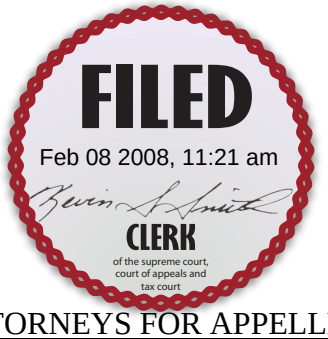

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IN THE
COURT OF APPEALS OF INDIANA

ROBERT YOUNG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0705-CR-439
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben Hill, Judge
Cause No. 49F18-0604-FD-66225

February 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Robert Young appeals his conviction and sentence for Theft[1] as a class D felony. Young presents the following restated issues for review:

1. Did the trial court err in instructing the jury?

2. Did the State present sufficient evidence to support Young's theft conviction?

3. Did the trial court err in sentencing Young?

We affirm.

On April 11, 2006, Israel Casey Keisari was working as a manager at the Double 8 Foods grocery store on Fairfield Avenue in Marion County. The store has three check-out lanes and one entrance/exit area, which is located about twelve feet away from the nearest check-out lane. Around 9:25 p.m., Keisari was standing in front of the third cash register when he saw Young walking down the aisle toward the check out area. Young gave Keisari a "kind of scary look." *Transcript* at 23. When they made eye contact, Young sped up his pace and headed for the second check-out lane, which was unattended. As Young got closer, Keisari saw that Young had a "bulky square" in the crotch area of his pants. *Id.* at 24. Keisari, thinking that Young had put something in his pants, approached Young and tried to stop him. Keisari was at the edge of the check stand, and Young was "half-way" through the check stand when Young sped up, shoved Keisari in the chest, and ran past Keisari and toward the exit. *Id.* at 25. Young was past the check-out lane when Keisari was able to grab hold of him and get him on the ground. As the two struggled on the floor, five packages of steaks flew out of Young's pants.

[1] Ind. Code Ann. § 35-43-4-2(a) (West, PREMISE through 2007 1st Regular Sess.).

The State charged Young with theft as a class D felony. During Young's jury trial, the State tendered an instruction regarding the statutory definition of attempt contained in Ind. Code Ann. § 35-41-5-1(a) (West, PREMISE through 2007 1st Regular Sess.). Young objected to the tendered instruction, and the trial court overruled the objection and gave the instruction as its Final Instruction Number 6. The jury found Young guilty of theft, and the trial court sentenced him to 545 days in the Indiana Department of Correction. Young now appeals. Additional facts will be provided below as necessary.

1.

We first address Young's argument that the trial court erred in instructing the jury. A trial court has discretion in instructing the jury, and we will reverse only when the instructions amount to an abuse of discretion. *Mayes v. State*, 744 N.E.2d 390 (Ind. 2001). When determining whether a trial court erroneously gave or refused to give a tendered instruction, we consider: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the instruction; and (3) whether the substance of the instruction was covered by other instructions that were given. *Id.*

Young contends the trial court erred by giving Final Instruction Number 6, which was tendered by the State and provided:

> A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime. An attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted.

Appellant's Appendix at 80. Young objected to the tendered instruction based on due process, arguing that he was charged with theft and not attempted theft and that "[t]his is not a lesser offense." *Transcript* at 87. After Young acknowledged that the instruction was a correct statement of the law and applied to evidence presented in the case, the trial court overruled the objection and gave Final Instruction Number 6 when instructing the jury. The jury was sent to deliberate and was given a verdict form for theft as a class D felony. After the jury had already begun deliberating, the State asked the trial court to give the jury a verdict form for attempted theft. Young objected to the additional verdict form as "highly prejudicial[.]" *Id.* at 119. The trial court denied the State's request to include a second verdict form.

On appeal, Young argues that the trial court erred in giving Final Instruction Number 6 because the "trial court failed to provide [] any instruction to explain that attempt to commit the crime was a lesser-included offense of the crime charged." *Appellant's Brief* at 5. Young also argues that trial court erred in giving Instruction Number 6 because the trial court "failed to provide a verdict form to show a finding of guilt on attempted theft as a lesser-included offense." *Id.*

In regard to Young's argument that the trial court erred by giving Instruction Number 6 because it failed to give another instruction explaining that attempt was a lesser included offense of the crime charged, we conclude this argument is unavailing because Young did not tender a proposed instruction with the explanation that he now argues was necessary. "When objecting at trial to the *giving* of an instruction, a party is

not required to tender an alternative instruction if the party's objection is sufficiently clear and specific to inform the trial court of the claimed error and to prevent inadvertent error[;]" however, "[i]f a party is objecting to the *failure to give* an instruction, . . . a tendered instruction *is* necessary." *Corbett v. State*, 764 N.E.2d 622, 630 (Ind. 2002) (emphasis in original). Because Young is actually objecting to the trial court's failure to give an additional explanatory instruction, and he failed to tender such an instruction, he has waived this argument on appeal. This argument is also waived because the argument he raises on appeal differs from the objection he raised to the instruction at trial. *See Patton v. State*, 837 N.E.2d 576 (Ind. Ct. App. 2005) (holding that a defendant may not appeal the giving of an instruction on grounds not distinctly presented at trial).

Young has also waived any argument that Instruction Number 6 was erroneous because the trial court failed to provide the jury with a verdict form on attempted theft. Under the doctrine of invited error, "a party may not take advantage of an error that []he commits, invites, or which is the natural consequence of [his] own neglect or misconduct." *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005) (citation omitted). At trial, Young objected to the State's request to submit a verdict form to the jury on attempted theft. Having invited the trial court to sustain his objection to the verdict form, Young may not now take advantage of the trial court's decision not to give the additional verdict form.

2.

We next address Young's argument that the evidence was insufficient to support his theft conviction. When considering a challenge to the sufficiency of evidence

supporting a conviction, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review "respects 'the jury's exclusive province to weigh conflicting evidence.'" *Id.* at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). We will consider only the probative evidence and reasonable inferences supporting the verdict, and we "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id.* (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

In order to convict Young of class D felony theft, the State was required to prove beyond a reasonable doubt that Young knowingly or intentionally exerted unauthorized control over property of another person with intent to deprive the other person of any part of its value or use. *See* I.C. § 35-43-4-2(a). Young only challenges the "intent to deprive" element. Relying on I.C. § 35-43-4-4(c) (West, PREMISE through 2007 1st Regular Sess.),[2] Young argues there was not sufficient evidence of his intent to deprive the store of its property because he was stopped by the manager prior to passing the cash register and had not yet removed the packages of steak beyond the cash register area.

[2] I.C. § 35-43-4-4(c) provides:

> Evidence that a person:
>
> > (1) concealed property displayed or offered for sale or hire; and
> >
> > (2) removed the property from any place within the business premises at which it was displayed or offered to a point beyond that at which payment should be made;
>
> constitutes prima facie evidence of intent to deprive the owner of the property of a part of its value and that the person exerted unauthorized control over the property.

We have previously held that concealment of an item provides a reasonable inference of the intent to deprive element of theft despite the fact that the item was not taken beyond the cash register. *See Johnson v. State*, 413 N.E.2d 335 (Ind. Ct. App. 1980) (holding the evidence was sufficient to support the conclusion that the defendant intended to deprive the boutique of items of clothing found in her tote bag even though, at time the items were discovered, the defendant had not passed cash register and explaining that the inference contained in I.C. § 35-43-4-4(c) did not operate to preclude an inference of intent to deprive merely because the defendant was stopped before she reached the cash register). Thus, Young's contention that the evidence was not sufficient to support his intent to deprive the store of the five packages of steaks because the manager approached him regarding the bulky square protruding from his crotch before he had completely passed through the check out lane must fail.

Here, the State presented evidence that Young stuffed five packs of meat in his pants, quickly headed for an unattended checkout lane, was halfway through the checkout lane when he sped up and shoved an employee out of his way, and was past the employee and the checkout lane and headed toward the exit when he was tackled and the meat fell out of his pants. The evidence was sufficient to support Young's theft conviction. *See, e.g.*, *Hartman v. State*, 164 Ind. App. 356, 328 N.E.2d 445 (1975) (holding that evidence that the defendant was discovered near the door with a shirt he had not paid for and had hidden under his jacket permitted an inference that he was in the process of leaving the store, without paying for the shirt, and was exerting unauthorized control over the property of the store with intent to deprive the store of its use and benefit).

3.

Young also argues that the trial court erred in sentencing him. Specifically, Young notes that there was a discrepancy between the trial court's oral sentencing statement—which provides that the trial court sentenced Young to "454" days in the Indiana Department of Correction, *see Transcript* at 144—and the Abstract of Judgment—which provides that Young is to serve "545" days, *see Appellant's Appendix* at 12—and argues that he should be serving 454 days instead of 545 days.

The State, pursuant to Ind. Appellate Rule 32(A), filed a motion with the trial court to correct the transcript of the sentencing hearing to accurately reflect the 545-day sentence imposed by the trial court. The trial court, after having its court reporter review the tape of the sentencing hearing, issued an order correcting the transcript filed in this appeal to accurately reflect that it had sentenced Young to serve "545" days in the Indiana Department of Correction. *See Appellee's Appendix* at 4. Accordingly, Young's challenge to his sentence based on a discrepancy is rendered moot.

Judgment affirmed.

ROBB, J., and MATHIAS, J., concur.