IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| JOHN FOLKS, | ) | |
| | ) | No. 291, 2004 |
| Defendant Below, | ) | |
| Appellant, | ) | Court Below: Superior Court |
| | ) | of the State of Delaware in |
| v. | ) | and for New Castle County |
| | ) | |
| STATE OF DELAWARE, | ) | Cr. A. ID #0306015047A |
| | ) | |
| Plaintiff Below, | ) | |
| Appellee. | ) | |

Submitted: February 16, 2005
Decided: April 25, 2005

Before **STEELE**, Chief Justice, **HOLLAND**, and **BERGER**, Justices.

***O R D E R***

This 25th day of April, on consideration of the parties' briefs, it appears to the Court that:

1. John Folks appeals his first-degree robbery and weapons possession convictions in the Superior Court, claiming the trial judge erred by failing to declare a mistrial following a juror's in-court remark, by admitting a post-arrest statement, and by sentencing him as an habitual offender. Because the trial judge properly mitigated any prejudice to Folks by dismissing the offending juror, and because the error in admitting Folks's statement was harmless, we affirm Folks's conviction. But because the State failed to prove that Folks is an habitual offender

beyond a reasonable doubt, we vacate Folks' sentence and remand for resentencing.

2. In June 2003, Folks approached Wayne McVey at a New Castle automated teller machine, placed a boxcutter to his throat and demanded McVey's money. When McVey failed to respond immediately, Folks grabbed at McVey's shirt pocket. The pocket ripped and McVey's money fell to the ground. As Folks stooped to retrieve the money, McVey kicked him, knocking the boxcutter out of Folks's hand. Despite McVey's resistance, Folks grabbed the money and ran. McVey and his stepson, who was nearby, chased Folks to an adjacent parking lot. Folks then entered a maroon car with out-of-state license plates and drove away.

3. New Castle City Deputy Fire Chief William Simpson Jr., driving past the scene, noticed the robbery in progress and pursued Folks. Simpson contacted New Castle City Police dispatch and followed Folks until a city police officer joined the pursuit. Once police had entered the picture, Simpson returned to the bank. Folks, meanwhile, parked the vehicle at a hotel and fled on foot. The officer eventually apprehended Folks, and, after arresting and searching him, discovered four twenty-dollar bills in Folks's hands. Authorities later charged Folks with first-degree robbery, possession of a deadly weapon during the commission of a felony, and other related offenses.

4. During his opening remarks, the prosecutor outlined the events leading to Folks's arrest and the evidence that the State intended to introduce. The prosecutor told the jury that the arresting officer "will tell you that when he went to get [Folks] . . . what happened was he had money in his hands, and guess what he had in his hands?"[1] Juror Five then audibly exclaimed: "The twenties?"[2] Because neither party immediately objected, the prosecutor continued his opening statement. After both sides concluded their opening remarks, the trial judge called a sidebar and questioned Juror Five about his ability to remain impartial. The trial judge then dismissed Juror Five and resumed the trial.

5. Several witnesses then testified for the State. McVey and his stepson identified Folks as the perpetrator. The arresting officer also identified Folks as the individual he apprehended following the car chase. In addition, the jury heard a portion of Folks's post-arrest statement. In his statement, Folks stated he went to the bank to panhandle money to buy drugs.

6. The jury convicted Folks of first-degree robbery and the weapons possession charge. The trial judge then found Folks to be an habitual offender and sentenced him to forty years in prison. Folks now appeals, claiming the trial judge erred by failing to declare a mistrial following the juror's remark, by admitting the

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1 *State v. Folks*, Del. Super., ID No. 0306015047A (Jan. 15, 2004), Trial Tr. at 136.

2 *Id.*

post-arrest statement, and by finding him to be an habitual offender and sentencing him accordingly.

7. Folks first claims that, following Juror Five's comment, the trial judge erred either by failing to declare a mistrial or, alternatively, by failing to examine the remaining jurors. A mistrial is a drastic remedy that only should be granted "where there is manifest necessity or the ends of public justice would be otherwise defeated."[3] Because Folks made neither request at trial, we review for plain error.[4]

8. We conclude that the trial judge did not err by failing to caution the jurors or by failing to declare a mistrial *sua sponte*. Juror Five's dismissal eliminated any prejudice that may have resulted from his comment. Furthermore, the juror's statement could not have affected the remaining jurors because the later trial testimony confirmed that Folks carried four twenty-dollar bills in his hand when the officer arrested him. The State proved that fact beyond a reasonable doubt. On this record, Folks makes no credible showing that, once the trial judge dismissed Juror Five, the remaining jurors would be prejudiced. Accordingly, we find no plain error.

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[3] *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998) (quotation marks and citation omitted). *See also Dawson v. State*, 637 A.2d 57, 62 (Del. 1994) ("A mistrial is mandated only when there are no meaningful and practical alternatives to that remedy.") (quotation marks and citation omitted).

[4] DEL. SUPR. CT. R. 8. *See also Lagola v. Thomas*, 867 A.2d 891, 897 (Del. 2005) ("Absent plain error, we will not review claims that are not fairly presented to the trial court.").

9. Folks next contends that the trial judge erred by admitting his post-arrest statement because the statement was inappropriate character evidence and had little independent evidentiary value.[5] He asserts that the prejudicial effect of his statement – panhandling to buy drugs – outweighed its probative value.[6] We review a trial judge's decision to admit evidence on a defendant's character for abuse of discretion.[7]

10. Given the abundance of testimonial evidence indicating Folks's involvement in the robbery, Folks's admission that he was present at the bank could hardly have prejudiced him. The potential prejudicial effect of admitting evidence of drug use, on the other hand, would have an immediate and negative impact on the jury. Because the danger of unfair prejudice outweighed the statement's probative value, we find that it should not have been admitted. Nonetheless, because McVey, the stepson, and the arresting officer all identified

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[5] *See* D.R.E. 404(b) (prohibiting admission of other wrongful acts "to prove the character of a person in order to show action in conformity therewith").

[6] *See* D.R.E. 403 (allowing exclusion of relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice").

[7] *Allen v. State*, 644 A.2d 982, 985 (Del. 1994) ("When the thrust of the objection was that the probative dangers attending the uncharged misconduct outweighed the probative value of the evidence, abuse of discretion is an appropriate standard of review. Given the intangible nature of the factors to be balanced, the appellate court must accord the trial judge wide latitude."), *citing* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 9:70 (1992).

Folks as the robber, the "untainted evidence of guilt" outweighs the "significance of the error."[8] We therefore find no reversible error.

11. Finally, Folks asserts that the trial judge erred by sentencing him as an habitual offender.[9] Folks claims that the evidence presented to the trial judge did not prove beyond a reasonable doubt that he had committed the three predicate offenses mandated by the habitual offender statute.[10] The State carries the burden of proof to establish that "each predicate offense meets the requirements of Section 4214 . . . beyond a reasonable doubt."[11] To sustain this evidentiary burden, the State must present "unambiguous documentary evidence of a predicate conviction."[12] We review to ensure that the trial judge's determination of habitual offender status is supported by substantial evidence and is free from legal error or any abuse of discretion.[13]

12. In support of the first predicate offense, the State produced a court docket indicating that a "John T. Folks" was convicted of a felony in 1977. The

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8 *Van Arsdall v. State*, 524 A.2d 3, 11 (Del. 1987).

9 *See* 11 *Del. C.* § 4214 (defining "habitual criminal" status).

10 *See id*. § 4214(a).

11 *Hall v. State*, 788 A.2d 118, 127 (Del. 2001).

12 *Id*. at 128. *Cf. Morales v. State*, 696 A.2d 390, 395 (Del. 1997) (reversing habitual offender determination where record before Court did not indicate what offenses and statutes underlay defendant's prior convictions).

13 *Walker v. State*, 790 A.2d 1214, 1221 (Del. 2002).

State introduced no other evidence supporting the conviction and the record is devoid of any information linking the name to John Folks, other than a similarity in name. Because an ambiguity in identity exists, the State did not prove that this defendant committed the predicate offense beyond a reasonable doubt. The trial judge therefore erred by sentencing Folks as an habitual offender. Accordingly, Folks's sentence must be vacated.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court sentencing Folks as an habitual offender is **VACATED**. The matter is **REMANDED** to the Superior Court to resentence Folks in a manner consistent with this Order. The judgments of conviction are **AFFIRMED**.

/s/ Myron T. Steele
Chief Justice