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**IN THE
COURT OF APPEALS OF INDIANA**

TRENT F. FREED,)

Appellant-Defendant,)

vs.)

No. 55A01-0704-CR-151

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Christopher Burnham, Judge
Cause No. 55D02-0512-FD-348

November 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Trent F. Freed appeals his conviction for operating a vehicle while intoxicated with a

prior operating while intoxicated conviction within the past five years¹ as a Class D felony. Freed raises the following restated issue: whether there was a fatal variance between the charging information and the evidence presented at trial.

We affirm.

FACTS AND PROCEDURAL HISTORY

On December 27, 2005, Conservation Officer Brian Knoy approached Freed, after Freed had laid his motorcycle down in a Martinsville intersection. Officer Knoy stated Freed was noticeably intoxicated and refused a field sobriety test. After Officer Knoy obtained a warrant for a blood draw, Freed returned a blood alcohol test greater than the legal limit.

The State charged Freed with six counts, two of which are relevant to this appeal: (1) operating a vehicle while intoxicated; and (2) operating a vehicle while intoxicated with a prior operating while intoxicated conviction with the past five years. After the jury convicted him of operating a vehicle while intoxicated, Freed waived his right to a jury trial on the issue of whether he had a conviction for operating while intoxicated within the last five years. On that issue, the State submitted an exhibit without objection that Freed has been sentenced on February 19, 2004 for operating a vehicle while intoxicated endangering a person. Based on the evidence, the trial court found him guilty of the enhanced offense of operating a vehicle while intoxicated with a prior operating while intoxicated conviction within the past five years. Freed now appeals.

DISCUSSION AND DECISION

Freed claims his conviction should be reversed because there was a variance between

¹ See IC 9-30-5-3.

the charging information and the evidence presented at trial. The test to determine whether there is a fatal variance between the proof at trial and a charging information is as follows: (1) whether the defendant was misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and whether he was harmed or prejudiced thereby, and (2) whether the defendant will be protected in a future criminal proceeding covering the same event, facts, and evidence against double jeopardy. *Whaley v. State*, 843 N.E.2d 1, 9 (Ind. Ct. App. 2001), *trans. denied*.

Specifically, Freed claims that the State alleged in its charging information that he committed the offense of “operating while intoxicated” within five years of his current charge, but that his only previous conviction proved at trial was “operating while intoxicated *endangering a person*.” While Freed is correct that a variance existed between his charging information and the proof presented at trial, he has failed to establish that that variance effected his trial preparation or prejudiced him, or that he will be subject to double jeopardy in the future.

Affirmed.

ROBB, J., and BARNES, J., concur.