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IN THE COURT OF APPEALS OF INDIANA

DANIEL L. ANWAY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 57A03-0912-CR-578
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Michael J. Kramer, Judge
Cause No. 57D02-0903-CM-341

June 18, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Daniel Anway ("Anway") was convicted in Noble Superior Court of Class A misdemeanor operating a vehicle while intoxicated, Class A misdemeanor resisting law enforcement, and Class B misdemeanor failing to stop after an accident. Anway was ordered to serve an aggregate 365-day executed sentence. Anway appeals and argues that a defect in the charging information prejudiced his ability to prepare and present a defense. Concluding that the error in the charging information did not prejudice Anway, we affirm.

Facts and Procedural History

On March 26, 2009, Anway, who was driving a black sports utility vehicle, struck a parked white pickup truck. Kirk Parker, who lived near the accident scene, observed Anway walking away from the accident. Parker called the police, and Kendallville Police Officer Christopher Shearer responded to the dispatch.

Anway began to flee when Officer Shearer found him approximately one block away from the accident scene. The officer told Anway to stop and activated his emergency lights, but Anway continued to flee. Anway eventually complied with the officer's demand to stop after the officer stated that he would use his taser on Anway. Officer Shearer then observed that Anway's eyes were red and glossy, his speech was slurred, his pupils were unresponsive to light, and he was extremely agitated. Anway was eventually transported to Parkview hospital, and at the hospital, he refused to take a blood test.

The next day, Anway was charged with Class A misdemeanor operating while intoxicated, Class A misdemeanor resisting law enforcement, and Class B misdemeanor failure to stop after an accident. At a bench trial held on October 5, 2009, Anway was found guilty as charged. He was ordered to serve an aggregate sentence of 365 days executed. Anway now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Anway argues that the defective charging information for Class A misdemeanor operating while intoxicated prejudiced his ability to prepare and present his defense. A challenge to the sufficiency of the charging information must be made by a motion to dismiss, and the failure to do so results in waiver of that error. Dickenson v. State, 835 N.E.2d 542, 549 (Ind. Ct. App. 2005), trans. denied; see also Ind. Code 35-34-1-4 (2004). Because Anway did not move to dismiss the defective charging information at trial, he has waived this issue for the purposes of appeal. See Dickenson, 835 N.E.2d at 549.

Yet, Anway asserts that the defect in the charging information constitutes fundamental error. To be considered fundamental, the error must be so prejudicial that Anway could not have received a fair trial. Dickenson, 835 N.E.2d at 549. Due process is satisfied where the charging information enables the accused and the court to determine the crime for which the State seeks to convict the defendant. Dickenson, 835 N.E.2d at 550 (quoting Richardson v. State, 717 N.E.2d 32, 51 (Ind. 1999)). Any error in a charging instrument is fatal only if the defendant is misled, or the information does not place the defendant on notice of the charge he faces. Id.

Pursuant to Indiana Code section 9-30-5-2 (2004), "a person who operates a vehicle while intoxicated . . . in a manner that endangers a person" commits a Class A misdemeanor. Anway's charging information for Class A misdemeanor operating while intoxicated, which cites to section 9-30-5-2, provides in pertinent part:

> [O]n or about the 26 day of March, 2009, one DANIEL L. ANWAY did then and there operate a vehicle, . . . in Noble County, State of Indiana, . . . while said person was intoxicated, and in a manner that endangered a person, . . .*and said person refused to submit to a certified chemical test for intoxication*.

Appellant's App. p. 14 (emphasis added).

Anway argues that the charging information "misstates the name and elements of the elevated OWI offense . . . [because] refusal to submit to a certified chemical test is not an element of OWI as a Class A misdemeanor." Appellant's Br. at 4. Therefore, Anway claims that the reference to his refusal to submit to a chemical test "constitutes a denial of [his] rights to due process and to prepare a defense as guaranteed by the Fifth Amendment to the United States Constitution and Article I, Section 13 of the Indiana Constitution." Id. Further, Anway asserts:

> At worst, the information falsely leads one to believe refusal to submit to a certified chemical test elevates OWI to a Class A misdemeanor. At best, it is unclear whether the OWI charge is elevated due to the endangerment allegation or the refusal allegation.

Appellant's Br. at 6.

First, we observe that Anway's defense at trial was simply that he was not intoxicated and a head injury caused the symptoms that led Officer Shearer to conclude that Anway was intoxicated. See Tr. pp. 66-67. Also, during the bench trial, the trial

court listed the elements the State was required to prove to convict Anway of Class A misdemeanor operating while intoxicated. Specifically, the court stated to Anway that

> you operated a vehicle [] while you were intoxicated and that means you were under the influence of alcohol, drugs, controlled substances or a combination of those things such that you had an impaired condition of thought and action and the loss of normal control of your faculties and that you operated the vehicle in a manner that endangered a person; that would include yourself.

Tr. p. 68. The court did not discuss Anway's alleged refusal to submit to a chemical test.

The charging information adequately advised Anway that the operating while intoxicated charge was elevated to a Class A misdemeanor because Anway operated a vehicle while intoxicated "in a manner that endangered a person, to-wit: . . . Daniel Anway and General Public." Appellant's App. p. 14. Because a person may not be criminally penalized for refusing to submit to a chemical test,[1] we cannot conclude that the reference to Anway's alleged refusal in the charging information prejudiced his defense. Furthermore, Anway was convicted in a bench trial, and "we presume the trial court knows and follows the applicable law." Donaldson v. State, 904 N.E.2d 294, 300 (Ind. Ct. App. 2009). Under the facts and circumstances before us, we conclude the superfluous allegation in the charging information, i.e. that Anway refused to submit to a chemical test, did not prejudice Anway's ability to prepare and present his defense.

Affirmed.

RILEY, J., and BRADFORD, J., concur.

[1] See Ind. Code § 9-30-6-7 (providing that the penalty for refusing to submit to a chemical test is suspension of the person's driving privileges).