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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-1517
)	
JAMES E. HUGHES,)	Honorable
)	Allen M. Anderson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: (1) The State proved beyond a reasonable doubt that defendant's passenger was under the age of 16 (for purposes of subjecting defendant to a mandatory fine and community service for aggravated DUI): although the testifying officer did not provide how he knew the passenger's age, defendant did not object to the testimony, and thus the trial court was entitled to credit it; (2) we vacated defendant's successive (and thus unauthorized) DNA analysis fee.

¶ 1 Following a bench trial in the circuit court of Kane County, defendant, James E. Hughes, was convicted of aggravated driving under the influence of alcohol (DUI) in violation of section 11-501(d)(1)(A) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501(d)(1)(A) (West 2008)). Under

that provision, a person who violates the DUI statute for a third or subsequent time is guilty of aggravated DUI. The offense is ordinarily a Class 2 felony (625 ILCS 5/11-501(d)(2)(B) (West 2008)), but defendant's criminal history mandated that he be sentenced as a Class X offender (see 730 ILCS 5/5-5-3(c)(8) (West 2008)). The trial court imposed a seven-year prison term. In addition, the trial court found that, at the time of the offense, defendant was traveling with a passenger who was under the age of 16. Section 11-501(d)(2)(B) provides, "If at the time of the third violation, the defendant was transporting a person under the age of 16, a mandatory fine of \$25,000 and 25 days of community service in a program benefitting children shall be imposed in addition to any other criminal or administrative sanction." Finally, the trial court ordered defendant to pay a \$200 DNA analysis fee. The principal issue raised on appeal is whether the State submitted sufficient evidence of the age of defendant's passenger. Defendant also argues that the trial court erred in imposing a DNA analysis fee. We vacate the DNA analysis fee, but affirm in all other respects.

¶ 2 Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), defendant argues that the mandatory fine and community service specified in section 11-501(d)(2)(B) may be imposed only if the State proves beyond a reasonable doubt that a passenger is under the age of 16. In *Apprendi*, the United State Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. We note that defendant does not dispute that, by waiving his right to a jury trial, he gave up the right to have the facts subject to the *Apprendi* rule determined by a jury. See *People v. Smith*, 337 Ill. App. 3d 175, 177 (2003). For its part, the State argues that *Apprendi* does not apply at all. According to the State, the mandatory fine and community service prescribed by section 11-501(d)(2)(B) do not represent an increase in the penalty

for aggravated DUI beyond the statutory maximum. We need not decide, however, whether *Apprendi* applies here. Assuming for the sake of argument that it does, we conclude that the State met its burden of proving beyond a reasonable doubt that defendant was transporting a passenger under the age of 16. See *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 3 At trial, the arresting officer, Daniel Yates, testified that he observed defendant's vehicle drive partly onto a sidewalk. Yates and another officer followed the vehicle, which pulled into the drive-through lane of a fast-food restaurant. Yates testified that when he approached defendant's vehicle he observed two juveniles in the vehicle. At trial, Yates did not testify about the age of either of the juveniles. At sentencing, however, Yates testified as follows:

“Q. And you were the officer that conducted the DUI traffic stop on the defendant, James Hughes; is that correct?

A. Yes.

Q. And at the time you conducted that traffic stop, how many other people were in the car besides Mr. Hughes?

A. There were two other occupants.

Q. And do you recall what their names were?

A. Yes, I do.

Q. And what were their names?

A. John Martinez and Jeffrey Briggs.

Q. And this John Martinez, was he a relative of Mr. Hughes?

A. No.

Q. And how old was he?

A. 17 at the time.

* * *

Q. And the other passenger, who was he?

A. He was a stepbrother to John Martinez.

Q. And was his name Jeffrey Briggs?

A. Yes.

Q. And was he related to Mr. Hughes in any way?

A. No.

Q. And how old was Mr. Briggs?

A. 14.”

¶ 4 Defendant argues that Yates’s “hearsay testimony at sentencing” that Briggs was 14 years old failed to prove beyond a reasonable doubt that defendant was transporting a passenger who was under the age of 16. According to defendant, “nothing appears in the record that shows how Yates came to his conclusion [that Briggs was 14 years old].” Defendant insists that Yates’s testimony about Briggs’s age was “mere conjecture.” We disagree.

¶ 5 Although defendant characterizes Yates’s testimony as “hearsay,” Yates did not testify about an out-of-court statement. See *People v. Olinger*, 176 Ill. 2d 326, 357 (1997) (“Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted”). The thrust of defendant’s argument is that the record does not establish the basis of Yates’s knowledge of Briggs’s age. As explained below, defendant’s failure to object to Yates’s testimony forecloses this particular challenge to the sufficiency of the evidence.

¶ 6 It is firmly established that, in order to preserve review of an evidentiary error, a criminal defendant must object at trial and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The rule serves an important purpose inasmuch as it affords the trial court an opportunity to cure any error arising from the admission of evidence. *People v. Stewart*, 343 Ill. App. 3d 963, 979 (2003). Where evidence merely lacks a sufficient foundation, an objection affords the proponent an opportunity to make the requisite foundational showing.

¶ 7 Although defendant frames the issue here in terms of the sufficiency of the evidence rather than the admissibility of evidence, the distinction here is artificial. To argue (as defendant does in this case) that the record does not establish the basis of a witness's knowledge of the subjects of his or her testimony is to argue that the witness was not competent to testify. A witness's personal knowledge is an aspect of his or her competency to testify (1 K. Broun, McCormick on Evidence § 69 (6th ed. 2006)) and a foundational requirement for the admissibility of his or her testimony (see *People v. Lewis*, 165 Ill. 2d 305, 335 (1995) (“the ‘lack of foundation’ objection may be employed at trial with respect to at least each of the following: competency of a lay witness, personal knowledge, qualification of an expert witness, and relevancy, as well as satisfaction of a hearsay exception”)). But incompetent evidence is not the same as insufficient evidence. When incompetent evidence is admitted without objection, “it becomes part of the evidence in the case and is usable as proof to the extent of its rational persuasive power.” 1 K. Broun, McCormick on Evidence § 54 (6th ed. 2006). “The incompetent evidence, unobjected to, may be relied on in argument, *and alone or in part it can support a verdict or finding.*” (Emphasis added.) *Id.* This principle applies to various grounds for challenging admissibility, including the hearsay rule and the failure to establish firsthand knowledge on the part of the witness. *Id.*

¶ 8 Consistent with these principles, we conclude that the lack of evidence of how Yates knew Briggs's age relates merely to the question of whether Yates was competent to testify on that point. Whether his testimony was sufficient to sustain a particular finding of fact is another matter. We draw support for this conclusion from our decision in *People v. Banks*, 378 Ill. App. 3d 856 (2007). In *Banks* the defendant was convicted of DUI and driving while his license was suspended. The offenses occurred on September 17, 2004. The record on appeal included an agreed statement of facts with police reports prepared by Terry Klingel of the Yorkville police department and John Collins of the Kendall County sheriff's department. The agreed statement of facts indicated that Klingel and Collins testified consistently with their narrative reports. Collins's narrative report noted that "[the defendant's] driver's license status was that of suspended as of 10/01 for [a previous conviction of] driving under the influence." *Id.* at 860. In his sworn report pursuant to section 11-501.1(d) of the Illinois Vehicle Code (625 ILCS 5/11-501.1(d) (West 2004)), Collins indicated that the defendant did not surrender his driver's license because it was suspended. We rejected the defendant's argument that the State failed to prove beyond a reasonable doubt that his license was suspended on September 17, 2004. *Banks*, 378 Ill. App. 3d at 861-62. We noted that defendant did not interpose a hearsay objection to the evidence and that "[i]t is well established that when hearsay evidence is admitted without an objection, it is to be considered and given its natural and probative effect." *Id.* at 861. Although we framed the question of admissibility in terms of hearsay, it appears that an objection based on Collins's lack of personal knowledge of the defendant's driver's license status would have been equally or more apt.¹ We concluded that, in the absence of an objection, the

¹It has been noted that:

"The distinction [between hearsay and evidence that is inadmissible because

statements in Collins's narrative report and his sworn report, taken together, were sufficient proof that the defendant's driver's license was suspended.

¶ 9 In this case, because defendant did not object that the State had failed to show the basis of Yates's knowledge of defendant's age, Yates's testimony that Briggs was 14 years old was to be given its natural and probative effect. We can see no persuasive reason why, in this case, the trial court could not give that testimony as much weight as the trial court in *Banks* gave to the evidence regarding the status of the defendant's driver's license. Accordingly we conclude that the State proved Briggs's age beyond a reasonable doubt and that the fine and community service may stand as part of his sentence.

of the witness's lack of personal knowledge] is one of the form of the testimony, whether the witness purports to give the facts directly upon his or her own credit (though it may appear later that the statement was made on the faith of reports from others) or whether the witness purports to give an account of what another has said and this is offered to establish the truth of the other's report. However, when either from the phrasing of the testimony or from other sources, the witness appears to be testifying on the basis of reports from others, although not to their statements, the distinction loses much of its significance, and courts may simply apply the label 'hearsay.' ” 2 K. Broun, McCormick on Evidence § 247 (6th ed. 2006).

In *Banks*, Collins evidently conveyed information learned from others about the status of the defendant's driver's license as firsthand knowledge.

¶ 10 Defendant next argues that the trial court erred in ordering him to pay a \$200 DNA analysis fee pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2008)). In *People v. Marshall*, 242 Ill. 2d 285, 303 (2011), our supreme court held that section 5-4-3 authorizes the trial court to order payment of the DNA analysis fee “only where that defendant is not currently registered in the DNA database.” It is undisputed that, prior to his conviction in this case, defendant was already registered in the DNA database. Thus, as the State acknowledges, it was improper to assess the fee in this case.

¶ 11 For the foregoing reasons, we vacate the DNA analysis fee. In all other respects, the judgment of the circuit court of Kane County is affirmed.

¶ 12 Affirmed in part and vacated in part.