DIVISION ONE
FILED: 12/29/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0719
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule
JOHN TILLMAN HYLAND,	)	111, Rules of the Arizona
	)	Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR20090139

The Honorable Ralph M. Hess, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Division
and Myles A. Braccio, Assistant Attorney General
Attorneys for Appellee

David Goldberg, Attorney at Law — Fort Collins, CO
By David Goldberg
Attorney for Appellant

N O R R I S, Judge

¶1 John Tillman Hyland timely appeals his convictions and sentences for two counts of aggravated driving under the influence ("DUI"), each a class 4 felony. Hyland argues the

superior court misapplied the doctrine of implied waiver of the physician-patient privilege, and should not have precluded him from arguing inferences from the evidence during his counsel's closing argument or denied his motion for judgment of acquittal. We disagree with each argument and affirm his convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 On September 13, 2008, an Arizona Highway Patrol ("DPS") officer observed a pickup truck stopped along the shoulder of State Route 89A. Some of the tires were flat, at least one tire was shredded, and the truck's frame appeared twisted, as if it had been in an accident. When the officer approached the driver's side door of the truck, he discovered Hyland sitting unconscious in the driver's seat with the engine still running. The officer called out loudly several times before Hyland opened his eyes and acknowledged his presence. Because Hyland had a large laceration on his forehead, the officer called for medical assistance. The officer noted blood on Hyland's face and hands, as well as on the steering wheel, gear shift, and inside door panel and floorboard on the passenger side.

[1]We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Hyland. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶3 Hyland smelled of alcohol, had bloodshot and watery eyes, and spoke "in a slurred manner." The officer saw two opened and 11 unopened beer cans and a nearly-empty bottle of an off-brand version of Jagermeister inside the cab of the truck. The officer asked Hyland several questions and had to repeat them several times before Hyland could answer. Hyland told the officer he had been drinking "a lot." Given Hyland's condition, the officer did not conduct any field sobriety tests.

¶4 Paramedics treated him at the scene, drew his blood, and then transported him to the hospital. At trial, one of the paramedics testified Hyland had a two-inch laceration to his forehead; he also stated he had smelled alcohol on Hyland's breath. Subsequent testing of a sample of Hyland's blood given to the officer by the paramedics showed a blood alcohol concentration ("BAC") of .301. Eventually, the court suppressed the BAC evidence.

¶5 Before trial, relying on the physician-patient privilege, *see* Ariz. Rev. Stat. ("A.R.S.") § 13-4062(4) (2010), Hyland moved in limine to preclude the State from using his hospital medical records, which included blood test results and, according to the State, also reflected his head laceration was not serious. Over the State's objection, the superior court granted the motion in part, ruling the State could not use the medical records during its case-in-chief. The court rejected,

however, Hyland's argument the State should be precluded from using his medical records to rebut any claim he might make at trial that his head injury had caused "his conduct" at the accident scene. Citing this court's decision in *State v. Wilson*, 200 Ariz. 390, 26 P.3d 1161 (App. 2001), a case discussing implied waiver of the privilege, the court ruled: "I am denying the motion to preclude the State from presenting the test results to rebut any claim raised by Mr. Hyland . . . or any evidence [presented] related to an explanation of Mr. Hyland's conduct as being related to a medical condition, including the head injury."

DISCUSSION

¶6 Hyland argues the superior court misapplied the implied-waiver doctrine in ruling the State could use his medical records at trial if he tried to explain his head injury had caused his condition (including disorientation, slurred speech, dilated eyes, and slow responses) at the accident scene. Although he acknowledges the doctrine prevents a party from using the privilege as "both a sword and a shield," *see id*. at 396, ¶ 16, 26 P.3d at 1167, he asserts he was entitled to rely on non-privileged evidence -- testimony from the DPS officer and paramedic that he had suffered a significant head injury -- to argue his head injury (and not intoxication) had caused his "condition." He further argues the doctrine only applies to

claims and affirmative defenses and thus he was entitled to use this other evidence to deny "an element of the offense and argue[] a reasonable inference from [this] evidence as an alternative explanation for [his] conduct." Exercising de novo review, we disagree with all of his arguments. *Wilson*, 200 Ariz. at 393, ¶ 4, 26 P.3d at 1164.

¶7 As relevant here, a party impliedly waives a privilege when he or she "places a particular medical condition at issue" through a claim or defense, affirmative or otherwise. *Id*. at 396, ¶ 15, 26 P.3d at 1167 (citing cases); *Throop v. F.E. Young & Co.*, 94 Ariz. 146, 157-58, 382 P.2d 560, 567-68 (1963) (privilege impliedly waived when party defended by denying negligence and claimed sudden heart attack caused automobile accident); *see State Farm Mut. Auto. Co. v. Lee*, 199 Ariz. 52, 13 P.3d 1169 (2000); *Buffa v. Scott*, 147 Ariz. 140, 708 P.2d 1331 (App. 1985). Implied waiver prevents a party from "asserting a particular factual position and then invoking the privilege" not only to support that position, but also to "prevent the opposing party from impeaching or otherwise challenging it." *Wilson*, 200 Ariz. at 396, ¶ 16, 26 P.3d at 1167. In other words, "waiver can be implied when a party injects a matter that, in the context of the case, creates such a need for the opponent to obtain the information allegedly protected by the privilege that it would be unfair to allow that

party to assert the privilege." *Lee*, 199 Ariz. at 61, ¶ 23, 13 P.3d at 1178.

¶8 The superior court properly applied these principles. It recognized that if, at trial, Hyland argued his head injury had caused his disorientation, the State would be entitled to challenge that assertion by introducing information from his medical records he had not sustained a serious head injury and was intoxicated. And, as the superior court properly recognized, the implied-waiver doctrine would apply even if Hyland grounded such an argument on the testimony of the DPS officer and paramedic.

¶9 Hyland next argues the superior court abused its discretion when, based on the State's objection, it precluded his lawyer from arguing inferences in closing -- from the DPS officer's and paramedic's testimony and photographs taken at the accident scene -- that his head injury and not alcohol had caused his disorientation. Referring to the DPS officer's testimony, the superior court reasoned that "to infer from [the officer's testimony] and present to the jury that there was a significant head injury goes beyond the scope of inference that can be derived from the witness who testified before the jury. . . . You can make reference to the head injury only to the extent that [the officer] had stated that he had observed

what he saw was a head injury and that's it. You can't go and make medical inferences from that."

¶10 The superior court did not abuse its discretion in precluding this argument. *State v. Montano*, 204 Ariz. 413, 419, ¶ 20, 65 P.3d 61, 67 (2003) (appellate court reviews superior court ruling on scope of closing argument for abuse of discretion). As discussed, before trial, the court barred the State from relying on the medical records in its case-in-chief and correctly ruled Hyland would impliedly waive his privilege to the information contained in those records if he attempted to argue his head injury had caused his "condition" at the accident scene, *see supra* ¶¶ 5-8. Accordingly, neither party presented any evidence at trial that Hyland had sustained a head injury capable of causing his disorientation. The only evidence of injury introduced at trial was that Hyland had sustained a laceration on his forehead which had bled. On this record, the superior court acted well within its discretion in ruling defense counsel's argument was outside the scope of the evidence presented at trial. *See State v. Wooten*, 193 Ariz. 357, 364, ¶ 33, 972 P.2d 993, 1000 (App. 1998) (upholding superior court's ruling precluding defendant from arguing third-party defense where evidence was insufficient to support it).

¶11 Finally, Hyland argues the State failed to present sufficient evidence from which the jury could find beyond a reasonable doubt he was impaired "to the slightest degree" by alcohol, *see generally* A.R.S. § 28-1381(A) (Supp. 2011),[2] especially because the DPS officer did not have Hyland perform any field sobriety tests. Thus, he contends the superior court should have granted his motion for judgment of acquittal. As a matter of law, we disagree. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993) (appellate court reviews claims of insufficient evidence de novo). We know of no authority -- and Hyland cites none -- that the State must present field sobriety test evidence to meet its burden of proof and obtain a conviction under A.R.S. § 28-1381(A). Through the testimony of the DPS officer and paramedic, the State presented ample evidence from which a reasonable jury could have concluded beyond a reasonable doubt Hyland had driven or been in actual physical control of the truck "[w]hile under the influence of intoxicating liquor . . . if the person is impaired to the slightest degree." A.R.S. § 28-1381(A)(1). Thus, the superior court properly denied Hyland's motion for judgment of acquittal.

[2]Although the Arizona Legislature amended certain statutes cited in this decision after the date of Hyland's offenses, the revisions are immaterial. Thus, we cite to the current version of these statutes.

CONCLUSION

¶12 For the foregoing reasons, we affirm Hyland's convictions and sentences.

_/s/_____
PATRICIA K. NORRIS, Judge

CONCURRING:

_/s/_____
MICHAEL J. BROWN, Presiding Judge

_/s/_____
PHILIP HALL, Judge