IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO: 2010-AP-29
Lower Court Case No: 2010-MM-1042

KENNETH MOORE,

Appellant,
vs.

STATE OF FLORIDA,

Appellee.
____________________________/

Appeal from the County Court,
for Orange County, Florida,
W. Michael Miller, County Court Judge

William R. Ponall, Esq. and Tad A. Yates, Esq.,
for Appellant

Lawson Lamar, State Attorney and
David H. Margolis, Assistant State Attorney,
for Appellee

Before POWELL, MIHOK, and THORPE, J.J.

PER CURIAM.

<u>FINAL ORDER AFFIRMING TRIAL COURT</u>

Appellant Moore appeals a conviction for Battery after a jury trial. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320, and affirm.

This is another case where break-up of a youthful relationship later led to an argument which turned physical. Appellant first argues that the trial judge erred in denying his motion for judgment of acquittal on the ground that the state failed to prove the essential element of intent.

Despite the minor inconsistency in the victim's direct testimony, after applying the test[1] for when such a motion ought to be granted, we find no error in its denial.

As to his second argument, that the self defense instruction given was erroneous, we note that he failed to preserve this point for appeal. When asked by the trial judge if either side had any objections to the instructions given, defense counsel replied "No". Even if there had been an objection, the standard instruction which was given was correct.

We reject his final argument, finding that the trial judge, in *sua sponte* correcting the prosecutor's misstatement as to the day of the offense at a side-bar conference, did not abandon his neutral role so as to prejudice the defendant. This was not fundamental error.

Accordingly, the trial court's ruling is **AFFIRMED.**

DONE AND ORDERED at Orlando, Florida this __6th___ day of ___July_____, 2011.

_/S/________________________
ROM W. POWELL
Senior Judge

/S/______________________________
A. THOMAS MIHOK
Circuit Judge

_/S/_________________________
JANET C. THORPE
Circuit Judge

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[1]*See Lynch v. State*, 293 So.2d 44, 45-46 (Fla. 1974); *Proko v. State*, 566 So.2d 918 (Fla. 5th DCA 1990); *Calvo v. State*, 624 So.2d 838 (Fla. 5th DCA 1993). In *Lynch*, the Florida Supreme Court said "A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence deduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence...The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal." [citations omitted] *See also M.N. v. State*, 821 So.2d 1205, 1206 (Fla.5th DCA 2002) ("[A] trial court should rarely, if ever, grant a motion for judgment of acquittal ("JOA") based on the state's failure to prove mental intent.")

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **William R. Ponall, Esquire,** P. O. Box 2728, Winter Park, Florida 32790-2728; **Tad A. Yates, Esq.**, 3117 Edgewater Drive, Orlando, Florida 32804; **David H. Margolis, Assistant State Attorney,** 415 N. Orange Avenue, Ste. 200, Orlando, Florida 32802-1673; and **Honorable W. Michael Miller**, 425 N. Orange Avenue, Orlando, Florida 32801, by mail, this __7th__ day of _____July____________, 2011.

_/S/_________________________________
Judicial Assistant