

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

JUSTIN SIMS,

APPELLATE DIVISION (CRIMINAL)
Case No.: 502010AP900059AXXXMB
Co. Court Case No.: 502008CT037459AXXXMB

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed: **DEC 12 2011**

~Appeal from Judge, Janis Keyser
County Court in and for Palm Beach County.

~For Appellant, Karen Ehrlich, Esq., Office of the Public Defender, Criminal Justice Building/6th
Floor, 421 3rd Street, West Palm Beach, FL 33401.

✓For Appellee, Stephanice Vaz Toledo, Esq., Office of the State Attorney, 401 N. Dixie Highway,
West Palm Beach, FL 33401.

PER CURIAM

AFFIRMED.

Given the facts of this case, in an abundance of caution the Appellant's requested instruction should have been given. However, this Court finds that any error was harmless beyond a reasonable doubt.

Accordingly, the Appellant's judgment of conviction and sentence is AFFIRMED.

(K. MARX AND RAPP, JJ. concur.) (FINE, J., dissents, with opinion.)

FINE, J., dissenting.

The fact that the Appellant was able to argue his defense establishes that there was evidence

supporting it. *See Sessaure v. State*, 891 So. 2d 455 (Fla. 2004). As a matter of law, the Appellant was entitled to the special instruction. “ ‘Where there is any evidence introduced at trial which supports the theory of the defense, a defendant is entitled to have the jury instructed on the law applicable to his theory of defense’ ” *Arthur v. State*, 717 So. 2d 193, 194 (Fla. 5th DCA 1998) (quoting *Bryant v. State*, 412 So. 2d 347, 350 (Fla. 1982)). “A defendant is entitled to an instruction on his theory of defense however flimsy the evidence is which supports that theory, or however weak or improbable his testimony may have been.” *Id.* (internal citations and quotations omitted). If the State fails to meet its burden of showing that the error is harmless beyond a reasonable doubt, a failure to give the requested instruction on the theory of defense constitutes reversible error. *Abbott v. State*, 589 So. 2d 943, 944 (Fla. 2d DCA 1991). It has not been shown beyond all reasonable doubt that had the special instruction been given, the result would have been the same.