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**IN THE  
COURT OF APPEALS OF INDIANA**

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MARK A. SYLWESTROWICZ, )

Appellant-Defendant, )

vs. )

STATE OF INDIANA, )

Appellee-Plaintiff. )

No. 45A03-0609-CR-395

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Salvador Vasquez, Judge  
Cause No. 45G01-0505-FB-42

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**July 2, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Mark Sylwestrowicz (“Sylwestrowicz”) appeals his convictions, after a jury trial, of burglary, as a class B felony, and theft, as a class D felony.

We affirm.

## ISSUE

Whether the trial court erred when it refused to instruct the jury on the offense of class A misdemeanor conversion as a lesser-included offense of theft.

## FACTS

David Hubbard (“Hubbard”) owned a duplex in Hammond, Indiana. He occupied one unit and held the other as a rental property. Hubbard permitted Sylwestrowicz to live in the rental unit on the condition that, in exchange, Sylwestrowicz would perform necessary repairs, cleaning and maintenance. Initially, Sylwestrowicz complied with the terms of the agreement; however, in time, Hubbard became dissatisfied with Sylwestrowicz’s efforts. Hubbard expressed his concerns to Sylwestrowicz, reduced their agreement to writing, and advised Sylwestrowicz that he must either work as agreed or pay rent. Sylwestrowicz neither worked nor paid rent thereafter, and on or about April 17, 2005, Hubbard slid an eviction notice under Sylwestrowicz’s door.

On April 20, 2005, Hubbard returned from school to find that his personal residence had been forcibly entered and ransacked. The wooden frame of Hubbard’s door was “ripped off” and the door handle was damaged. Tr. 214. Hubbard alerted the police and subsequently observed that several items of his personal property were missing: (1) a video cassette recorder; (2) a stereo; (3) a cassette deck; (4) several

watches; (5) a pair of binoculars; (6) a pair of nunchucks;<sup>1</sup> and (7) a black powder gun. While the police were en route, Hubbard entered Sylwestrowicz's residence to check for any of the stolen items and observed pieces of his broken door frame inside Sylwestrowicz's residence. When the police arrived on the scene, Hubbard advised the officers that he suspected Sylwestrowicz, and showed them the pieces of the broken door frame that he had found inside Sylwestrowicz's residence.

After the police left the premises, Hubbard visited Larry Chambers, his neighbor across the street. Chambers, a friend of Sylwestrowicz's, was the proprietor of a flea market operating in his garage. Hubbard "asked to look around Chambers' garage to see if any of his property was there." State's Br. 2. Hubbard "discovered his binoculars, his nunchucks, and one of his watches" in Chambers' garage. *Id.* Chambers told Hubbard, and Sylwestrowicz concedes, that Sylwestrowicz had "brought the[ ] items to Chambers that afternoon" and had asked Chambers to sell the items for him. *Id.* Hubbard photographed the items and retrieved them.

On May 16, 2005, Sylwestrowicz was charged with burglary, a class B felony, and theft, a class D felony. After jury selection on June 5, 2006, the trial commenced on June 6, 2006. After the State rested its case, Sylwestrowicz orally requested that the trial court give an instruction on criminal conversion as a lesser-included offense of theft. The trial court declined to do so, finding that there was no dispute in the evidence to warrant such an instruction.

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<sup>1</sup> The nunchaku (also sometimes called "nunchucks," "numchuks," or "chain sticks") is a martial arts weapon consisting of two sticks connected at their ends with a short chain or rope. Wikipedia, *the free encyclopedia, Nunchaku*, at <http://en.wikipedia.org/wiki/Nunchucks>.

The defense presented its case and the trial came to a close on June 7, 2006. Thereafter, the jury deliberated and returned guilty verdicts on both counts. At Sylwestrowicz's sentencing hearing on July 27, 2006, the trial court entered judgment only on the burglary conviction, finding that the theft count was a lesser-included offense of burglary in this case. Sylwestrowicz now appeals.

### DECISION

Sylwestrowicz argues that the trial court erred when it refused to give an instruction on criminal conversion as a lesser-included offense of theft. Specifically, he contends that he was entitled to the instruction because criminal conversion is an inherently lesser-included offense of theft and a factually lesser-included offense of burglary. We find that Sylwestrowicz has waived any error in the trial court's refusal to give his requested instruction.

In reaching this conclusion, we are guided by *Ortiz v. State*, 766 N.E.2d 370, 375 (Ind. 2002), in which our Supreme Court determined that “[f]ailure to tender an instruction results in waiver of the issue for review.” In *Ortiz*, the Court explained that a tendered instruction is necessary to preserve error because “without the substance of an instruction upon which to rule, the trial court has not been given a reasonable opportunity to consider and implement the request.” *Id.* Sylwestrowicz failed to tender his requested instruction in writing to the trial court, and thus, did not preserve error for appeal. Accordingly, we find that Sylwestrowicz has waived any error stemming from the trial court's refusal to give his requested final instruction.

Waiver notwithstanding, the trial court did not err when it refused to give Sylwestrowicz's requested instruction. Instruction of the jury is within the discretion of the trial court and is reviewed only for an abuse of that discretion. *White v. State*, 849 N.E.2d 735, 739 (Ind. Ct. App. 2006). Instructions are given "to inform the jury of the law applicable to the facts and to enable the jury to understand the case clearly and arrive at a just, fair, and correct verdict." *Id.* Jury instructions must state the law correctly, apply to the evidence admitted during trial, and be relevant to the issues that the jury must decide in reaching its verdict. *Id.*

Our Supreme Court has delineated the following three-part test for determining whether an instruction on a lesser-included offense should be given:

First, the trial court must compare the statute defining the crime charged with the statute defining the alleged lesser-included offense to determine if the alleged lesser-included offense is inherently included in the crime charged.

Second, if a trial court determines that an alleged lesser-included offense is not inherently included in the crime charged under step one, then it must determine if the alleged lesser-included offense is factually included in the crime charged. If the alleged lesser-included offense is neither inherently nor factually included in the crime charged, the trial court should not give an instruction on the alleged lesser-included offense.

Third, if a trial court has determined that an alleged lesser-included offense is either inherently or factually included in the crime charged, it must look at the evidence presented in the case by both parties to determine if there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater. '[I]t is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense' if there is such an evidentiary dispute.

*Spann v. State*, 850 N.E.2d 411, 414-15 (Ind. Ct. App. 2006) (citing *Wright v. State*, 658 N.E.2d 563, 567 (Ind. 1995)). The parties agree that conversion is a lesser-included offense of theft. They diverge, however, as to whether there is a serious evidentiary dispute about the element that distinguishes theft from conversion, namely, Sylwestrowicz's intent to deprive Hubbard of the use and value of his property, and further, as to whether in light of this dispute, a jury could have concluded that Sylwestrowicz committed conversion but not theft.

The trial court found no dispute in the evidence regarding the "intent to deprive" element. The evidence before us establishes that Sylwestrowicz broke into Hubbard's residence, stole several items of Hubbard's property, delivered them to Chambers, and asked Chambers to sell the items for him. As the State contends, Sylwestrowicz's conduct "clearly manifested his intent to deprive Hubbard of the use and value of his property." State's Br. 7. We agree and find that it is inconceivable that Sylwestrowicz had the intent to return those stolen items of property to Hubbard. *See Chanley v. State*, 583 N.E.2d 126, 130 (Ind. 1991); *Anderson v. State*, 653 N.E.2d 1048, 1052 (Ind. Ct. App. 1995). Accordingly, the trial court did not err when it refused to give Sylwestrowicz's requested instruction on criminal conversion as a lesser-included offense of theft.

Affirmed.  
BAKER, C.J., and ROBB, J., concur.