

STATEMENT OF THE CASE

Appellant-Defendant, Libraye Harris (Harris), appeals her convictions for two counts of forgery, as a Class C felony, Ind. Code § 35-43-5-2, and one count of attempted theft, as a Class D felony, I.C. §§ 35-41-5-1 and 35-43-4-2.

We affirm in part, reverse in part, and remand with instructions.

ISSUES

Harris presents two issues on appeal, which we restate as:

- (1) Whether the trial court abused its discretion by admitting hearsay into evidence; and
- (2) Whether her conviction for attempted theft violates the double jeopardy provision of the Indiana Constitution.

FACTS AND PROCEDURAL HISTORY

On July 9, 2007, Melvin McCray (McCray) was working as a manager at an ACE Cash Express store in Indianapolis, Indiana. Harris entered the store and presented two Wal-Mart MoneyGram money orders that McCray, who had been trained on how to recognize counterfeit checks, believed to be counterfeit. McCray is familiar with Wal-Mart MoneyGram money orders and noticed that the font on the front of the money orders presented by Harris was “slim, which is different from the way they usually are.” (Transcript p. 14). The “overall color” of Harris’ money orders was also duller than the ones McCray had seen in the past. (Tr. p. 15). In addition, all Wal-Mart MoneyGram money orders include a heat-sensitive red water color ink security feature that disappears when pressure is

applied. The red marks on Harris' money orders did not disappear. Finally, McCray knew that Wal-Mart MoneyGram money orders have a corporate verification number on the back, and Harris' money orders had no such numbers. McCray called MoneyGram's corporate office, which confirmed that Harris' money orders were counterfeit.

McCray then called the police, and Indianapolis Metropolitan Police Department Detective Daniel Cherry (Detective Cherry) was dispatched to the store. Detective Cherry questioned Harris, and Harris first told him that she had received the money orders from her brother to repay a debt. Harris then changed her story, telling Detective Cherry that she had received the money orders from a friend. Harris eventually gave a third story, explaining that she had received the money orders "over the internet." (Tr. p. 28).

On July 10, 2007, the State filed an Information charging Harris with Counts I and II, forgery, as a Class C felony, I.C. § 35-43-5-2, and Count III, attempted theft, as a Class D felony, I.C. §§ 35-41-5-1 and 35-43-4-2. On November 15, 2007, a bench trial was held. When the State asked McCray whether the MoneyGram corporate office had confirmed that Harris' money orders were counterfeit, Harris' attorney made a hearsay objection. The trial court overruled the objection and allowed McCray to testify that the corporate office had, in fact, confirmed that Harris' money orders were counterfeit. At the close of evidence, Harris moved for judgment on the evidence. The trial court denied the motion and found Harris guilty as charged on all three counts. On December 28, 2007, the trial court sentenced Harris to four years on Count I, with one year executed and three years suspended to probation; four years on Count II, with one year executed and three years suspended to probation; and 545

days on Count III, with 180 days executed and 365 days suspended to probation. The trial court ordered that all three sentences be served concurrently, for a total sentence of one year executed and three years of probation.

Harris now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Hearsay*

Harris first contends that the trial court should not have admitted into evidence McCray's testimony that the MoneyGram corporate office confirmed to him that Harris' money orders were counterfeit, claiming that the testimony constituted inadmissible hearsay. The State responds that McCray's testimony was not inadmissible hearsay, but that even if it was, the erroneous admission of the testimony was harmless. We need not determine whether the trial court admitted inadmissible hearsay, because we agree with the State that any error was harmless.

A claim of error in the admission or exclusion of evidence will not prevail on appeal unless a substantial right of the party is affected. *Schmid v. State*, 804 N.E.2d 174, 181 (Ind. Ct. App. 2004), *trans. denied*. To determine whether a substantial right of a party has been affected, we assess the probable impact of the evidence upon the finder of fact. *See id.* When there is substantial independent evidence of guilt such that it is unlikely that the erroneously admitted evidence played a role in the conviction, the substantial rights of the party have not been affected, and we deem the error harmless. *Id.*

Here, there was substantial evidence of Harris' guilt independent of McCray's conversation with MoneyGram's corporate office. McCray, who had been trained on how to recognize counterfeit checks and who was familiar with Wal-Mart MoneyGram money orders, noticed that the font on the front of Harris' money orders was "slim, which is different from the way they usually are," and that the "overall color" of Harris' money orders was also duller than the ones McCray had seen in the past. (Tr. pp. 14-15). In addition, the red marks on Harris' money orders did not disappear when McCray applied pressure, as they did with regular Wal-Mart MoneyGram money orders. Furthermore, Harris' money orders did not have a corporate verification number on the back, unlike typical Wal-Mart MoneyGram money orders. Finally, Harris gave three different explanations of her possession of the money orders to Detective Harris. The trier of fact may consider false statements to police as evidence of guilt. *See Davis v. State*, 635 N.E.2d 1117, 1120 (Ind. Ct. App. 1994).

In addition to this independent evidence of guilt, the trial court itself indicated that the challenged evidence did not play a role in Harris' convictions. In denying Harris' motion for judgment on the evidence, the trial court stated:

[T]he Court is going to find there's sufficient circumstantial evidence, that this is a counterfeit money order *based upon the employee's testimony, that he's familiar with money orders -- with Wal-Mart money orders and that the water mark is missing -- just lay knowledge, you always see that little red water mark there and it's not on this one, and that when you put your finger -- it even says to authenticate, rub circle, and there's nothing going on.* So the Court does find that there's sufficient evidence to prove at this point beyond a reasonable doubt, because it is a court trial, that this is a counterfeit money order.

(Tr. pp. 31-32) (emphasis added). The trial court made no mention whatsoever of McCray's call to MoneyGram or MoneyGram's subsequent confirmation that Harris' money orders were counterfeit. The trial court's statement solidifies our presumption that, in bench trials, the court disregards any inadmissible evidence and renders its decision solely on the basis of relevant and probative evidence. *In re A.J.*, 877 N.E.2d 805, 814 (Ind. Ct. App. 2007), *trans. denied*. "In fact, we have previously held that '[a]ny harm from evidentiary error is lessened, if not completely annulled, when the trial is by the court sitting without a jury.'" *Id.* (quoting *Berry v. State*, 725 N.E.2d 939, 943 (Ind. Ct. App. 2000)).

Because it is unlikely that the challenged evidence played a role in Harris' conviction, her substantial rights were not affected, so any error in the admission of the evidence was harmless. *See Schmid*, 804 N.E.2d at 181.

II. *Double Jeopardy*

Harris also argues that her conviction and sentence for attempted theft violates the double jeopardy provision of the Indiana Constitution—Article 1, Section 14—because the same evidence supporting the forgery convictions was the basis for the attempted theft conviction. The State concedes this issue. Therefore, we remand this cause to the trial court with instructions to vacate the conviction and sentence for attempted theft. Because the trial

court ordered Harris' three sentences to run concurrently, however, this action will have no practical impact on Harris' overall sentence.

CONCLUSION

Based on the foregoing, we conclude that even if the trial court abused its discretion by admitting hearsay evidence, the error was harmless. However, because Harris' conviction and sentence for attempted theft violates the double jeopardy provision of the Indiana Constitution, we remand this cause to the trial court with instructions to vacate that conviction and the corresponding sentence.

Affirmed in part, reversed in part, and remanded with instructions.

BAILEY, J., and BRADFORD, J., concur.