked capacity to consent to sexual battery because of battered spouse syndrome, and psychological evidence consisting of subjective observations and conclusions of psychologist could not be adequately rebutted absent an independent examination of victim.

Discussion: This case was brought to us by virtue of the Honorable Judge Carney. The facts in this case involve a familiar scenario. The victim lived with the defendant off and on for years. The sexual battery occurred in the home of the defendant's relatives. After the attack, the victim never told anyone what happened. She even ate breakfast with the family after the assault. The State tried to explain this abnormal behavior through the use of a privately retained psychologist. The State claimed that the victim was not capable of consenting by virtue of the "Battered Woman Syndrome." The 4th DCA cites several cases from different jurisdictions on this issue. The court acknowledged that a victim should not be compelled to undergo a compelled psychological examination except under extreme circumstances. Strong and compelling reasons must exist to warrant such an examination. The compelling reason in this case was based upon due process arguments. It would not be fair to allow the State to use an expert to give a subjective evaluation without allowing the defendant an equal opportunity. The court implies that if the original psychologist had been independently appointed, there may have been a different result. In conclusion, if you plan to use an expert witness to prove lack of consent, you must prepare the victim for the possibility of becoming subjected to additional evaluations from the defense.

Caulder v. State, 500 So.2d 1362 (Fla. 5th DCA 1986):

In charge of sexual battery upon child of 11 years or younger, lack of consent was element of crime, although not required to be alleged or proved, and thus, jury should have been charged on simple battery in prosecution for sexual battery on child of 11 years or younger.

Discussion: The court notes that lack of consent is presumed in cases involving children. Therefore, lesser included offenses that involve consent are valid.

State v. Rider, 449 So.2d 903 (Fla. 3d DCA 1984):

Spouse could be prosecuted for sexual battery upon the other spouse.

Sexual gratification is not an element of sexual battery.
A violation of sexual battery statute occurs whenever there is an intentional, nonconsensual intrusion into the sexual privacy of another.

Discussion: The defense relied on common law "implied consent" in arguing that a woman could not be raped by her husband. Although this issue will not likely be raised frequently, I have included this case because of its thorough analysis of consent and the development of the law. Cases from different states are discussed. The distinctions between common law rape and modern sexual battery are also discussed.

Berezovsky v. State, 335 So.2d 592 (Fla. 3d DCA 1976):

Consent of woman obtained by actual violence, duress or threats is not such consent as will shield offender.

Resistance is relative term and must be considered in accordance with special circumstances surrounding each and every case, such as strength of parties and evidence or lack of evidence of injuries and other such relevant factors.

Testimony of rape victim, together with medical evidence of penetration and showing of bruises on victim's right upper arm and thigh, supported defendant's conviction of rape.

Mentally Defective (794.011(1)(a))

Mentally defective means a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct.

Dudley v. State, 2014 WL 1923782 (Fla.)

Term "mentally defective," as used in reference to particular group of victims under statute setting out first-degree felony of sexual battery, does not equate to incompetence to testify, cannot be equated with the definition of insanity under statute setting out affirmative defense to a criminal prosecution, and does not require that the victim display a total or complete lack of mental capacity or understanding; disapproving *Mathis v. State*, 682 So.2d 175.

State v. Dudley, WL 2581772 (Fla.App. 5 Dist.,2011)

State's evidence was sufficient to support a jury finding that victim was "mentally defective," as required for offense of sexual battery on mentally defective person; victim, who was 21 years old, had mental and developmental age far below her physical age, victim repeatedly referred to defendant's sexual organ as his "popsicle" and testified to the times when defendant put his "popsicle" inside her, victim was in class for the mentally disabled who had IQs lower than 70, special education teacher testified that victim needed constant supervision as she was not capable of self-direction and had significant cognitive limitations, victim had mild cerebral palsy and had been diagnosed with bi-polar disorder, and defendant was fully aware of victim's mental condition; receding from *State v. Torresgrossa*, 776 So.2d 1009.

"Mentally deficient" cannot reasonably be read to mean a total lack of mental capacity for purposes of offense of sexual battery on a mentally defective person; "deficient" means lacking in some quality or not up to a normal standard, and it does not mean devoid of or totally lacking.

With respect to offense of sexual battery on a mentally defective person, the statutory definition of "mentally deficient," that is, incapable of appraising the nature of his or her conduct, connotes significantly diminished judgment, but not a complete and total lack of mental awareness.

Hudson v. State, 31 Fla. L. Weekly D2405 (Fla. 4th DCA 2006):

> Evidence was sufficient to go to jury on issue of whether victim was mentally defective in prosecution for sexual battery against a mentally defective victim and attempted sexual battery against a mentally defective person; detective, who investigated the case and interviewed the victim, believed the victim to be about seven to nine years old mentally, and nurse who examined the victim thought she was childlike and delayed and documented that she appeared to be mentally challenged.
>
> Expert testimony is not an absolute necessity in proving mental deficiency for purposes of offense of sexual battery against a mentally defective person; as long as there is competent and substantial evidence from which the jury may conclude the victim is mentally deficient, such that she or he is incapable of consent, the matter is a question to be resolved by the jury.

Schimele v. State, 26 Fla. L. Weekly D1258 (Fla. 4th DCA 2001):

> Psychologist's testimony that victim's cognitive impairment, together with his limited ability to function and adapt to the world, made him incapable of understanding the nature of his conduct and its ramifications, was sufficient to support finding that victim was mentally defective.
>
> Discussion: Since the determination of whether a victim is mentally defective is very fact specific, I have chosen to provide a relevant portion of the actual opinion to provide all of the details.
>
> > *At trial the state adduced the testimony of Dr. Ram, a psychologist who has practiced in Florida for over 50 years. Dr. Ram evaluated the victim and his family. The victim, who was 26 years at the time, was diagnosed at age 3 with cephalea and was educated solely in programs for cognitively impaired students. Dr. Ram personally interviewed the victim and immediately observed, he said, that he was ``obviously mentally impaired. He looked like a retarded man; his gait, his physical appearance and, above all, his voice, [immediately signaled that he was] a retarded person.'' The doctor described the victim as having a very high pitched voice and childlike speech. His affect or*

> *emotional response was labile -- changing from excitement to calmness, speaking quite loudly, and laughing about things not funny, with an affect that seemed unrelated to or inconsistent with what he said.***Error! Reference source not found.**
>
> *The victim scored 53 on the Wechsler Adult Intelligence Scale, the standard intelligence test, a score ranking in the lower part of the moderately impaired range and which is exceeded by 99.9 percent of the adult population. According to Dr. Ram, the victim has the reading ability of a 4 year old, the speaking ability of a 7-9 year old, the writing ability of a 6-7 year old (he could write his first name but nothing else), and the personal care ability of a 9-10 year old. Although the victim works three days per week for three hours per day as a bagboy at a supermarket, he has almost no mathematical ability. He cannot feed himself and cannot even understand to purchase groceries.*
>
> *On cross-examination, Dr. Ram testified that the victim's understanding of sex was ``pretty cloudy''. While the victim had been to a topless bar where he experienced a ``lap dance'', and his mother had seen him watching sexually explicit movies, Dr. Ram explained that these experiences did not mean that he would understand what he was doing. Dr. Ram testified that on the date of the offenses the victim was not able to give a knowing, voluntary, intelligent consent to having sexual relations with defendant.*

The appellate court noted that the prosecution prevailed on the issue of "mentally defective" because they asked the right questions. A previous case on the same issue, Mathis v. State, 682 So.2d 175 (Fla. 1st DCA 1996), was reversed because the prosecution did not ask the magic questions regarding the victim's ability to appraise the nature of her conduct. The prosecutor in this case obviously learned a lesson from Mathis and covered the essential issues. The appellate court highlighted the following question and answers with approval:

"When asked whether the victim could consent to a sexual relationship, the doctor explained:

A: Well, he could. Say he gave consent just like a 6 or a 5 year old can say that he gave consent. From my perspective that's not informed consent. He can't give informed consent because he's too intellectually impaired. [e.s.]

Q: And he would not understand if he knew what he was consenting to?

A: You got it."

State v. Torresgrossa, 26 Fla. L. Weekly D272 (Fla. 5th DCA 2001):

Trial court properly dismissed information charging defendant with sexual battery on a mentally defective person on ground that victim was not a mentally defective person as a matter of law.

Although victim's intellect was below average and state's expert classified her as falling within the mildly mentally retarded range, victim was not mentally defective where she had a high school diploma, had periodically held employment, had a driver's license, had never been involuntarily committed, had never been adjudged incompetent, had never been the subject of guardianship proceedings, had no history of hallucinations, delusions, or psychosis, did not suffer from any perceptual disorder, and is not precluded from entering into contracts, marrying, voting, or driving a vehicle.

Discussion: The state's psychologist testified that the victim was incapable of realizing the nature of her conduct and had a mental age of ten years. The doctor admitted that an IQ score only predicts how well a person should achieve academically. The doctor also testified that the victim's sexual relations with her prior boyfriend were consensual, but she believed the defendant had manipulated the victim because of her mental age. The court notes that "mentally defective" is not a medical term, but has been defined by statute as "a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature or his or her conduct." While the victim may be more easily manipulated because of her level of functioning, she was clearly aware and capable of appraising the nature of her conduct.

Bowman v. State, 25 Fla. L. Weekly D1476 (Fla. 4th DCA June 21, 2000):

> Person may be found competent to testify and still be mentally defective under statutory definition.
>
> Testimony by school psychologist who worked with victim for three years that victim had IQ of 36 and psychologist's description of people scoring in that range were sufficient to permit jury to determine issue of whether the defendant was mentally defective.
>
> Discussion: The victim, who was in his early twenties, was assaulted by the driver of the bus for handicapped people. His grandmother testified that he behaves like a four or five year old in some respects and a nine or ten year old in others. He is unable to read or write, but can sign his name. The school psychologist testified that the individuals with in the victim's intelligence range "may have very weak skills and are not completely independent in terms of being able to go running an errand on their own or maybe even cross the street on their own in terms of socialization with others." The appellate court distinguished this case from Mathis v. State, 682 So.2d 175 (Fla. 1st DCA 1996) and took a more favorable position towards victims. Even though the psychologist could not define "mentally defective," her testimony was sufficient to send the case to the jury. It appears there may be a difference in opinion between the 1st DCA and the 4th DCA. The court also gives us good language regarding the competency of children and how it is not unusual for young children to understand the moral obligation to tell the truth.

Wilburn v. State, 23 Fla. L. Weekly D1544 (Fla. 4th DCA June 24, 1998):

> Challenge to facial constitutionality of sexual battery-mentally defective statute must fail where conduct of defendant, who was a nurse in Alzheimer's disease unit of nursing facility, in attempting to engage in oral sex with a patient fell squarely within statutory prohibition.
>
> The state established that the patient involved was "mentally defective" because he was not legally or medically capable of giving consent to sexual activity nor was he capable of understanding or evaluating his conduct.

Kever v. State, 704 So.2d 222 (Fla. 1st DCA 1998):

Evidence insufficient to prove that victim was mentally defective in sexual battery prosecution. Case remanded for defendant to be sentenced on lesser included offense of sexual battery.

Discussion: A brief opinion with no facts to enlighten us on the mentally defective standard.

Mathis v. State, 682 So.2d 175 (Fla 1st DCA 1996):

Trial court made insufficient findings of fact on the issues of the reliability of child hearsay statement and that the victim had a physical, mental, or developmental age of 11 or less.

Reliability must be determined independently of any corroborating evidence.

State precluded from retrying defendant for first degree felony of sexual battery upon "mentally defective' victim where evidence presented at trial was legally insufficient to permit jury to find victim was "mentally defective" on date of alleged sexual battery.

Testimony of school psychologist that child's IQ fell at upper end of "trainable mentally defective" where no evidence was offered as to correlation, if any, between IQ, and child's "mental and developmental age," and child's ability to understand the nature of her conduct.

Discussion: This case is very helpful in two respects. The discussion of child hearsay and the necessary findings of reliability is similar to many other cases, but this opinion includes excerpts from the actual transcript which lets us know the judge's exact words. The case also has a very helpful discussion of the meaning of "mentally defective." We have been left largely without guidance on this issue in the past, so this case gives us a good reference point. The court notes that the definition of "mentally defective" is very similar to the definition of insanity used in Florida criminal proceedings. Most importantly, the court points out that you cannot prove the element by simply referring to a victim's IQ or developmental age.

Hammond v. State, 660 So.2d 1152 (Fla. 2d DCA 1995):

Voir dire of mentally retarded victims not sufficient to establish victims' competency to testify at trial where victims' answers to

trial court's leading and suggestive questions indicated only that victims possibly knew the difference between truth and a lie, but did not demonstrate that victims felt moral obligation to tell the truth or that victims were able to relate facts to the jury.

Abuse of discretion to fail to sever charges involving different victims over two and a half year period where state was unable to prove temporal relationship between the crimes and only similarities between the crimes were that they were sexual in nature and allegedly occurred in teacher's home.

Discussion: This case concerns the competency of a victim, but I felt it was useful enough to include in this section. This is a good case to read when you need a mentally handicapped victim to testify. Be sure that the three primary points are covered: (1) whether the witness knows the difference between a truth and a lie, (2) whether the witness is capable of observing and recollecting facts; (3) whether the child is capable of narrating those facts to the court or to a jury and (4) whether the child has a moral sense of the obligation to tell the truth. The court notes that "This competency determination is of heightened importance when the witness is mentally retarded, because there might exist a tendency on the part of the jurors to believe that the retarded are not capable of conniving or fabrication.

Mentally Incapacitated (794.011(1)(c)):

Mentally incapacitated means temporarily incapable of appraising or controlling a person's own conduct due to the intoxicating substance administered without his or her consent or due to any other act committed upon that person without his or her consent.

The Standard Jury Instructions alters the above definition by stating "Mentally incapacitated means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to t*he influence of a narcotic, anesthetic* or intoxicating substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

Amelio v. State, 2018 WL 3912077 (Fla.App. 4 Dist., 2018)

The victim voluntarily drank several drinks and the defendant apparently had sex with her while she was very drunk. He was

charged with sexual battery-mentally incapacitated. In ruling that she did not qualify as "mentally incapacitated," the court stated, "In conclusion, the legislature defines mental incapacity in the sexual battery statute to include involuntary, and not voluntary, intoxication."

Although at first glance, the case seems to be saying you cannot convict of sexual battery on a mentally incapacitated victim if the victim voluntarily became intoxicated, the opinion actually has more far-reaching implications. F.S. 794.022(4) reads"[w]hen consent of the victim is a defense to prosecution under s. 787.06, s. 794.011, or s. 800.04, evidence of the victim's mental incapacity or defect is admissible to prove that the consent was not intelligent, knowing, or voluntary; and the court shall instruct the jury accordingly." The appellate court ruled that this section must be given the same meaning as the definition of mental incapacity in 704.011, which reads, "'Mentally incapacitated' means temporarily incapable of appraising or controlling a person's own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered without his or her consent or due to any other act committed upon that person without his or her consent.

So even though the victim was likely in a condition where she was unable to give intelligent consent, the jury was not given the option of the mentally incapacitated instruction. The same issue would have applied even if the defendant had been charged with straight sexual battery. In conclusion, if a victim voluntarily consumes drugs or alcohol to the point that she cannot give intelligent consent, we must rely on the standard consent definition to prove our case. *"Consent" means intelligent, knowing, and voluntary consent and does not include coerced submission. "Consent" shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender.* F.S. 794.022(4) seems to be irrelevant now. Since consent is not a defense in 800.04, reference to that statute in 794.022(4) is not logical. If it is a violation of 794 and the intoxication was involuntary, we will simply charge 794.011(4) and get the mentally incapacitated instruction for that charge.

Offender (794.011(1)(d)):

Offender means a person accused of a sexual offense in violation of a

provision of this chapter.

Physically Helpless (794.011(1)(e)):

Physically helpless means unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act.

Abdallah v. State, 2021 WL 6057100 (Fla.App. 3 Dist., 2021)

An Uber driver picked up two intoxicated women to drive them home. The victim was so intoxicated she could not remember what happened that night, but her friend testified to most of the events. The friend was not present, however, when the defendant sexually battered the victim. The defendant claimed the victim consented to having sex with him while her friend was in another room. The court ruled that the state presented sufficient evidence to support the jury verdict on the issues of consent, physically helpless and physical incapacitation.

The State's evidence, viewed in the light most favorable to the State, showed an inebriated K.N. falling to the ground twice (at the restaurant and in front of her apartment building) and hitting her head with the first fall; her drifting in and out of consciousness during the entire time she was in Abdallah's presence; Abdallah carrying K.N. from the sidewalk to the entry of her apartment, propping her up during the elevator ride; and Abdallah carrying K.N. to her bedroom and placing her on her bed where she lay limp. The extensive evidence of K.N.'s helplessness was sufficient for the jury to infer that K.N. was unable to communicate an unwillingness to have sexual relations.

To establish K.N.'s physical incapacity, the State was required to establish that K.N. was "bodily impaired or handicapped and substantially limited in ability to resist or flee." § 794.011(1)(j), Fla. Stat. (2016). *The evidence adduced by the State showed that K.N. was, by any objective measure, "bodily impaired" by her extreme inebriation. K.N. exited Abdallah's car and collapsed to the sidewalk. She was unable to walk. She could not open her apartment door. After entering the apartment, Abdallah made the presumptuous decision to take K.N. directly to her bedroom where he placed her on her bed. Lacking any physical or*

mental resolve, K.N. was in no condition to resist Abdallah or to flee her own apartment.

Arroyo v. State, 2018 WL 3636833, (Fla.App. 3 Dist., 2018)

The victim qualified as both "physically incapacitated" and "physically helpless to resist" under the following facts:

After the victim arrived at Juarez's party, she quickly drank approximately twelve shots of vodka. She became heavily intoxicated, fell down, and hit her head on the hard wooden backboard of a couch. Tyler carried her to the bedroom, where she vomited, and he then left the party in order to get more alcohol. Although the victim initially mumbled "no" at some point during the initial assault by Juarez, the evidence reflected that the victim was extremely intoxicated and felt helpless, like a "ragdoll." The victim additionally testified that she could not move her arms, felt "heavy," and she could not kick or fight.

Note: "Physically Helpless" typically means the victim is unable to communicate her consent or lack thereof. In general, if the victim can verbally object, she is not physically helpless. In this case, however, the court stretches this concept under the unique circumstances of this case. Even though the victim did say, "no," the court seemed to believe that her advanced level of intoxication was enough. The court noted, "In order to show that the victim was physically helpless, there must be evidence that the victim was "unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act" at all relevant times. Even though she did communicate an unwillingness, she was likely not able to do so at "all relevant times."

Nimmons v. State, 27 Fla. L. Weekly D851 (Fla. 5th DCA 2002):

While touring a city, the victim and her boyfriend drank alcoholic beverages at a cafe where defendant, who said he worked at the establishment, bought the couple several drinks. After the couple decided to stay the night in the city, defendant recommended a hotel for them to stay in. After the victim fell asleep, the boyfriend and defendant continued drinking after which the boyfriend passed out. The victim awoke to find that defendant had assaulted her. The next morning, the victim realized that her physical symptoms were not the result of alcohol consumption and went to a doctor.

The victim's urine sample tested positive for a sedative. Defendant argued that the trial court erred in admitting the laboratory report into evidence because the warning label stated that the report could not be used for legal purposes. The appellate court held that there was positive evidence of the trustworthiness of the test, including the medical reliability of the test itself and the chain of custody. The trial court did not err in concluding that the warning implicated the weight and not the admissibility of the report.

Darby v. State, 689 So.2d 427 (Fla. 3rd DCA 1997):

Reference to statute relating to sexual battery of victim physically helpless to resist to be deleted where evidence at trial showed that victim was able to communicate her unwillingness to participate.

Bullington v. State, 616 So.2d 1036 (Fla. 3d DCA 1993):

Fifteen year old girl with whom defendant had sexual intercourse was not "physically helpless to resist," within meaning of sexual battery statute, notwithstanding that her hands had been tied at her express request; girl was able to communicate orally and had full use of her legs.

Mere fact that defendant's sex partner may have passed out for period of time during their consensual sexual encounter was not sufficient to show that she was "physically helpless to resist," within meaning of sexual battery statute, absent evidence as to how long she was unconscious or that she was in any way violated during period of unconsciousness.

State failed to show that defendant conspired to commit sexual battery on person physically helpless to resist, given complete lack of evidence that defendant intended to perform sexual battery without alleged victim's consent.

Discussion: The Third DCA characterized the victim as "a willing participant in the carnal revelry." The evidence in the case showed that the 15 year old victim met one of the suspect's after smoking crack in an entertainment in Tampa. She eventually flew down to Key West to party with several individuals. She suggested that the defendant purchase restraints because that is the only way she could "get off" while having sex. The victim told her companions she was 19 years old. The victim then proceeded to participated in various sexual encounters with various people. When the

defendant learned she was only 15, he immediately sent her home. For some unknown reason, the suspect was not charged with indecent assault. The appellate court indicated in its conclusion that it would have been the appropriate charge.

Coley v. State, 616 So.2d 1017 (Fla. 3d DCA 1993):

Evidence was insufficient to support conviction under statute prohibiting sexual battery on person physically helpless to resist; evidence included proof that, although victim was tied up, she was physically able to communicate at relevant times, that she communicated during each act in question, and that she was neither asleep nor unconscious.

State v. Sedia, 614 So.2d 533 (Fla. 4th DCA 1993):

Physical therapy patient, who was lying with her back to physical therapist when, without warning, she felt penis enter her vagina from behind, had no opportunity to communicate her unwillingness to have sexual intercourse and , as such, was physically helpless to resist within meaning of sexual battery statute.

Gould v. State, 577 So.2d 1302 (Fla. 1991):

Sexual battery of victim physically helpless to resist can be proven without actual use of any force.

Discussion: This case also addresses whether sexual battery/slight force is a necessarily lesser included offense of physically helpless to resist. The court rules that it is not, because sexual battery requires some element of force. It should be noted that this ruling only applies to cases prior to the April 8, 1992 amendment which eliminated force as an element to sexual battery.

Norman v. State, 555 So.2d 1316 (Fla. 5th DCA 1990):

Where victim of sexual battery was able to communicate her unwillingness and did so before and during commission of offense, defendant could not be convicted of committing sexual battery when victim was physically helpless to resist.

Perez v. State, 479 So.2d 266 (Fla. 5th DCA 1985):

Evidence that severe blow to her face rendered victim physically

unable to effectively communicate her unwillingness was sufficient for jury to have found that victim was "physically helpless to resist", as required for conviction of sexual battery under F.S. 794.011(4)(a), even though there was some evidence that victim did communicate her unwillingness.

McIlwain v. State, 402 So.2d 1194 (Fla. 5th DCA 1981):

Evidence in prosecution of defendant who was charged with sexual battery on seventeen year old boy and who used hypnosis and nitrous oxide was sufficient to establish that victim did not intelligently consent to battery because of his youth, inexperience, and effects of hypnotism and nitrous oxide and that victim was physically unable to communicate his unwillingness to battery and was physically helpless to resist.

Where information charging defendant with sexual battery fairly apprised defendant of charge and defendant had access to victim's statement and deposition well before trial, refusal to dismiss information because it did not state why victim was physically helpless to resist and refusal to grant bill of particulars were not reversible error.

Physically Incapacitated (794.011(1)(j)):

Physically incapacitated means bodily impaired or handicapped and substantially limited in ability to resist or flee.

Abdallah v. State, 2021 WL 6057100 (Fla.App. 3 Dist., 2021)

An Uber driver picked up two intoxicated women to drive them home. The victim was so intoxicated she could not remember what happened that night, but her friend testified to most of the events. The friend was not present, however, when the defendant sexually battered the victim. The defendant claimed the victim consented to having sex with him while her friend was in another room. The court ruled that the state presented sufficient evidence to support the jury verdict on the issues of consent, physically helpless and physical incapacitation.

The State's evidence, viewed in the light most favorable to the State, showed an inebriated K.N. falling to the ground twice (at the restaurant and in front of her apartment

building) and hitting her head with the first fall; her drifting in and out of consciousness during the entire time she was in Abdallah's presence; Abdallah carrying K.N. from the sidewalk to the entry of her apartment, propping her up during the elevator ride; and Abdallah carrying K.N. to her bedroom and placing her on her bed where she lay limp. The extensive evidence of K.N.'s helplessness was sufficient for the jury to infer that K.N. was unable to communicate an unwillingness to have sexual relations.

To establish K.N.'s physical incapacity, the State was required to establish that K.N. was "bodily impaired or handicapped and substantially limited in ability to resist or flee." § 794.011(1)(j), Fla. Stat. (2016). *The evidence adduced by the State showed that K.N. was, by any objective measure, "bodily impaired" by her extreme inebriation. K.N. exited Abdallah's car and collapsed to the sidewalk. She was unable to walk. She could not open her apartment door. After entering the apartment, Abdallah made the presumptuous decision to take K.N. directly to her bedroom where he placed her on her bed. Lacking any physical or mental resolve, K.N. was in no condition to resist Abdallah or to flee her own apartment.*

Arroyo v. State, 2018 WL 3636833, (Fla.App. 3 Dist., 2018)

The victim qualified as both "physically incapacitated" and "physically helpless to resist" under the following facts:

After the victim arrived at Juarez's party, she quickly drank approximately twelve shots of vodka. She became heavily intoxicated, fell down, and hit her head on the hard wooden backboard of a couch. Tyler carried her to the bedroom, where she vomited, and he then left the party in order to get more alcohol. Although the victim initially mumbled "no" at some point during the initial assault by Juarez, the evidence reflected that the victim was extremely intoxicated and felt helpless, like a "ragdoll." The victim additionally testified that she could not move her arms, felt "heavy," and she could not kick or fight.

Note: "Physically Helpless" typically means the victim is unable to communicate her consent or lack thereof. In general, if the victim can verbally object, she is not physically helpless. In this case, however, the court stretches this concept under the unique

circumstances of this case. Even though the victim did say, "no," the court seemed to believe that her advanced level of intoxication was enough. The court noted, "In order to show that the victim was physically helpless, there must be evidence that the victim was "unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act" at all relevant times. Even though she did communicate an unwillingness, she was likely not able to do so at "all relevant times."

Sokup v. State, 25 Fla. L. Weekly D1520 (Fla. 5th DCA June 23, 2000):

Conviction for sexual battery on physically incapacitated person cannot be sustained where state failed to prove victim did not consent.

Victim's drunken state in instant case did not rise to level of incapacitation contemplated by statute.

Discussion: In this rather unusual fact scenario, four teenage girls found the business card of a mail stripper and arranged for him to appear at a birthday party. The defendant provided alcohol to the girls and they all danced together. The 16 year old victim then took her own clothes off and asked the defendant to remove his. The victim and defendant ended up on a couch with the victim performing oral sex on the defendant. The other girls described the conduct as anything but nonconsensual. The victim drank four or five shots of liquor and some champagne and testified that she was numb at the time and not thinking straight. The appellate court ruled there was no competent evidence of lack of consent and the victim's level of intoxication was insufficient to substantiate physical incapacitation.

Retaliation (794.011(1)(f)):

Retaliation includes, but is not limited to, threats of future physical punishment, kidnapping, false imprisonment or forcible confinement, or extortion.

Serious Personal Injury (794.011(1)(g)):

Serious personal injury means great bodily harm or pain, permanent disability, or permanent disfigurement.

Jones v. State, 478 So.2d 493 (Fla. 5th DCA 1985):

> Evidence was sufficient to support conviction of sexual battery with physical force likely to cause serious personal injuries. There was testimony that victim was choked during sexual battery, resulting in bruising about neck, and testimony that victim had experienced quite a bit of trauma.

Booker v. State, 397 So.2d 910 (Fla. 1981):

> Where elderly woman was found dead in her apartment with two knives embedded in her body, semen and blood in the vaginal area indicating sex before death, and the apartment was found to be in a state of disarray, there was overwhelming circumstantial evidence demonstrating only one reasonable hypotheses, to wit: that defendant used force likely to cause serious bodily injury in the commission of the sexual battery.

Sexual Battery (794.011(1)(h)):

Sexual battery means 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; however, sexual battery does not include an act done for a bona fide medical purpose.

Boyd v. State, 30 Fla. L. Weekly S458 (Fla. 2005):

> Competent, substantial evidence supported conviction for sexual battery; defendant's semen was found on victim's inner thighs, victim's blood was in defendant's apartment, bruising on victim's inner thighs and vaginal area was consistent with either consensual or nonconsensual intercourse, and victim was last seen alive with defendant.

Hamilton v. State, 703 So.2d 1038 (Fla. 1997):

> State introduced sufficient proof of sexual assault independent of defendant’s confession.
>
> Discussion: When found, the body of the victim was too badly decomposed to reveal physiological signs of sexual assault. Nevertheless, other proof was introduced: semen was found on the rear seat covers of the car, the victim’s body was found naked

except for a pair of shorts and the co-perpetrator told the deputy that the defendant got into the back seat of the car and made the victim take her clothes off and she was crying and asking them if they were going to hurt her.

Aiken v. State, 390 So.2d 1186 (Fla. 1980):

Desire for sexual gratification was not necessary element to charges of sexual battery where batteries were alleged to have been committed by male upon female with the male's sexual organ and no foreign objects were involved.

Discussion: The court specifically refused to consider the question of intent to gain sexual gratification where the actor used a foreign object. See Cordts v. State, 532 So.2d 1363 (Fla. 2d DCA 1988) which rules that sexual gratification is not necessary for digital penetration.

Hendricks v. State, 360 So.2d 1119 (Fla. 3d DCA 1978):

When object other than the actor's sexual organ is brought into union with the victim, intent to derive sexual gratification becomes a necessary element of the crime of sexual battery.

Where act of union with victim involved sexual organ of actor, there could be no question that the act itself inferred a criminal intent requiring no specific intent other than that evidenced by doing of the acts constituting the offense of sexual battery; in such situation the intent of the actor to attain sexual gratification was not an element of the crime which must have been alleged and proved.

Discussion: Cordts v. State, 532 So.2d 1363 (Fla. 2d DCA 1988) indicates that sexual gratification is not necessary for digital penetration.

Unlawful Sexual Activity:

Hodge v. State, 29 Fla. L. Weekly D609 (Fla. 4th DCA 2004):

In prosecution for unlawful sexual activity with certain minors, question of whether victim had disabilities of nonage removed is a matter of defense.

Where defendant presented no evidence that minor victim had disabilities of nonage removed at time of offense, he was not entitled to judgment of acquittal.

No error in refusing to instruct jury that state was required to prove that defendant knew victim was underage and that he acted with criminal intent.

Violation of section 794.05 is strict liability crime, and lack of criminal intent or mistake of age was not defense to charge.

Campbell v. State, 25 Fla. L. Weekly D2501 (Fla. 2d DCA October 18, 2000):

No error in convicting defendant of unlawful sexual activity with person 16 or 17 years of age, even though victim had been sentenced as adult for felony and placed under supervision of Department of Corrections.

F.S. 743.066 removes disability of nonage of minor adjudicated as an adult and in the custody or under the supervision of the Department of Corrections, as such disability relates o health care services, except in regard to medical services relating to abortion and sterilization. Victim's entitlement, at least temporarily, to make her won medical decision as a result of her adjudication as felon did not remove her protection provided by statue for minors from sexual activity.

Griffin v. State, 25 Fla. L. Weekly D684 (Fla. 1st DCA March 13, 2000):

Statute governing sexual activity by a person 24 years of age or older with a person 16 or 17 years of age is constitutional.

Wright v. State, 739 So.2d 1230 (Fla. 1st DCA 1999):

Statute concerning sexual activity by a person 24 years of age or older with a person 16 or 17 years of age does not constitute unconstitutional violation of equal protection or right of privacy.

Walborn v. State, 729 So.2d 504 (Fla. 2d DCA 1999):

Statute which makes it a crime for a person 24 years of age or older to engage in sexual activity wit a person 16 or 17 years of age does not constitute an unconstitutional denial of equal protection or the right to privacy.

Pawloski v. State, 718 So.2d 1264 (Fla. 2d DCA 1998):

> Unlawful sexual activity with certain minors (794.05) does not constitute an unconstitutional violation of the right to privacy.

State v. Cunningham, 712 So.2d 1221 (Fla. 2d DCA 1998):

> Statute which makes it unlawful for a person 24 years of age or older to engage in sexual activity with a person 16 or 17 years of age does not violate the constitutional right to privacy.
>
> Discussion: This case is very valuable for your research file. It provides an in-depth discussion of the history of the statute and how it relates to other sex offenses against children.

Victim (794.011(1)(i)):

Victim means a person who has been the object of a sexual offense.

Owen v. State, 596 So.2d 985 (Fla. 1992):

> Finding that murder victim was still alive at time of sexual union, thereby supporting conviction for sexual battery, was supported by evidence. Whether the victim was alive or dead at the time of sexual union is an issue of fact to be determined by the jury.
>
> Discussion: The Supreme Court made a similar ruling in Owen v. State, 560 So.2d 207 (Fla. 1990), where the same defendant raped another woman who was at the brink of death.

Holten v. State, 573 So.2d 284 (Fla. 1990):

> Defendant could be convicted of sexual battery with great force; although evidence could not conclusively establish that bottle was inserted in victim's anus before death, there was evidence from which jury could conclude that defendant thought victim was alive at time he initiated sexual battery.

Jones v. State, 569 So.2d 1234 (Fla. 1990):

> Victim of sexual battery must have been alive at time of assault.

Non-Statutory Definitions:

Age:

Fitzsimmons v. State, 2020 WL 6935885 (Fla.App. 1 Dist., 2020)

Even though the State apparently did not elicit direct testimony about the suspect's age, the appellate court said it was indirectly established.

And third, there was indirect testimony that Fitzsimmons was over the age of eighteen. Caleb testified that he was twenty-three years old and that Fitzsimmons was his father. And the evidence showed that the victim's father had been friends with Fitzsimmons for more than twenty-five years. This testimony satisfied the third element of both charges.

Terry v. State, 2017 WL 2983283, (Fla.App. 4 Dist., 2017)

The State introduced the defendant's birth certificate to prove he was 24 years of age or older in an unlawful sexual activity with a child case. The defense argued that the State did not prove the defendant's age because there was nothing linking the birth certificate to the defendant. The court ruled that circumstantial evidence was sufficient to prove the defendant's age. The jury had an opportunity to observe him during trial and sequence of events during testimony made it apparent he was over 24 years of age. The defendant was actually 58.

White v. State, 2016 WL 67359, (Fla.App. 4 Dist.,2016)

State's failure to offer testimonial or documentary evidence of the defendant's age in a sexual battery prosecution required case to be remanded for defendant to be sentenced to a lesser offense where the defendant's age was not necessary to prove.

Note: Under some circumstances the defendant's age can be proved circumstantially, but in this case the defendant was only 20 years-old, which made it difficult.

MacKay v. State, 2014 WL 5100049 (Fla.App. 2 Dist.)

Omission from the jury instructions and verdict form at capital sexual battery trial of the element of the offense that defendant was over the age of 18 at the time of the offense was not fundamental error entitling defendant to habeas relief 25 years after his conviction of the offense, where element was not in dispute, as defendant did not allege that he was under the age of 18, and it appeared defendant was over the age of 20 at the time of the offense.

Monroe v. State, 2014 WL 5420656 (Fla.App. 1 Dist.)

Unpreserved claims of evidentiary deficiency as to defendant's age of at least 18 at time of offenses did not result in fundamental error with respect to his convictions for capital sexual battery on a child under age 12 and lewd or lascivious molestation on a child under age 12, even though, as an adult offender, defendant was sentenced to a mandatory sentence of life without parole for capital sexual battery and 40 years' incarceration for lewd or lascivious molestation; evidence was legally sufficient to show that defendant committed the offenses at least as a juvenile, even if not as an adult.

Rincon v. State, 33 Fla. L. Weekly D2766 (Fla. 4th DCA 2008):

Fact that information charging defendant with sexual offenses committed on a victim under 12 years old included, as the end date for the offenses, victim's 12th birthday did not preclude sentencing for offenses committed on a victim under 12 years old, where defendant pled guilty, thereby admitting that he sexually abused the victim while she was under 12 years old.

Feliciano v. State, 31 Fla. L. Weekly D2395 (Fla. 1st DCA 2006):

Statutory rape law, prohibiting unlawful sexual activity with minors of age 16 or 17 by persons 24 years of age or older, did not violate due process for failure to require proof the defendant knew the minor's age.

In the instance of statutory rape, it is no defense that the defendant actually believed the female to be in excess of the prohibited age.

In the context of sex offenses against minors of certain specified ages, to which there is no defense of ignorance or mistake of age,

any type of adult sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents.

State v. Surin, 31 Fla. L. Weekly D489 (Fla. 3d DCA 2006):

Circumstantial evidence was sufficient to show that defendant was at least 18 years old at time of offenses, so as to support convictions for sexual battery of person under 12 years of age by person 18 years of age or older; jury had opportunity to observe defendant throughout trial, there was evidence that defendant married victim's mother one year before offenses, that he cared for victim while mother was at work, and that he was old enough to enter the country without his parents or any other family members, mother referred to defendant as adult during her testimony, and victim repeatedly referred to defendant as "daddy."

Perritte v. State, 30 Fla. L. Weekly D2086 (Fla. 5th DCA 2005):

Absence of jury finding that defendant was over the age of 18 at time of committing sexual battery upon a victim under the age of 12 did not, under *Apprendi*, mandate conviction for life felony as opposed to capital felony, which capital offense mandated life sentence, since matter of defendant's age was never in dispute, with victim's mother testifying that she had attended defendant's 49th and 50th birthday parties, and defendant himself testifying that he was 53 years old at time of trial, and defendant did not object to instruction or verdict form that omitted his age, and in fact agreed to the omissions.

Glover v. State, 28 Fla. L. Weekly S739 (Fla. 2003):

Age of defendant is an element of capital sexual battery under 794.011(2).

Although trial court did not specifically instruct jury that age of defendant was element of offense that must be proven beyond a reasonable doubt, district court did not err in affirming conviction, because defendant's age of over eighteen years was not a disputed element.

Discussion: Read this case well before trying a capital sexual battery case. The court held that the judge must specifically instruct the jury that the defendant's age is an element of the offense. The court in this case, however, said failure to do so was

not a problem because age was not an issue. The court noted that the jury viewed the 37-year-old defendant in the courtroom for several days. The defendant's booking admission that he was born in 1964 was admitted into evidence and there was no evidence to the contrary.

Toussaint v. State, 25 Fla. L. Weekly D643 (Fla. 4th DCA March 15, 2000):

Where information, because of clerical error, charged defendant, who was 52 years old, with sexual battery upon person less than twelve years of age by a person under eighteen years of age, and court noticed error and brought it to the attention of State and defendant after closing all evidence, court's granting of motion to amend information to allege offense of sexual battery upon person less than twelve years of age by a person over age of eighteen did not violate double jeopardy principles.

Because elements of offense charged in initial and amended Information were the same, amended information did not place defendant in double jeopardy.

D'Ambrosio v. State, 736 So.2d 44 (Fla. 5th DCA 1999):

Age of defendant is one of the elements to be proved to establish capital sexual battery, and thus it must be included within the instructions, along with the proof.

Adkins v. State, 729 So.2d 955 (Fla. 5th DCA 1998):

Trial court acted within its discretion when it allowed State to reopen case to prove victim's age in prosecution for child sexual battery.

Grady v. State, 701 So.2d 1181 (Fla. 5th DCA 1997):

Defendant's alleged lack of knowledge of age of victim was not a defense, where he was charged with procurement for prostitution of person under 18.

While general rule is that every crime must include specific intent, or mens rea, exception exists where state has compelling interest in protecting underage persons from being sexually abused or exploited.

M.J.C. v. State, 681 So.2d 1203 (Fla. 5th DCA 1996):

> Judgment of guilt of capital sexual battery reversed where defendant was only fifteen years of age at time of offense. Defendant should have been sentenced to life felony for sexual battery pertaining to offenders less that eighteen years of age.

Burgos v. State, 667 So.2d 1030 (Fla. 2d DCA 1996):

> Evidence was insufficient to convict defendant of one of two counts of sexual battery on a child less than 12 where nothing in record established that the crime occurred prior to victim's 12th birthday.

State v. Robinette, 652 So.2d 926 (Fla. 1st DCA 1995):

> Prior removal of child's disabilities of nonage is not a defense to charge of employing, authorizing or inducing a child less than 18 years of age to engage in a sexual performance.
>
> Discussion: The trial court dismissed the charge because the child involved had obtained a prior judgment removing disabilities of nonage pursuant to section 39.016. The appellate court ruled that Sexual Performance by a Child is a strict liability crime and F.S. 39.016 has no effect on that.

Velazquez v. State, 648 So.2d 302 (Fla. 5th DCA 1995):

> In sexual battery on child less than twelve years of age, trial court erred in ruling that as long as alleged conduct occurred on or before victim's twelfth birthday, the alleged criminal activity fell within ambit of statute. Under either common law rule or modern trend, defendant's motion to dismiss should have been granted because victim turned twelve before noon on his birthday, the time the state alleged that the offense occurred.
>
> Discussion: The court discusses both the common law rule and modern trend or "birthday rule." The court states that Florida is bound to follow the common law when there is no statutory authority indicating otherwise. This rule states that a person turns a given age at 12:01 a.m. on the day before his birthday. The modern trend indicates that a person turns a given age at 12:01 a.m. on his birthday. The court indicates that the modern trend makes more sense, but we are obligated to follow the common law.

It is also important to note that the court ruled that neither sexual battery nor indecent assault are necessarily lesser included offenses of sexual battery on a child and therefore, the defendant could not be sentenced for those crimes.

Baker v. State, 604 So.2d 1239 (Fla. 3d DCA 1992):

Defendant could not be convicted of capital sexual battery absent either a specific allegation in the charging document or a finding by the jury that defendant was 18 years of age or over. While jury was instructed it had to find defendant was at least 18 in order to find him guilty of a capital felony, jury found defendant guilty only of "sexual batteries charged in the information" as verdict form contained no provision for finding of defendant's age.

Discussion: The reason age is an essential element of the charge is that it is only a life felony for someone under the age of eighteen to commit the offense. The court indicates that if you fail to charge the defendant's age in the document, you may be able to cure it by listing it in the jury instruction.

Jesus v. State, 565 So.2d 1361 (Fla. 4th DCA 1990):

Defendant's age was not element of sexual battery.

Discussion: This case appears to be somewhat contradictory to the Baker decision. The court in this opinion indicated that "Section 794.011 refers to a person's age only in prescribing the means by which an offender should be punished." This case involved a sexual battery upon a child under 794.011(2). The defense objected to the fact that the State proved the defendant's age solely through his own statement and therefore failed to present a sufficient corpus delicti, or prima facie case, without the use of the statement. In response, the court ruled that the State did not have to prove the age. This differs from the Baker case in that the State in Baker never charged, much less proved the defendant's age. In the instant case, it was charged in the information and introduced through the defendant's statement. This is a good case to use if you forget to prove the defendant's age, but the better practice is to charge it and prove it.

Alternative Pleadings:

Price v. State, 33 Fla. L. Weekly S821 (Fla. 2008):

Information charging defendant with sexual battery on a physically incapacitated person by "oral and/or vaginal penetration by, or union with the sexual organ of victim," provided sufficient notice to defendant of the allegations against him, so as to comply with requirements of due process; information tracked the language of sexual battery statute, referenced specific section of the criminal code which sufficiently detailed all the elements of the offense, and could include alternative bases for conviction, since offense of sexual battery could be proven by alternative methods.

Due process of law requires the state to allege every essential element when charging a violation of law to provide the accused with sufficient notice of the allegations against him.

Defendant could not challenge sufficiency of information charging him with sexual battery on a physically incapacitated person for the first time in petition for habeas corpus, after dismissing direct appeal from his conviction, since information was not fundamentally defective; information tracked the language of sexual battery statute, there was nothing in the record showing that defendant was misled as to what he was charged with or that he was embarrassed in the preparation of his defense, at trial defendant did not claim the information was defective nor did he file a motion to dismiss, and there was nothing in the record that showed actual prejudice to the fairness of defendant's trial.

Attempt:

Hernandez-Paz v. State, 2020 WL 1684089, at *1 (Fla. 1st DCA Apr. 7, 2020)

Trial court did not err in denying a motion for judgment of acquittal on a charge of attempted sexual battery. The defendant did floor work at the victim's house. He later returned to say he left a tool in her bedroom. While in the room, he repeatedly asked her for sex. After she repeatedly told him "no," he proceeded as follows:

> *While standing in a manner that he was blocking her only way out of the bedroom, Appellant told the victim that they "can do something quick right now, that no one had to know about what [they] had to do right then and there," and he proceeded to try to*

> *reach under her pajama shorts and grab her vagina. She slapped his hand away before he could make physical contact, and she told him no. Appellant, however, did not cease his sexual advances at that point…Instead of stopping when the victim unambiguously refused his sexual advances by slapping his hand away and telling him no, Appellant forcibly continued his assault by immediately putting her in a tight bear hug, with one arm around her waist and on her buttocks and the other hand grabbing her breasts. He then lifted her up and tried to swing her over to the bed that was right next to them. Nervous about being placed on the bed, the victim pushed Appellant off as hard as she could and ran out of the bedroom to get her cell phone. Appellant terminated his attempt only then, after the victim got away from him.*

The appellate court cited various cases with similar fact patterns and concluded, "Thus, we find that the trial court properly denied Appellant's motion for judgment of acquittal as there was competent, substantial evidence to support a verdict finding him guilty of attempted sexual battery."

Duxbury v. State, 2019 WL 846768 (Fla.App. 5 Dist., 2019)

Substantial evidence existed to support jury's verdict that sexual battery with physical force had been attempted on victim and that defendant was perpetrator of that crime; although there was no evidence of actual intercourse, crime charged was attempted sexual battery, and victim had numerous abrasions on her body consistent with attempted sexual battery, and defendant's DNA was found on victim's breasts.

Jefferson v. State, 2018 WL 1612237, (Fla.App. 3 Dist., 2018)

In ruling that evidence was sufficient to support an attempted sexual battery, the court wrote,

> *Both the victim's testimony and the Appellant's testimony provide proof beyond a reasonable doubt that the Appellant*

had the specific intent to sexually assault the victim, and made overt acts to accomplish that assault. The Appellant admitted that he followed the victim and demanded that she get into his car, that he asked her to take her blouse off, that he offered her money for sex, and that he forcibly attempted to keep her in the car for that purpose.

Heathcock v. State, 2017 WL 3442739 (Fla.App. 5 Dist., 2017)

Jury instruction in trial for attempted sexual battery upon a physically helpless person providing that defendant was charged with "attempt to commit attempted sexual battery" was erroneous, since there is no crime of "attempt" to commit attempted sexual battery.

Tulier v. State, 2014 WL 4086814 (Fla.App. 2 Dist.)

Defendant's act of offering the 16-year-old victim $400 in exchange for oral sex was not sufficient to amount to an overt act toward the commission of sexual activity with a minor, as required for attempted sexual activity with a minor; defendant's actions constituted mere preparation, or solicitation.

The defendant drove his car up to a 16 year old boy and offered him $400 for a blow job. Defendant never got out of the car or took any steps toward completing the act.

Mizner v. State, 2014 WL 3734288 (Fla.App. 2 Dist.)

Facts: FDLE agents posted ad on Craigslist for family fun. Agent posed as 35 year old mother who wanted suspect to have sex with her and her young child. They eventually went to meet in a restaurant to get to know one another. If things worked out, they would drive back to the "mother's" home town, pick up the girl from school and head to the "mother's" house for sex. Defendant was arrested when he arrived at the restaurant.

Holding:

- Defendant did not make a sufficient over act toward the commission of the crime to justify attempted sexual battery

of a child charge. Too many additional steps had to be taken to complete the act.

Kaczmar v. State, 37 Fla. L. Weekly S619 (Fla. 2012):

Circumstantial evidence was insufficient to support conviction of attempted sexual battery or the attempted sexual battery aggravator in death penalty case; defendant's statement earlier on night of charged murder that he hoped to have sex with victim did not support a finding of attempted sexual battery, and state did not provide evidence inconsistent with defendant's reasonable hypothesis that he killed victim in a fit of rage and not during an attempted sexual battery.

Williams v. State, 32 Fla. L. Weekly S347 (Fla. 2007)

Evidence of victim's pregnancy was sufficiently relevant in first-degree felony murder trial to totality of the circumstances and to specifically proving the underlying felony, attempted sexual battery; defendant was not the father of victim's child, and thus evidence of victim's pregnancy was probative to demonstrate victim's lack of consent to any type of sexual conduct with, or sexual advance by, defendant.

Evidence was sufficient to support first-degree felony murder charge based on underlying felony of attempted sexual battery; evidence showed that victim voluntarily opened the door for the attacker, and given her advanced state of pregnancy, was likely clothed when she did so, yet when police arrived, victim appeared at the door completely nude and was attempting to cover her nudity, police discovered at the crime scene victim's blood-stained shorts and panties on the bed under some bloody sheets in a condition that indicated they were removed either during or in close proximity to the attack, victim had bite marks on her bare breast and back, and in the general area of her groin, and victim had made an unsolicited statement to officer that she had been "raped."

Troy v. State, 31 Fla. L. Weekly S677 (Fla. 2006):

State presented sufficient circumstantial evidence that was inconsistent with defendant's hypothesis of innocence to permit

submission of attempted sexual battery charge to jury; among the indicia of an attempted sexual battery produced at trial was the evidence that victim was found completely nude, with her underwear and torn bra next to her body, that victim exhibited bruises in the exterior of her vaginal area, and that the crime scene reflected a great deal of violence inflicted upon victim.

Johns v. State, 28 Fla. L. Weekly D595 (Fla. 5th DCA 2003):

Where act charged in the information was that defendant placed victim's penis into his mouth and evidence showed defendant tried to kiss victim's penis, there was no material difference between the act charged and the act proved.

Discussion: The information stated, "to wit: by placing the victim's penis into his mouth." The victim testified, "He'd like-he would pull my penis out and him go down there and try to kiss it and then I jerked away again and he got mad." The victim later said, "He would put it up to his mouth and rub his mustache against to it. He would like try to kiss it. And then at certain points he would try to put it into his mouth." The defendant argued that the evidence did not support the language in the information, but the appellate court disagreed.

Donovan v. State, 27 Fla. L. Weekly D1289 (Fla. 5th DCA 2002):

Evidence that defendant pulled victim toward him as he spoke about oral sex was sufficient to send case to jury on attempted sexual battery charge.

No error in imposing sex offender conditions on probation where defendant was convicted of "attempted" sexual battery.

Holland v. State, 25 Fla. L. Weekly S796 (Fla. October 5, 2000):

Sexual battery is a general intent crime.

Attempted sexual battery is a general attempt crime.

Voluntary intoxication is only applicable to specific intent crimes.

Discussion: The court notes that the rule to apply when determining whether at attempt to commit an offense is a general or specific intent crime is whether the completed offense would

have been a general or specific intent crime. Since sexual battery is a general intent crime, attempted sexual battery is also.

Louis v. State, 764 So.2d 930 (Fla. 4th DCA 2000):

Victim's statement that she was undressed by one of perpetrators and touched "over my chest, through my shirt, on my stomach, on my genital area" sufficient to establish sexual contact and thus victim injury under relevant statutes and guidelines.

Evidence sufficient to establish attempted sexual battery by digital penetration as charged in the information.

Discussion: Most of this case discusses the scoring of victim injury points and follows the rationale of 5th DCA in *Kitts v. State*. The issue of attempted sexual battery is not thoroughly discussed.

State v. Ortiz, 25 Fla. L. Weekly D2016 (Fla. 3rd DCA August 23, 2000):

Error to grant motion to dismiss attempted sexual battery charge where there was no physical or medical evidence of attempted sexual battery, but circumstantial evidence that murder victim was found in isolated field with her shirt around her head and her shorts below her knees was sufficient to established prima facie case.

Discussion: This opinion has an interesting discussion. It is important to note that the appellate court is simply ruling that the judge did not have a basis for granting a 3.190 (c)(4) motion where the state is entitled to the most favorable construction of the evidence with all inferences resolved against the defendant. The medical examiner in this case opinioned that the victim had been sexually assaulted based upon the positioning of her clothing, the location of her body and other surrounding circumstances. The trial judge ruled that the doctor's opinion was not credible, prompting the appellate court to rule that the judge is not allowed to make credibility determinations at a 3.190(c)(4). The appellate court noted that "even if the trial court doubts the sufficiency of the state's evidence, it cannot grant a motion to dismiss criminal charges simply because it concludes the case will not survive a motion for a judgment of acquittal."…"Moreover, if the state's evidence is all circumstantial, whether it excludes all reasonable hypothesis of innocence may only be decided at trial, after all of the evidence has been presented."

Ellis v. State, 754 So.2d 887 (Fla. 5th DCA 2000)

Error to deny motion for judgment of acquittal on charge of attempted sexual battery, where there was evidence of improper touching on multiple occasions, but no evidence of intent to penetrate the victim's vagina.

Discussion: The child in this case testified that the Suspect simply touched her vagina with his fingers. During the Defendant's confession, he admitted to touching the child's vagina but repeatedly denied anything beyond the mere touching. The detective who obtained the confession drew a picture of a hand and asked the Defendant to color the parts of his fingers that went into the child's vagina. The Suspect proceeded to color the pads of his fingers. The appellate court ruled that if the defendant could be charged with attempted sexual battery under this scenario, then the State could conceivably charge attempted sexual battery every time the suspect touched the victim's vaginal area.

State v. Duke, 709 So.2d 580 (Fla. 5th DCA 1998):

Conduct of defendant in discussing sexual acts on the Internet with detective whom he thought was a 12-year-old child, in arranging to meet "child" to commit sexual acts, and arriving at prearranged meeting point did not reach level of overt act leading to commission of sexual battery as required by attempt statute.

Discussion: Please note that the conduct of the suspect can now be charged under F.S. 847.0135 which makes it a 3rd degree felony for someone to utilize a computer on-line service or Internet service, etc… to solicit, lure, or entice a child or another person believed by the person to be a child to commit any illegal act described in F.S. 794, F.S. 800 or F.S. 827.

Gudinas v. State, 693 So.2d 953 (Fla. 1997):

No merit to defendant's contention that evidence did not reveal an overt act to support charge, where eyewitness testimony indicated that defendant followed victim from one parking lot to another, and tried to forcibly enter her car on three separate occasions, including an attempt to smash her window, while using vulgar language which made clear defendant's intent to rape victim. He did not have to yell, "I want to rape you," in order for his criminal intentions to be apparent.

Defendant's attempt to rape first victim occurred within three hours previous to, and in same proximate area of, later rape and murder, and defendant's failure to complete attack against first victim may have provided a causal link to his completed attack on second, therefore, it was proper to join the offenses.

Discussion: This case is useful for two issues. The first helps us with cases of attempted sexual battery. The second deals with joinder of offenses. If you review a case where the defendant assaults more than one woman on the same night, you may be able to use this case to justify filing both incidents in the same information. If you can show that the acts were part of a crime spree or that there is another meaningful relationship between the two offenses, you may be able to charge them together.

Patel v. State, 679 So.2d 850 (Fla. 1st DCA 1996):

Claim that defendant was erroneously convicted of solicitation to commit sexual battery on a child younger than 16 years of age when evidence at trial established, at most, that defendant tried to persuade child under age 16 to engage in sexual relations with him for money was sufficient to require further proceedings.

Discussion: This case points out the difference between soliciting a child to commit indecent assault or sexual battery and attempting to commit the offense upon the child. If a defendant encourages a child to have sex with him it is classified as an attempt to commit the crime. If the defendant encourages the child to commit a sexual offense on someone else, it is solicitation.

Chapman v. State, 677 So.2d 46 (Fla. 2d DCA 1996):

Contention that trial court erred in instructing jury on attempted capital sexual battery where evidence showed only completed crime waived by failure to object to instruction.

Tooley v. State, 675 So.2d 984 (Fla. 5th DCA 1996):

Defendant properly convicted of attempted sexual battery, despite fact that he voluntarily desisted from completion of the act, where facts showed that defendant, with the announced and obvious intent to rape victim, kidnapped victim, tied her up, threatened her with a gun, and beat her into unconsciousness.

Barnhart v. State, 670 So.2d 1082 (Fla. 2d DCA 1996):

Reversible error to refuse to give requested jury instruction on attempted capital sexual battery where there was evidence which supported such instruction.

Discussion: The appellate court ruled that the equivocal nature of the child's testimony would have supported either a capital sexual battery or an attempted capital sexual battery. The victim testified that "He was trying to stick his penis in my vagina." When asked how she knew he was doing that, she testified "Because it hurt."

Barwick v. State, 660 So.2d 685 (Fla. 1995):

Circumstantial evidence that defendant admitted he had observed victim sunbathing and subsequently returned with knife to apartment complex where he initially observed her and entered victim's apartment only after she herself had entered, combined with circumstances in which victim's body was found and test results indicating that defendant was within two percent of population that could have left semen stain on comforter wrapped around victim's body, was sufficient to withstand motion for judgment of acquittal on charge of attempted sexual battery.

Discussion: This is primarily a homicide case. It's primary value for a resource is the court's discussion of the standards to be applied at a judgment of acquittal argument when the state presents a circumstantial case.

Velasquez v. State, 657 So.2d 1218 (Fla. 1st DCA 1995):

Attempted sexual battery of fourteen-year-old victim improperly scored as first degree felony. Statute providing for enhancement in cases of sexual battery by multiple perpetrators does not apply to attempt.

Rogers v. State, 660 So.2d 237 (Fla. 1995):

Act of touching victim's breast and ordering her to remove her clothes, which victim refused to do, did not rise to level of overt act toward commission of sexual battery.

Walker v. State, 622 So.2d 630 (Fla. 3d DCA 1993):

Evidence, including statement by then eight year old brother of victim that he saw defendant sitting beside child with his finger in

her "privates," although disputed, was sufficient to support defendant's conviction of attempted sexual battery of two year old child.

Pride v. State, 511 So.2d 1068 (Fla. 1st DCA 1987):

Evidence of only partial penetration of victim would be sufficient for completed sexual battery, precluding instruction on attempt.

Bates v. State, 465 So.2d 490 (Fla. 1985):

Abandoning sexual battery because of a premature ejaculation was not a complete and voluntary renunciation of criminal purpose so as to constitute a defense to attempted sexual battery.

Carnal Intercourse:

Victor v. State, 566 So.2d 354 (Fla. 4th DCA 1990):

Defendant who performed fellatio upon unmarried person under 18 years old could be convicted of "carnal intercourse" with an unmarried person under 18.

Carnal intercourse, for purposes of statute defining offense of unlawful carnal intercourse with any unmarried person under 18, requires neither sexual intercourse nor penetration of victim. Statute, which protects minors from sex acts imposed by adults, is equally violated; regardless of which party is acting upon the other.

Discussion: This case interprets the seldom-used 794.05 that requires the victim to be of previous chaste character.

Circumstantial Evidence; Sufficiency of Proof

Kirkpatrick v. State, 2022 WL 3643506 (Fla.App. 1 Dist., 2022)

As to the sexual battery charge, Kirkpatrick claims that his counsel should have argued that the State failed to prove that the sex between him and the victim was nonconsensual. But the forensic evidence directly refutes Kirkpatrick's claim. The victim was found nude with zip ties on her wrists and ankles. She had abrasions on her wrists that showed that she struggled against her bindings. The evidence suggested that the victim had Kirkpatrick's blood and

DNA under her fingernails. And a detective found a pair of ripped women's underwear near a bloody pillow at the crime scene. This evidence, along with Kirkpatrick's confession to his roommate, casts doubt on Kirkpatrick's claim that the sex was consensual and was sufficient to submit the charge to the jury. See Troy v. State, 948 So. 2d 635, 647 (Fla. 2006) (holding that the circumstantial evidence was sufficient to present to the jury, given the victim was found completely nude with her underwear and torn bra next to her body, the victim exhibited bruises in the exterior of her vaginal area, and the amount of violence inflicted on the victim). Because any motion for judgment of acquittal would have been denied, counsel cannot be considered ineffective. See Dickerson, 285 So. 3d at 358.

Shrader v. State, 2016 WL 4649190 (Fla.App. 2 Dist.,2016)

Evidence failed to establish that victim's death occurred as a consequence of and while defendant was engaged in commission of alleged sexual batteries, even though defendant initially gave evasive answers about his whereabouts and not remembering victim and even though victim's body was found in state of partial undress, and thus evidence did not support conviction of first-degree felony murder; there was no evidence of timing of sexual intercourse between victim and defendant, and there was no medical evidence to suggest that victim suffered any sexual trauma.

Dessaure v. State, 35 Fla. L. Weekly S568 (Fla. 2010)

Evidence supported instruction on sexual battery as underlying felony used to prove felony murder, where victim was found naked and face down on the floor, defendant's semen was found on a towel near the victim's body and on her bed linens, and a witness testified that defendant told him he struck the victim and began having sex with her.

Thomas v. State, 29 Fla. L. Weekly S708 (Fla. 2004):

State presented sufficient evidence that was inconsistent with defendant's hypotheses of innocence, in prosecution of defendant for sexual battery, to permit submission of circumstantial evidence case to jury; State presented expert testimony that the seeds and

vegetation found under victim's jeans near her pubic area were consistent with her having been undressed outside of the vehicle, and thus was inconsistent with defendant's statement that he had consensual intercourse with victim in the passenger seat of her vehicle, and State elicited testimony that victim's nose bleeds had never been significant enough to account for the blood that was found on victim's socks, and thus was inconsistent with defendant's assertion that victim had a nose bleed during sexual intercourse and that she used her socks to wipe off the blood.

Consciousness Guilt

Torrealba v. State, 28 Fla. L. Weekly D2648 (Fla. 3d DCA 2003):

Jury could have reasonably concluded that defendant knowingly and intentionally participated in sexually battery and kidnapping by setting up victim and assisting another perpetrator based on the victim's testimony about defendant's behavior and after the incident, all of which reflected a consciousness of guilt.

Discussion: The defendant dated the victim, which angered her boyfriend. The defendant called the victim to come to her house and have a drink. After drinking, the victim became disoriented. The defendant's boyfriend then began to attack the victim. Eventually, the victim became paralyzed by a narcotic and the boyfriend sodomized him with a dildo. Although the victim never specifically saw the defendant do anything to him, the circumstances around the event were sufficient to implicate her.

Corroboration, The Need for

Wali Saleem v. State, 25 Fla. L. Weekly D2352 (Fla. 5th DCA September 29, 2000):

A victim's testimony concerning a sexual battery, if clear as to the identity of the perpetrator, is legally sufficient to sustain a conviction and requires no medical or other corroboration.

Testimony concerning redness inside the victim's vagina hours after the offense could have been caused by digital manipulation was sufficient to create a jury question.

Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984):

> No corroborative evidence is required in sexual battery case when victim can testify directly to crime and can identify her assailant, although it should be carefully scrutinized so as to avoid unmerited conviction**.**
>
> Fact that physical and scientific evidence in record tended to show impossibility of defendant's having been male involved in sexual intercourse with alleged victim did not vitiate legal sufficiency of alleged victim's testimony, although it did bear heavily on her credibility and weight of all evidence tending to support verdict of guilty.

Deadly Weapon:

The Standard Jury Instructions defines a weapon as a deadly weapon "if it is used or threatened to be used in a way likely to produce death or great bodily harm."

Whitfield v. State, 2016 WL 6036612 (Fla. 5th DCA 2016)

> Information charging defendant with two counts of sexual battery while using a deadly weapon or using actual physical force likely to cause serious personal injury was sufficient, notwithstanding its failure to specify what type of deadly weapon was used; State provided defendant with appropriate notice of the conduct for which he was being prosecuted, sufficiently pleading the essential elements of the two charged crimes in the information, including that defendant used or threatened to use a deadly weapon or used actual physical force likely to cause serious personal injury to the victim.

Bright v. State, 2016 WL 1437769 (Fla. 1st DCA 2016):

> Competent and substantial evidence did not support finding that defendant, in process of vaginal sexual battery of victim, used or threatened to use deadly weapon, as required to support conviction for first count of sexual battery with deadly weapon; evidence showed that victim, after driving around with defendant earlier in night, awoke in shed to defendant having vaginal sex with her, which led to first count, and defendant went outside, retrieved

firearm, and returned to commit anal sexual battery upon victim, which led to second count. The first count was reduced to a straight sexual battery, but the second count was sufficient for armed sexual battery.

Jones v. State, 29 Fla. L. Weekly D2389 (Fla. 4th DCA 2004):

Evidence was legally insufficient to find defendant guilty of sexual battery while using, or threatening to use, a deadly weapon where there was no evidence in record to support finding that stun gun was deadly weapon by its ordinary use or in the manner in which it was used on victim.

Shelby v. State, 541 So.2d 1219 (Fla. 2d DCA 1989):

Crime of sexual battery while using or threatening to use a deadly weapon is committed when assailant, in order to carry out his assault, informs victim that he has deadly weapon under circumstances that cause victim to have reason to believe that assailant has ability to carry out his threat, even when weapon is unseen and never discovered.

Discussion: The court made special note in this case that the State charged the defendant "threatened" to use a deadly weapon. He was not charged with" using" a deadly weapon.

Familial or Custodial Authority:

Teet v. State, 2022 WL 1110561 (Fla.App. 5 Dist., 2022)

The 17-year-old high school junior was in a junior ROTC program. She developed a romantic relationship with her teacher and eventually had sex with him after he drove her home from an extracurricular ROTC event. The court ruled he was not in a position of familial or custodial authority. The court noted the critical fact was that the child's parents did not consent to him driving her home. If they had, they would have been granting him custody over the child. The court also noted that the act did not occur during a school function. The court also criticized the State for not charging other applicable offenses that did not require custodial authority. The court noted F.S. 800.101 would have been an applicable charge today. The court did to mention it, but the State could have charged unlawful sexual activity with certain

minors. When similar situations arise, it is probably best to charge both sexual battery familial/custodial and unlawful sexual activity. If a double jeopardy issue arises, the court can dismiss one of them after the verdict. This opinion provides a good review on the meaning of "custodial."

Woolman v. State, 2020 WL 1280817 (Fla. Dist. Ct. App. Mar. 18, 2020)

The trial court instructed the jury that the victim must have been in the "custody or control" of the defendant. The appellate court ruled that this instruction was in error because the court have said "custody and control."

> *Hallberg is clear that "custodial authority" means having "custody and control of another." Id. at 1358. It is a conjunctive rather than disjunctive definition, requiring both custody and control, and it does not allow for an alternative of "a duty or obligation to care for another." Here, the jury was instructed that it could find Woolman guilty if he had custody or control or a duty to care for the victim. Whether Woolman had custodial authority over the victim was heavily disputed at trial. The instruction provided to the jury in this case was an incorrect statement of law and reduced the State's burden as to a contested element of the charged offense; as such, it was fundamentally erroneous.*

Crews v. State, 2013 WL 6050783 (Fla.App. 1 Dist.)

Teacher without any teaching responsibility or extracurricular activity supervisory authority over a child during a summer recess is not in a position of "custodial authority" for the purposes of the statute which forbids sexual activity with a child by a person in familial or custodial authority; thus, teachers are not, by reason of their chosen profession, custodians of their students at all times, particularly when school is recessed for the summer.

Defendant, a teacher, lacked requisite custodial authority over child victim at time of alleged sexual contact to support conviction of sexual activity with a child by a person in familial or custodial authority, where activity alleged occurred away from school, at a

time when defendant was not victim's classroom teacher, and was unconnected to school activity.

Sexual offenses committed against children by teacher constituted "misconduct in public office" within scope of statute extending statute of limitations for offenses constituting misconduct in public office.

Statute extending the statute of limitations for offenses constituting "misconduct in public office" may apply to sexual offenses against a child committed while the accused was indisputably a public school teacher.

Horne v. State, 28, Fla. L. Weekly D1301 (Fla. 2d DCA 2003):

Where defendant was charged with soliciting his son, who was under the age of eighteen, to engage in sexual acts with defendant's wife, and language of information tracked subsection of statute prohibiting the engaging in an act with a person less than 18 years of age which constitutes sexual battery by a person in a position of familial or custodial authority, rather than the subsection of the statute prohibiting the soliciting of such a person to engage in an act which would constitute sexual battery, trial court erred in denying judgment of acquittal as to counts because there was no view that jury could lawfully take to support conviction under the "engaging subsection of statute. As a result of court's denial of judgment of acquittal, defendant was erroneously convicted of an offense with which he was not charged.

Defendant was properly convicted of commission of a lewd and lascivious act in the presence of a child under the age of 16 years based on his act of having sexual intercourse with his wife in the presence of his son.

Pozek v. State, 26 Fla. L. Weekly D2665 (Fla. 5th DCA 2001):

Where defendant took child to the home of his friend, who eventually became child's guardian, when child showed up at defendant's residence, child returned to defendant's home when she left the home of defendant's friend, defendant began providing child with food and clothing and taking her to school, defendant took child to meetings which arose from her troubles with the law

and attended those meetings as a parent or guardian would, child referred to defendant as her uncle, and defendant wrote letter to child's mother and stepfather stating that he loved child and wanted to raise her up into a fine young lady, defendant had familial or custodial authority over victim.

Croker v. State, 752 So.2d 615 (Fla. 2d DCA 1999):

Defendant, who lived with child victim of sex offense in what appeared to be family unit, had familial relationship with victim, as required to support conviction for sexual activity with a child by a person in familial or custodial authority.

"Familial relationship," for purposes of statute prohibiting sexual activity with a child by a person in familial or custodial authority, requires recognizable bond of trust with defendant, similar to bond that develops between child and his grandfather, uncle or guardian.

Familial authority and "custodial relationship" are subject to different definitions, for purposes of statute prohibiting sexual activity with a child by a person in familial or custodial authority; custodial authority indicates finding of in loco parentis, while familial relationship indicates recognizable bond of trust with defendant, similar to a bond that develops between a child and family members.

Discussion: In this particular case, the Suspect had sex with the twelve (12) niece of his girlfriend. The Suspect lived with his girlfriend and her niece. The niece had been placed in the home five (5) years previously by HRS. The defense argued that the case of Hallberg v. State, involving the custodial position of a teacher over a student, was not applicable in this case because the Hallberg decision only involves custodial authority and does not apply to situations of familial authority. The Croker court followed the Florida Supreme Court ruling in State v. Rolles in which it was held that a familial relationship requires a recognizable bond of trust with the Defendant similar to bond that develops between a child and its grandfather, uncle and guardian. Under that scenario, the State presented sufficient evidence of familial authority.

State v. Griffen, 694 So.2d 122 (Fla. 5th DCA 1997):

Trial court properly excluded evidence of sexual batteries previously committed on one minor where acts were committed in

familial relationship but there was little similarity between those acts and charged crime. Trial court erred in excluding evidence of sexual batteries previously committed on another minor where the acts were committed in familial relationship and where there were significant similarities between those acts and charged crime in that victims were barely teenagers, oral sex was involved, and defendant promised to teach victims sexually with the goal that they might be able to make money for themselves and defendant.

Familial relationship existed between defendant and child where child's mother permitted child to temporarily reside in defendant's household and implicitly granted parental-type authority to defendant.

Discussion: This is a fairly well-written case which is a good reference for this subject.

Hull v. State, 686 So.2d 676 (Fla. 3rd DCA 1996):

Error to deny motion to dismiss charge of sexual battery familial or custodial authority where sworn motion to dismiss conclusively demonstrated that defendant had no close personal relationship or any authority over victim.

Discussion: The defendant had a consensual sexual relationship with his seventeen year old niece by marriage. He was charged with sexual battery by a person in a position of familial or custodial authority. The victim had moved into her own private room in the Hulls' home while she was attending college in the Keys. The appellate court ruled there was no "recognizable bond of trust" or the "duty or obligation to care for the other."

Johnson v. State, 682 So.2d 215 (Fla. 5th DCA 1996):

Defendant who was cousin of fourteen year old victim and an occasional overnight guest in victim's home, but who had no responsibility for victim's care and was not looked upon by victim as father figure or as person deserving of special respect or courtesy other than that victim normally paid older persons, was not in position of familial custody or authority.

Error to permit state, over defense objection, to elicit from defense witness her opinion as to credibility of victim.

Defendant not entitled to jury instruction on sexual battery as

lesser included offense.

Falco v. State, 669 So.2d 1053 (Fla. 4th DCA 1996):

Term "custodial authority" in statute proscribing sexual activity with child by person in custodial authority is not unconstitutionally vague.

Hammond v. State, 660 So.2d 1152 (Fla. 2d DCA 1995):

Defendant who rented room from alleged victims' teacher and who had apparently objected to victims' presence at teachers' home, was not in position of familial or custodial authority.

Hallberg v. State, 649 So.2d 1355 (Fla. 1994):

Teacher with no teaching responsibility or extracurricular activity supervisory authority over a child during summer recess is not in a position of custodial authority for purpose of statute.

Teachers are not, by reason of their chosen profession, custodians of their students at all times, particularly when school is recessed for the summer.

Discussion: The court emphasizes that the parents of the child did not place her into the defendant's custody. The defendant simply visited the child's home during the summer and had sex. The parents did not sanction or consent to these visits.

State v. Rawls: 649 So.2d 1350 (Fla. 1994):

In prosecution for sexual battery on person under 12, collateral crime evidence of similar conduct involving three other boys was admissible; charged offense and collateral offenses were strikingly similar in that defendant befriended boys' mothers, arranged to move into their homes, paid rent, bought groceries and was generous to all family members, and then, in same manner, sexually molested male youths of approximately the same age in their homes while no others were present and instructed them not to tell anyone what had occurred.

Trial judge improperly modified standard instruction to include corroboration of victim's testimony as proper use of collateral crime evidence. Without evidence that offense arose within familial or custodial setting, collateral crime evidence could not be

used for victim corroboration.

Discussion: Although this case is primarily concerned with a Williams Rule issue, the concept of familial or custodial authority is thoroughly discussed. There is certainly an argument that familial or custodial authority in the Heuring context is the same as its statutory context. The defendant in this case did not stand in the position of familial or custodial authority because he was only a boarder at the victim's home. He did not exercise any type of custodial or supervisory authority over the victim. The Supreme Court notes that "Consanguinity and affinity are strong indicia of a familial relationship but are not necessary. Also, the defendant and victim need not reside in the same home."

Vandiver v. State, 578 So.2d 1145 (Fla. 4th DCA 1991):

Evidence was insufficient to sustain conviction for sexual battery on a child by person in familial or custodial authority. The record demonstrated that victim, who had run away from HRS placement, spent only two days with the defendant, defendant had no contact with victim before his daughter brought her to his home, defendant did not solicit victim's visit, and he informed her to notify HRS upon her arrival at his home.

Discussion: The State rested its case solely on the fact that the defendant lodged and fed the victim for a two day period and made her feel at home during her brief stay. The court felt that the State's argument was unreasonable.

Lazarowicz v. State, 561 So.2d 392 (Fla. 3rd DCA 1990):

In prosecution for sexual battery of a child by person in position of familial authority, testimony as to uncharged acts of physical violence by defendant upon victim and her sisters was relevant to prove defendant's familial authority over victim and to explain her behavior during entire time period.

Stricklen v. State, 504 So.2d. 1248 (Fla. 1st DCA 1986):

Relationship existing between defendant and victim placed defendant in a position of "familial or custodial authority" for purpose of statute where testimony indicated defendant had cultivated very close relationship to victim over considerable period of time, assuming responsibility for his care practically every weekend, and although defendant did not reside in victim's

home, circumstances could be characterized as establishing close family type ties.

Collins v. State, 496 So.2d 997 (Fla. 5th DCA 1986):

Defendant had child within his "custody" for purposes of statute where victim had many contacts with defendant, she had ridden in his truck many times, defendant had daily contact with victim's's mother, and mother of child knew and approved that child was in care of defendant on day crime was committed.

Coleman v. State, 485 So.2d 1342 (Fla. 1st DCA 1986):

Words "familial or custodial," within statute proscribing offense of sexual battery upon a person over the age of 11 years, are not restricted to persons related to victim by consanguinity, blood relationship, or affinity, marital relationship, but must be interpreted as including any person maintaining a close relationship with children of the ages specified and who lives in the same household with those children.

Defendant assumed a position of "familial or custodial" authority over 14 year old female victim and, hence, fell within statute proscribing sexual battery where defendant, though not shown to have stood in loco parentis to victim at time of offense, was living with victim and her mother in same household to extent that victim loved, trusted and obeyed defendant as any child would love, trust and obey her natural father.

Discussion: Compare this decision with Rawls, in which the Florida Supreme Court indicates that it is not necessary for the defendant to live in the same house as the victim.

Force:

Note:

One should be very careful when reviewing the case law as it applies to the term "force." There have been several changes to the sexual battery statues which have given the term different meaning. The current law became effective on April 8, 1992. Under this law, no actual force need be used during the commission of a sexual battery as long as it is against the will of

the victim. Between 1974 and 1992, the element of "force not likely to cause serious personal injury" was a necessary element of sexual battery. The force did not have to be great, but it did have to be present. Prior to 1974, the statute required that the defendant "ravishes or carnally knows a person of the age of eleven years or more, by force and against his or her will. A review of the case of the past reveals some shocking decisions as to the degree of force required. Victims were continually punished by the appellate court for not "resisting enough." Because most of these decisions are not applicable under the current state of the law, I have chosen not to review them here. If they should be cited by defense counsel during a motion for directed verdict, explain to the judge that the cases interpreted a different law. Among those older case hostile to the victim were: Dean v. State, 277 So.2d 13 (Fla. 1973); O'Bryan v. State, 324 So.2d 713 (Fla. 1st DCA 1976); Johnson v. State, 118 So.2d 806 (Fla. 2d DCA 1960); but see Spencer v. State, 332 So.2d 30 (Fla. 1st DCA 1976)(sufficient resistance by victim); State v. Hudson, 397 So.2d 426 (Fla. 2d DCA 1981)(victim only submitted out of fear);

Robinson v. State, 2018 WL 1647692, (Fla.App. 1 Dist., 2018)

In ruling that the facts were sufficient for the jury to convict on the charge of sexual battery-great force, the court noted,

> *The young woman testified that Robinson held her down by her neck, bit her, made her bleed, and caused her great pain. The young woman's medical records, entered into evidence, detailed a half-centimeter vaginal tear, significant bruising and discoloration on her neck, and bleeding following the attack. Other witnesses testified to seeing significant amounts of blood on the young woman's bed sheets, and Robinson himself testified that he changed shirts afterward because the shirt he wore during the encounter was covered in blood. This evidence—and all the inferences drawn from it—were sufficient to allow a reasonable jury to conclude that Robinson used force sufficient to cause "great bodily harm or pain."*

State v. Sedia, 614 So.2d 533 (Fla. 4th DCA 1993):

State is not required to prove that defendant used more physical

force than merely physical force necessary to accomplish sexual penetration in order to convict defendant under statute making it a crime to commit sexual battery with use of physical force and violence not likely to cause serious personal injury.

Discussion: This case was brought to us by the Honorable Judge Fogan. The facts of the case indicate that a physical therapist was manipulating a 62 year old woman patient by the hips and buttocks. The patient was lying nude from the waist down facing away from the defendant. Without warning, she felt the defendant's penis enter her vagina. The trial court dismissed the count in that no force was used. The appellate court reversed this decision based upon the legislative intent as shown in the subsequent April of 1992 amendment of the statute. F.S. 794.005 is relied upon to establish this intent. Consequently, even though this offense occurred before the 1992 change in the law, the 4th DCA felt that the intent could be applied retroactively. Read F.S. 794.005 for the clear expression of intent.

Russell v. State, 576 So.2d 389 (Fla. 1st DCA 1991):

"Force" means only that degree of power necessary to overcome any resistance; outcry and resistance are not necessary to establish use of force.

Discussion: This case discussed the law as it existed prior to the April 8, 1992 statutory amendment that eliminated the requirement of slight force. This case would have little relevance to sexual batteries committed after April of 1992, but does appear to lessen the resistance required of the victim in the above mentioned older cases.

Penetration and Union:

The Standard Jury Instructions defines "union" as "an alternative to penetration and means coming into contact."

Note: This section contains cases which discuss the sufficiency of evidence offered to prove penetration or union. For cases discussing penetration and union as scored under the sentencing guidelines, please see the Sentencing Issues chapter.

Fountain v. State, 2021 WL 1651363 (Fla.App. 2 Dist., 2021)

During a trial for sexual battery/familial custody, the victim testified the suspect never put his penis in her mouth. The prosecutor could not get her to testify to oral penetration, so he/she tried the union route.

> *Taking a different tack, the State next inquired whether Mr. Fountain "ever place[d] his penis in union with [he]r mouth." The State informed the victim this meant the area "outside your mouth." The victim responded Mr. Fountain had placed his penis in union with her mouth. However, when asked by the State to describe the act of "union," she testified that his penis "was around my face, like around my mouth and around stuff like that." Significantly, when asked whether Mr. Fountain had "ever place[d] his penis upon your lips" or "ha[d] you kiss his penis," she responded, "No."*

Based on this response, the court ruled the trial judge should have issued a JOA on that count.

Ramos v. State, 2019 WL 2364341 (Fla.App. 4 Dist., 2019)

Trial court's use of word butt rather than anus in jury instruction on elements of sexual battery, constituted fundamental error in prosecution for sexual battery on person less than 12 years of age; issues of union and penetration were in dispute, victim's testimony that referred to her butt even though defendant referred to correct anatomical term in part of his statement to law enforcement made distinction between anus and butt or buttocks critical to jury's consideration of defendant's guilt, and jury was left to deliberate and convict defendant based on conduct less than that required by statute for crime of sexual battery and its consequent life sentence.

Tirado v. State, 2017 WL 1709785, (Fla.App. 4 Dist., 2017)

Trial court did not err in instructing jury that "union" means "contact" in sexual battery prosecution.

Leon v. State, 2016 WL 2595981 (Fla. Dist. Ct. App. May 6, 2016)

Information expressly alleged penetration only, and therefore sexual battery convicted based on a jury instruction that allowed the jury to find that defendant's finger was "in union with" victim's vagina was not permitted.

Haspel v. State, 2014 WL 3605610 (Fla.App. 4 Dist.)

Sexual battery jury instruction that required State to prove that victim's vagina was penetrated by "an object" was not fundamental error at trial on charges of sexual battery on a child under the age of 12, even though information charged defendant with committing sexual battery "by causing his finger to penetrate the vagina" of the victim; evidence adduced regarding this count of the information was that victim was digitally penetrated, prosecutor argued in closing that jury needed to find digital penetration to convict defendant, and verdict instructed jury to find defendant guilty "as charged in the information."

Moore v. State, 2014 WL 3671323 (Fla.App. 5 Dist.)

It was improper for State to charge defendant with sexual battery by causing his finger to 'unite" with the vagina of the victim.

Castro v. State, 37 Fla. L. Weekly D421 (Fla. 3d DCA 2012):

Evidence was sufficient for defendant's conviction for sexual battery of his stepdaughter on the basis of his union with her vagina, even if he did not penetrate it, where she testified that he would take her into his bedroom when no one else was home, lay her down on the floor, take off her underwear, and attempt to penetrate her with his penis, and that assaults also occurred on defendant's fishing boat where he also attempted to penetrate her.

Trial counsel was not ineffective in failing to investigate defendant's claim of impossibility of penetration of his stepdaughter's vagina, even if his penis was too large to penetrate it, where such an examination and claim, if true, would only have supported victim's testimony that, despite the defendant's repeated attempts to penetrate her vagina with his penis, he was unable to do so.

Allen v. State, 2011 WL 3903163 (Fla.App. 4 Dist.)

Since the jury verdict form in sexual battery case did not distinguish the findings that substantiated the verdict between "penetration" and "union" with the victim's sexual organ, sentencing court erred in assessing sexual penetration points, and this error was reversible because, although the sentence imposed fell within the permitted range of a properly prepared scoresheet, appellate court could not conclude with certainty that defendant's sentence would have been the same if sentencing court had used a properly prepared scoresheet.

Hammonds v. State, 2011 WL 2097692 (Fla.App. 5 Dist.)

Defendant argued that trial court erred in failing to grant a JOA on two counts of sexual battery upon a child, claiming that the State did not rebut his reasonable hypothesis of innocence. The appellate court agreed with the trial court's following ruling:

While there is not direct evidence that he had union with his penis and these young boys' rectums, the fact that the young boys both testified he put his penis between their buttock cheeks and that it was painful to them, I think would allow a jury to find should they so choose—- I'm not saying they will, but allow a jury to find that he is guilty of capital sexual battery."

Palumbo v. State**,** --- So.3d ----, 2011 WL 248513 (Fla.App. 5 Dist.)

He contends that the evidence was insufficient to support the sexual battery conviction because his penis did not penetrate the victim's "vagina," as defined in the technical, medical sense- meaning just the passageway between the cervix and the vulva. We have previously held that the statute criminalizes "union" with the "vagina," including, in this context, the entire vulva area and not just the passageway between the cervix and the vulva. Pate, 656 So.2d at 1326. No elaboration of our prior panel opinion is necessary. We acknowledge conflict with the Second District's decision in Richards v. State, 738 So.2d 415 (Fla. 2d DCA 1999).

Myles v. State, 35 Fla. L. Weekly D2819 (Fla. 3d DCA 2010):

Standard jury instruction on sexual battery, stating that defendant committed an act upon victim in which the sexual organ of defendant penetrated or had union with victim's vagina, was sufficient to apprise the jury of the law in prosecution of defendant for sexual battery by union, and as such, defendant was not entitled to special jury instruction on the dictionary definition of vagina as the canal between the vulva and the uterus.

[It] is clear that the Legislature intended that "union" mean something other than penetration.... [C]ontact alone, between the sexual organ of the offender and the mouth, anus, or vagina of the victim, is sufficient to convict.

Watkins v. State, 35 Fla. L. Weekly D2255 (Fla. 1st DCA 2010):

Victim's testimony that defendant made her put her tongue "on" defendant's anus was insufficient to establish "penetration," as required to support conviction for sexual battery.

Within meaning of statute governing offense of sexual battery, "union" permits a conviction based on contact with the relevant portion of anatomy, whereas "penetration" requires some entry into the relevant part, however slight.

"The victim testified that she had to pull the back of defendant's pants down and "lick his butt cheeks, crack and anus." The prosecutor asked, "When you licked his anus was your tongue actually on his anus, in his anus?", and she replied, "On it, yes." She also said that defendant would position himself so that she had to lick his genitals as well as his anus. There was no evidence that the victim put her tongue in defendant's anus, even slightly." (*There is something not right about this job!)*

Russ v. State, 32 Fla. L. Weekly D2585 (Fla. 3rd DCA 2007):

Semantic error in jury instruction, which, by stating that unlawful sexual digital contact could be committed either by penetration "and/or" mere union with vagina or anus of victim, told jury that guilty verdict could be based on simple digital contact alone, could not be said to have misled or influenced jury in any way, and thus, could not be fundamental error in prosecution for sexual battery; information charged, trial testimony of victim demonstrated, and special verdict of jury specifically found only that penetration had

occurred, and there was no suggestion that mere contact was sufficient.

Marles v. State, 31 Fla. L. Weekly D2241 (Fla. 5th DCA 2006):

Evidence supported finding of penetration sufficient to permit conviction for sexual battery on a person under twelve years of age; victim testified at trial that defendant "put his finger in my private," and in taped statements played for the jury, victim testified that she was asleep when she felt defendant's finger in her private, the place "where you go peepee."

Eaton v. State, 30 Fla. L. Weekly D1975 (Fla. 1st DCA 2005):

Trial court committed fundamental and reversible error, in prosecution for sexual battery on a child at least 12 years of age but less than 18 years of age by person in position of familial or custodial authority, by instructing jury that it could convict based upon finding of either sexual union or sexual penetration, where information alleged only sexual penetration and jury returned general verdict, without specifying theory upon which it based its verdict.

Thornton v. State, 29 Fla. L. Weekly D1868 (Fla. 2d DCA 2004):

Evidence insufficient to support conviction for capital sexual battery where state failed to prove penetration.

Remand with directions to enter conviction for lesser included offense of battery.

Discussion: The victim testified that the defendant "touched her private parts." When asked whether Thornton ever "put his finger inside of your private area," she responded, "Not that I think of it." The court remanded for sentencing on a charge of battery, but noted that there was sufficient evidence for a conviction of lewd molestation if the State had charged it. Since lewd molestation is not a lesser included offense of capital sexual battery, it may be wise to charge lewd molestation as an alternative count in cases where the penetration issue is not supported by physical evidence. It is very risky to depend on a young child to say the magic words to support the penetration element when she is under the stress of court testimony.

Peters v. State, 28 Fla. L. Weekly D2877 (Fla. 2d DCA 2003):

If, as alleged by defendant, there was no evidence that defendant digitally penetrated the victim's vagina, that he had no specific intent to digitally penetrate the victim's vagina, and that he took no over act toward doing so, defendant could have presented a viable defense to capital sexual battery and attempted capital sexual battery.

Discussion: Defendant filed an ineffective assistance of counsel claim because he attorney told him to plead guilty to attempted capital sexual battery based on the fact he did not have a viable defense to the charge. The defendant confessed to rubbing the labia majora of the child and the child's testimony was vague as to whether the defendant's finger went inside her private or on her private. The court specifically discussed the definition of vagina and what is means to penetrate it and concluded that the defendant had a viable offense to the charge.

Wali Saleem v. State, 25 Fla. L. Weekly D2352 (Fla. 5th DCA September 29, 2000):

A victim's testimony concerning a sexual battery, if clear as to the identity of the perpetrator, is legally sufficient to sustain a conviction and requires no medical or other corroboration.

Testimony concerning redness inside the victim's vagina hours after the offense could have been caused by digital manipulation was sufficient to create a jury question.

Palaczolo v. State, 25 Fla. L. Weekly D174 (Fla. 2nd DCA January 12, 2000):

Prosecutor's statement that defendant would be guilty of sexual battery if his finger penetrated or had union with the vagina of the victim was incorrect statement of the law.

Fundamental error to instruct jury that digital capital sexual battery could be established by proof of union.

Discussion: The issue addressed was whether trial court committed fundamental error by instructing the jury that digital capital sexual battery could be established by proof of union. It should be noted that the victim in this case testified that the suspect inserted two fingers into her vagina, causing pain. The witness who conducted the physical examination on the child has testified that there were

no signs of penetration on this child and that it would be unusual given the testimony about two fingers. Based upon this testimony it was especially egregious that the court told the jury that union would suffice.

Richards v. State, 738 So.2d 415 (Fla. 2d DCA 1999):

In sexual battery prosecution, in which it was alleged that defendant digitally penetrated vagina of four-year-old girl, defendant was entitled to instruction that state was required to prove that some entry into victim's vagina took place, however slight; touching victim's vaginal area without actual penetration into vagina would not be sufficient to support conviction for sexual battery.

Under circumstances of instant case in which combination of doctors' testimony in State's closing argument served to create a reasonable probability that the jury could have been confused or misled to believing that penetration of the vaginal area was sufficient to convict defendant, who was charged with digitally penetrating vagina of child, defendant was entitled to instruction clarifying definition of vagina. New trial required.

Discussion: This case shows the significance of making the definition of vagina very clear when the suspect is charged with digital penetration. The testimony by the physician in the case made it very confusing as to the difference between vagina and sexual organ. The case gave a lengthy discussion on the definitions and the developments of case law concerning the term vagina.

The appellate court tried to clarify the acts which constitute sexual battery by dividing the definition into four parts and translating them individually. Here are the results:

The statute prohibits:

(1) "Oral, anal, or vaginal penetration by the sexual organ of another." Translation: It is illegal for a man to place his penis inside the mouth, anus, or vagina of a victim.

(2) "Oral, anal, or vaginal union with the sexual organ of [the defendant]." Translation: It is illegal for a man to touch the

mouth, anus or vagina of the victim with his penis, and it is illegal for a woman to touch the mouth, anus or vagina of the victim with her "sexual organ."

(3) "Oral, anal, or vaginal union with the sexual organ of [the victim]." Translation: It is illegal for a man to touch the sexual organ of the victim with his mouth or anus, and it is illegal for a woman to touch the sexual organ of the victim with her mouth, anus, or vagina.

(4) "The anal or vaginal penetration of another by any other object." Translation: It is illegal for a man or a woman to place any object inside the anus or vagina of the victim.

Rallo v. State, 726 So.2d 839 (Fla. 2d DCA 1999):

Defendant was entitled to judgment of acquittal where he was charged with committing a "lewd and lascivious act in the presence or upon N.B., …by willfully and knowingly placing the penis of Joseph Rallo into or in union with the anus of said child, which act as stated was lewd and lascivious in the presence of a child…" because there was no evidence to support specific allegation in information that defendant's penis came into contact with victim's anus.

Testimony of child victim, that he only felt defendant's hands, did not conform to charge in information that defendant's penis came into contact with victim's anus, and thus reversal was warranted on that charge in sexual abuse case.

Graves v. State, 704 So.2d 147 (Fla. 1st DCA 1997):

Evidence of digital penetration, including victim's testimony and demonstration performed by victim before jury, sufficient to support conviction.

Evidence sufficient to support second count of sexual battery charging injury to sexual organs of six-year-old victim during attempt to commit sexual battery. Prosecution sufficiently charged offense of injury to sexual organs during attempt to commit sexual battery.

Trial court properly admitted testimony of victim's mother concerning consensual acts of sex between herself and defendant,

where testimony was relevant to show that defendant uses his fingers during sex and leaves scratches, was consistent with physical evidence and victim's testimony and did not suggest that defendant should be convicted merely because he committed a prior bad act or crime.

Trial court's instruction to jury that "union is an alternative penetration and means coming into contact with" was erroneous, because sexual battery by use of implement other that sexual organ of another requires penetration.

Barton v. State, 704 So.2d 569 (Fla. 1st DCA 1997):

The element of penetration was established by the victim's statement to the detective that the defendant "put his finger in her and it made her hurt" and corroborated by the testimony of the nurse who said that the physical examination of the victim's vaginal area revealed evidence of blunt penetration. Victim's videotaped testimony at trial that she did not know whether defendant had penetrated her but that defendant touched her in her vaginal area was not necessarily inconsistent with statement made to officer.

Swaim v. State, 677 So.2d 913 (Fla. 5th DCA 1996):

Conviction for sexual battery on child less than twelve reversed where victim's testimony did not establish that digital penetration occurred during the time period alleged in the information.

Discussion: This case is primarily about the issue of digital penetration. Excerpts of the transcript are printed and discussed to determine if the child's testimony was sufficient to support vaginal penetration.

Heuss v. State, 660 So.2d 1052 (Fla. 4th DCA 1995):

Evidence was sufficient to convict defendant on count of sexual battery upon a child less than 12 by oral union with child's sexual organ when child referred to her "private parts."

Child victim's testimony that defendant "in a way" put one finger inside her vagina and that he would "try to stick it in" and "it would hurt" combined with circumstantial medical evidence of injury to the child's vagina held sufficient to sustain conviction for sexual battery upon a child.

Discussion: This Judge Backman case provides us with a broad definition of sexual organ when used in the context of oral sex. The defense argued that "private parts" did not sufficiently describe the child's vagina to convict him of the offense as charged in the information. The appellate court held that the term "female parts" includes the vagina, the labia minora and the labia majora.

State v. Pate, 656 So.2d 1323 (Fla. 5th DCA 1995):

Defendant properly convicted for causing his mouth to unite with victim's vagina although there was no contact with the vagina as vagina is medically and technically defined. Count charging oral union with victim's vagina validly charged sexual battery although there was no penetration.

Discussion: This is a good case for the proposition that vagina is a term of art for the "private parts." It would have avoided a lot of confusion if the State had used the term "sexual organ" instead of "vagina" when dealing with oral sex.

T.S. v. State, 651 So.2d 1292 (Fla. 2d DCA 1995):

Stepfather's testimony that he observed juvenile, fully dressed, in bedroom with his sister, who was wearing a dress and whose underwear was around her ankles, and physician's testimony that sister's hymen was absent, which indicated penetration, did not provide adequate proof, independent of juvenile's confession, that crime occurred.

Discussion: This is actually a corpus delicti case, but I felt compelled to included it here to assist you in evaluating your cases. The court's surprising decision should be considered when you have a non-verbal victim.

Hipp v. State, 650 So.2d 91 (Fla. 4th DCA 1995):

Jury instruction in sexual battery case stating that prosecution had to prove that defendant "with his finger or fingers, penetrated or had union with vagina" of victim did not amount to fundamental error or a denial of due process where there was lack of disputed evidence on issue of penetration.

Discussion: The court made a special note to point out that "the evidence of digital penetration was neither ambiguous or disputed,

nor was penetration a significant issue." Had the issue of penetration been a close call, the conviction would have likely been reversed.

Widner v. State, 646 So.2d 258 (Fla. 4th DCA 1994):

Testimony of child victim that defendant touched her on the "inside" of her vagina, combined with expert testimony that abnormal tears in victim's hymen membrane indicated digital molestation and were not likely to be self-inflicted sufficient to support trial court's denial of defendant's motion for judgment of acquittal.

Discussion: This case was tried before Judge Lebow by ASA Anne Alper.

Bowden v. State, 642 So.2d 769 (Fla. 1st DCA 1994):

Amended information charging sexual battery on two year old child by "union with his penis and her sexual organ or by penetrating her vagina with his fingers" was sufficient to charge crime of capital sexual battery. Where male offender is charged with committing sexual battery by penile union or penetration, sexual battery statute is broad enough to contain with its prohibition penetration or union with the female victim's sexual organ.

Discussion: This is a very helpful case for those judges who get hung up on the technical definitions of body parts. The court indicates that the term "vagina" as used in the statute is a term of art, which connotes "a female's private parts." The precise medical meaning is not controlling under these circumstances. The medical definition is appropriate, however, in circumstances involving digital penetration. In spite of its favorable ruling for the state, the court indicates that the state's information is unartfully drawn.

Ready v. State, 636 So.2d 67 (Fla. 2d DCA 1994):

Uncorroborated hearsay statements cannot be used as sole evidence to prove penetration needed for sexual battery by digital penetration.

Kirby v. State, 625 So.2d 51 (Fla. 3d DCA 1993):

Finger is an "object" within context of sexual battery statute.

Coerced insertion of woman's own fingers in her intimate body orifice, against her will and at command of person that is intimidating her, is prohibited by sexual battery statute.

Pineiro v. State, 615 So.2d 801 (Fla. 3d DCA 1993):

Trial court's instruction defining "union" as alternative to penetration and as meaning coming into contact could not have misled jury and therefore did not rise to level of fundamental error, where state in its closing argument clearly explained its burden of proof to jury, and just seconds before giving "union" instruction, trial court in its jury instructions also explained what state had to prove.

Discussion: The confusion in this case resulted from the fact that state worded its information "by placing his mouth and/or tongue in union with the vagina of R.M., a minor, and/or by penetrating the vagina of R.M., a minor, with his finger. Thus, when "union" was described as an alternative to penetration, it could have misled the jury as to the digital penetration clause in the information. Be sure instruct you judge properly on the jury instructions.

Gay v. State, 607 So.2d 454 (Fla. 1st DCA 1992):

Defendant's conviction on charge of capital sexual battery was supported by victim's testimony that, while victim and defendant were in shower at local swimming pool, defendant touched victim's anus with his penis.

Discussion: This is a good case to support the State's position when a child victim is vague in his or her testimony. The opinion includes parts of the trial transcript where the child says "he tried to stick it in my crack." In response to the question of how close the defendant got to it, the child said "He touched it." The child indicated that the defendant did not put it inside and did not hurt him. The child said he could not be sure it was not defendant's finger. The court ruled that sufficient evidence was presented for the jury to conclude there was union with the anus. See the case for more on the dialogue between the prosecutor and the child. This case also contains good discussions of kidnapping of a child and the "pedophile profile."

Gill v. State, 586 So.2d 471 (Fla. 4th DCA 1991):

Fundamental error occurred in prosecution for sexual battery upon child where court instructed that union in the sense of coming into contact was alternative to element of penetration of anus by object, and reversal was required even in absence of specific objection; victim's testimony indicated that penetration occurred, but part of that testimony was sufficiently ambiguous to raise jury question as to whether penetration had in fact occurred, no independent evidence of penetration was presented, statute was not violated by proof of anal union with object in absence of penetration and digital penetration of anus was charged.

Discussion: The basic gist of this holding is that a finger or object must penetrate the vagina or anus. Union is not an alternative to penetration in this circumstance. Distinguish this case with Pineiro v. State, 615 So.2d 801 (Fla. 3d DCA 1993):

Travers v. State, 578 So.2d 793 (Fla. 1st DCA 1991):

Whether defendant had committed sexual battery upon five year old child was question for jury, given ample medical evidence of penetration and child's testimony in graphic detail regarding defendant's alleged sexual abuse. The fact that victim's recollection of details as to time and place and other circumstances surrounding the offenses was in part vague or nonexistent was not unusual for the child's age.

Studstill v. State, 578 So.2d 484 (Fla. 5th DCA 1991):

Jury question was presented as to whether separate second sexual battery was committed by defendant by vaginal penetration with defendant's finger or towel or some other object after defendant raped victim.

Discussion: The victim testified that the defendant ejaculated before removal from her vagina and that, after he did this, "He started to clean me out...with a paper towel or napkin or something." The defendant objected that the victim said nothing about penetration or insertion and that she never said it was her vaginal area that was touched with the napkin or towel. The court ruled that it was a jury question.

Russell v. State, 576 So.2d 389 (Fla. 1st DCA 1991):

Admission of expert testimony of state's medical witness that victim's injuries were consistent with forced sexual intercourse,

based on evidence of small vaginal laceration, was not abuse of discretion.

Discussion: A medical doctor testified that his examination revealed a laceration of the posterior of the vagina consistent with forced intercourse. He was allowed to testify only that it was consistent with forced intercourse, not that it proved it. This issue is not necessarily relevant to the filing of cases, but it will let you know how to consider certain injuries in your efforts to prove penetration.

J.W.C. v. State, 573 So.2d 1064 (Fla. 5th DCA 1991):

Where sexual battery charge involves use of defendant's finger on child's vagina, State must show penetration, although even the slightest evidence of penetration is sufficient.

Davis v. State, 569 So.2d 1317 (Fla. 1st DCA 1990):

Evidence concerning external injuries suffered by victims who were two and one-half and two years old, together with victims' hearsay statements, were sufficient to support finding of penetration, as element of sexual battery by vaginal digital penetration.

Discussion: This case is very helpful for proving penetration through circumstantial evidence. The court notes that proof of even the slightest penetration will suffice. "Florida is among the 29 states listen in American Law Reports which have held that evidence of injury to external female parts of the victim may be sufficient circumstantial evidence of penetration. 76 A.L.R.3d 163, 192 Rape." The cases cited in the A.L.R. indicate that penetration may be inferred by redness or swelling, lacerations, abrasions, or other unusual conditions in or on the female genitalia. The court also cites Williams v. State, 43 So.2d 431 (1907), in which the Florida Supreme Court found that "the bruised and contused condition of her private parts" was sufficient direct evidence of penetration. In the Davis case, there was medical testimony that the victim had a vaginal discharge and tear at the opening of her vagina consistent with an injury created by force. The child had a small abnormal opening to her vagina which was observed by her mother and grandmother and was identified as new in origin. The genitalia of both girls were in an unusual condition for children of their ages. Other details are also included within the opinion.

Stidham v. State, 567 So.2d 14 (Fla. 2d DCA 1990):

> State produced no evidence of vaginal penetration during incident in which, according to victim's testimony, defendant touched victim in between her legs and over top of her clothes, and therefore, evidence was insufficient to support conviction of sexual battery.

Tillman v. State, 559 So.2d 754 (Fla. 4th DCA 1990):

> Conviction for sexual battery had to be reversed; information charged defendant with "penetration" but not "union with," and evidence at trial did not prove that penetration occurred.
>
> Discussion: Be careful to word your information properly. If "union" is an option, be sure to include the term in your information.

Firkey v. State, 557 So.2d 582 (Fla. 4th DCA 1989):

> Finger penetration of female's labia without penetration of her vagina is crime under statute prohibiting handling, fondling, or making assault upon a child under age of sixteen years in lewd, lascivious, or indecent manner, however, penetration of the vagina is required for a charge of sexual battery.
>
> The phrase "union with" continues the concept that any penetration by a male's private organ of any part of a female's private parts also constitutes a crime. "Female private parts" includes the labia majora and labia minora.
>
> Jury cannot convict on evidence susceptible to speculation or conjecture.
>
> Discussion: This case is a must for those who want to understand the technical definitions of penetration and vagina etc.... For some reason, the State worded its information as "the penetration of the vaginal folds of the victim by the fingers of (the defendant)." The court defines the various anatomical parts from a medical dictionary. It notes that neither the labia majora nor the labia minora are part of the vagina. "Vagina" is defined as the musculomembrane tube which forms the passageway between the cervix uteri and the vulvae." The victim in this case testified that

> "A. Around my vagina and around my privates and then he would go in them but he wouldn't get his finger inside my vagina, he just went right in the crack and just rubbed on it.
> Q. Do you know whether or not he put his finger in your vagina?
> A. No."

The court ruled that this was insufficient to prove penetration.

Wallis v. State, 548 So.2d 808 (Fla. 5th DCA 1989):

> Mere union of defendant's hand or finger with victim's vagina did not violate sexual battery statute; thus, charging documents which alleged these insufficient acts in alternative and disjunctive with allegations of acts that were sufficient to allege violation of statute caused charges to be legally insufficient, and jury instructions permitting finding of guilt on same insufficient acts, in disjunctive with sufficient acts, were in error.
>
> Discussion: The State charged the defendant with committing sexual battery by "causing his hand or finger to unite with or to penetrate" the victim's vagina.

Stone v. State, 547 So.2d 657 (Fla. 2d DCA 1989):

> Despite shyness and embarrassment of sexual battery victim on witness stand, evidence was sufficient to support finding that defendant made contact between his mouth and sexual organ of six year old victim and thus, to convict defendant of sexual battery on a child less than twelve years of age.
>
> Discussion: This is an excellent case to take with you to court. If you have not yet encountered a similar situation, you will. The victim was eight years old when she testified. She indicated that the defendant got on top of her and hurt her "private." She also indicated that he licked her "private." The victim could not define the word "private." She was uncertain whether her "private" was below her waist and did not remember who had taught her the word. The girl's mother testified that she had taught the word to the child to describe her "genital area." The 2nd DCA aptly notes: "Although the weight of the evidence in this case could be far greater, we do not believe it is incumbent upon parents to teach their toddlers the sexual vocabulary of *Gray's Anatomy* in order to protect them from the lifelong psychological damage of sexual battery."

Hodak v. State, 555 So.2d 1326 (Fla. 5th DCA 1990):

Term "oral" in sexual battery statute encompasses a tongue, and thus conviction of defendant for sexual battery could be based on contact between defendant's tongue and victim's vaginal area.

Cordts v. State, 532 So.2d 1363 (Fla. 2d DCA 1988):

State was not required to establish defendant's intent to obtain sexual gratification to convict defendant of sexual battery, when act of penetration was committed with defendant's finger rather than sexual organ.

Discussion: See Hendricks v. State, 360 So.2d 1119 (Fla. 3d DCA 1978): which indicates that sexual gratification is necessary for digital penetration.

Pride v. State, 511 So.2d 1068 (Fla. 1st DCA 1987):

Evidence of only partial penetration of victim would be sufficient for completed sexual battery, precluding instruction on attempt.

Croney v. State, 495 So.2d 926 (Fla. 4th DCA 1986):

Before defendant could be found guilty of sexual battery upon a child 11 years of age or younger, State had to prove that defendant with his tongue penetrated or had union with victim's vagina or that defendant with his finger penetrated victim's vagina.

Discussion: The defense objected to the jury instruction and indicated that the tongue was an object which was required to penetrate. The 4th DCA disagreed.

State v. Wright, 473 So.2d 268 (Fla. 1st DCA 1985):

In sexual battery prosecution in which defense was that rapes as described by 14 year old victim were unlikely, if not impossible, because of large size of defendant's penis, trial court did not abuse its discretion in refusing to admit photographs and model of defendant's penis, and in refusing to allow defendant to display his actual penis to the jury, as the evidence was of dubious probative value and potential for confusion of issues and misleading the jury was substantial.

Discussion: No comment.

Dorch v. State, 458 So.2d 357 (Fla. 1st DCA 1984):

Contact alone, between sexual organ of offender and mouth, anus, or vagina of victim, is sufficient to convict under sexual battery statute.

Owens v. State, 300 So.2d 70 (Fla. 1st DCA 1974):

Medical testimony regarding nature of lacerations of child's vagina, and her testimony as to defendant's being on top of her, plus expert testimony that chemical analysis of stains found on child's undergarments showed semen stains matching defendant's rare blood type, constituted sufficient circumstantial evidence to support conviction for rape of female child under the age of 11.

Discussion: The nine year old victim was not able to testify as to the issue of penetration because of her age. The court allowed it to be proven circumstantially.

Person:

Rich v. State, 34 Fla. L. Weekly D1856 (Fla. 1st DCA 2009):

Whether victim was alive at time of sexual battery with physical force was a jury question, and, thus, inmate was not entitled to habeas corpus relief from conviction for nonexistent crime, although prosecutor argued that inmate strangled victim to death and then sexually battered her; ample evidence was presented that would allow jury to find that sexual battery commenced while victim was alive, and inmate claimed at trial that sexual encounter was consensual.

Sexual battery cannot be committed on a deceased person.

Issue of whether victim of sexual battery was dead or alive at the time of sexual union is an issue of fact to be determined by the jury.

Object:

Haspel v. State, 164 So.3d 6 (Fla. 4th DCA 2014)

> Sexual battery jury instruction that required State to prove that victim's vagina was penetrated by "an object" was not fundamental error at trial on charges of sexual battery on a child under the age of 12, even though information charged defendant with committing sexual battery "by causing his finger to penetrate the vagina" of the victim; evidence adduced regarding this count of the information was that victim was digitally penetrated, prosecutor argued in closing that jury needed to find digital penetration to convict defendant, and verdict instructed jury to find defendant guilty "as charged in the information."

Lakey v. State, 38 Fla. L. Weekly D995 (Fla. 4th DCA 2013)

> Defendant's finger is considered an "object" within the meaning of the attempted sexual battery statute, and therefore must penetrate and not merely have union with the relevant body part.
>
> Jury instruction in prosecution for attempted sexual battery on a child which referenced attempt to "have union with" victim's sexual organ was fundamental error, where charging instrument specified digital contact, finger was "object" within scope of attempted sexual battery statute, and provision of attempted sexual battery statute involving attempted sexual battery by object required attempt to commit act of penetration and did not reference attempted union.

Richards v. State, 738 So.2d 415 (Fla. 2d DCA 1999):

> Under statutory provision pertaining to sexual battery, a perpetrator's finger is an "other object," which must penetrate and not merely have union with the relevant part.

Kirby v. State, 625 So.2d 51 (Fla. 3d DCA 1993):

> Finger is an "object" within context of sexual battery statute.
>
> Coerced insertion of woman's own fingers in her intimate body orifice, against her will and at command of person that is intimidating her, is prohibited by sexual battery statute.

Hendricks v. State, 360 So.2d 1119 (Fla. 3d DCA 1978):

> When object other than the actor's sexual organ is brought into union with the victim, intent to derive sexual gratification becomes a necessary element of the crime of sexual battery.

Sexual Gratification:

Cordts v. State, 532 So.2d 1363 (Fla. 2d DCA 1988):

> State was not required to establish defendant's intent to obtain sexual gratification to convict defendant of sexual battery, when act of penetration was committed with defendant's finger rather than sexual organ.

W.S.L. v. State, 470 So.2d 828 (Fla. 2d DCA 1985):

> Trial court could have found that sexual gratification was involved in murder of baby, where defendant inserted or tried to insert a coat hanger into baby's anus and a pencil in baby's vagina, and where defendant put his penis in baby's mouth and urinated.
>
> Discussion: The court refused to consider the issue as to whether sexual gratification is required in a case of penetration by an object.

State v. Rider, 449 So.2d 905 (Fla. 3rd DCA 1984):

> Sexual gratification is not an element of sexual battery.

Aiken v. State, 390 So.2d 1186 (Fla. 1980):

> Desire for sexual gratification was not necessary element to charges of sexual battery where batteries were alleged to have been committed by male upon female with the male's sexual organ and no foreign objects were involved; overruling State v. Alonzo, 345 So.2d 740.
>
> Discussion: The Court specifically refused to address the question as to whether sexual gratification is required when digital penetration is alleged.

Surace v. State, 378 So.2d 895 (Fla. 3rd DCA 1980):

Intent to obtain sexual gratification was not an essential element of crime of sexual battery, required to be alleged and proved, in situation where battery was accomplished by use of chair leg and billy club, which resulted in perforation of victim's uterus and rupture of small intestines; notwithstanding fact that multiple batteries were executed with foreign objects rather than penis, inference could be drawn that defendant's intent encompassed sexual gratification.

Hendricks v. State, 360 So.2d 1119 (Fla. 3d DCA 1978):

When object other than the actor's sexual organ is brought into union with the victim, intent to derive sexual gratification becomes a necessary element of the crime of sexual battery.

State of Mind/General and Specific Intent:

Olenchak v. State, 2020 WL 6771799 (Fla.App. 4 Dist., 2020)

In a post-conviction motion for ineffective assistance of counsel, defendant argued his attorney erred by failing to object to the following comment by the prosecutor in closing:

Ladies and gentlemen, you were just told that the State has not proven its case. You were told that the State had to prove that the defendant intentionally committed this act. I would say to you that that is a deliberate misstatement of the law. The Judge read you the law, the elements of sexual battery and nowhere in that instruction did he tell you that the State had to prove intent. Intent is not an element of this crime. Don't hold me to that burden that the defense attorney had just laid out for me. He has increased my burden by requiring me to prove an element of a crime that I don't have to prove to prove my case.

The court noted that sexual battery is a general intent crime, and the comment was error. The case was sent back to the trial court for an evidentiary hearing.

State v. Griffin, 2019 WL 1715741 (Fla.App. 5 Dist., 2019)

State established a prima facie case of guilt with respect to defendant for charged crimes of sexual battery on a child between

the ages of twelve and eighteen and incest arising from defendant's sexual intercourse with his 17-year-old minor daughter, although daughter testified that she engaged in a sexual act with defendant while he was asleep and physically helpless due to effects of psychotropic medication, rendering him unable to knowingly or willfully commit sexual act; as sexual battery and incest were general intent crimes, State was not required to prove that defendant acted with a specific intent, and there was indisputable evidence of sexual intercourse between defendant and his daughter as act resulted in a child, allowing a jury to infer necessary general intent.

Olenchak v. State, 2016 WL 231371(Fla.App. 4 Dist.,2016)

Sexual battery is a general intent crime and Florida law does not require that a defendant act with specific intent.

Trial court properly denied defendant's special jury instruction inserting the word "intentional" into the sexual battery instruction.

Holland v. State, 25 Fla. L. Weekly S796 (Fla. October 5, 2000):

Sexual battery is a general intent crime.

Attempted sexual battery is a general attempt crime.

Voluntary intoxication is only applicable to specific intent crimes.

Discussion: The court notes that the rule to apply when determining whether at attempt to commit an offense is a general or specific intent crime is whether the completed offense would have been a general or specific intent crime. Since sexual battery is a general intent crime, attempted sexual battery is also.

Layman v. State, 728 So.2d 816 (Fla. 5th DCA 1999):

A defendant accused of sexual battery "should be permitted to testify as to the victim's statements immediately prior to, and at the time of, the sexual encounter. Such statements are relevant to, and are admissible as, evidence of the victim's then existing state of mind regarding the question of consent.

Killian v. State, 730 So.2d 360 (Fla. 2d DCA 1999):

Paperback books with racy titles and covers depicting sexual activity, although found in defendant's home pursuant to valid search warrant, were not admissible in prosecution for capital sexual battery, handling and fondling a child, and use of a child in a sexual performance; defendant's state of mind was not at issue, books were not relevant to any issue before court, and books were inadmissible to prove defendant acted in conformity with particular character trait.

State of mind is not a material fact in a sexual battery case and intent is not an issue.

Lewd assault is not a specific intent crime.

State of mind is not material fact in sexual battery case.

Discussion: The Suspect was the uncle of the nine (9) year old victim. The victim testified that when she was alone with him at his home he took two Polaroid photographs of her in the nude and placed them in a drawer in his garage next to a "nasty" magazine that pictured two naked men and a naked woman on the cover. She then testified that he fondled her and then had oral sex with her. Months later, the police executed a search warrant on the Suspect's home in search of these photographs. They never found the photographs or the magazine described by the victim, but they did find several books entitled: ***Teens For Older Men, Satisfaction Through Incest, Making Great Granddaughters, As Young As They Cum, and Incest Is Best***. All of these books had writing only and no photographs therein. The victim had never seen any of these individual books. The prosecutor argued in his closing that these books tended to show the Suspect's state of mind. The Appellate Court ruled that this is improper because state of mind is not a material fact in a sexual battery case and intent is not an issue. Since these books were in no way connected with the acts performed on this child, submitting them was improper.

Other

Morgan v. State, 2013 WL 6122270 (Fla.App. 5 Dist.)

Variance between indictment, charging defendant with sexual battery by contact between defendant's penis and victim's vagina, and proof at trial, establishing contact between defendant's mouth

and victim's vagina, resulted in defendant's conviction of uncharged crimes in violation of due process and was not harmless, despite state's citation to correct statute in indictment.

Defendant charged with sexual battery by contact between defendant's penis and victim's vagina invited error in giving of jury instructions containing uncharged offense of sexual battery by contact between defendant's mouth and victim's vagina, waiving any claim of fundamental error; trial court thoroughly reviewed jury instructions with prosecutor and defense counsel after all evidence was presented, specifically referencing instruction as to oral contact, defense counsel indicated that she had no objection to such instruction, trial court inquired again after instructions were revised and again after instructions were read to jury, and defense counsel assented each time.

Diaz v. State, 35 Fla. L. Weekly D1281 (Fla. 4th DCA 2010):

State's proof of defendant's sexual battery on person less than 12 years old by oral union with victim's vagina, rather than charged offense of sexual battery on person less than 12 years old by inserting his fingers into victim's vagina, was fatal variance in proof which could not be cured by state's amending charging document to conform to proof of sexual battery by oral union.