

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2006

JIMMIE LEE BANKS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D05-2639

[October 25, 2006]

PER CURIAM.

Affirmed.

GUNTHER and FARMER, JJ., concur.

GROSS, J., concurs specially with opinion.

GROSS, J., concurring specially.

I concur in affirming appellant's conviction. When the jury posed a question, defense counsel asked the judge to respond by re-reading the standard charge on sexual battery involving no physical force. The judge did so. Now, appellant argues that the re-reading of the standard instruction was fundamental error. Any error was waived by counsel asking that the instruction be read. *See Armstrong v. State*, 579 So. 2d 734, 735 (Fla. 1991); *Singletary v. State*, 829 So. 2d 978, 979 (Fla. 1st DCA 2002). This request was consistent with the defense strategy and theory of the case which was not that the incident was an accident, but that no penetration at all occurred, as evidenced by counsel's repeated statement in opening and closing, "If the hand don't fit, you must acquit."

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Richard L. Oftedal, Judge; L.T. Case No. 04-309 CFA02.

Carey Haughwout, Public Defender, and David John McPherrin, Assistant Public Defender, West Palm Beach, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.