

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20050033-CA
v.)	
)	F I L E D
Kirk Vaughan Kelsey,)	(December 1, 2005)
)	
Defendant and Appellant.)	2005 UT App 515

First District, Logan Department, 041100194
The Honorable Gordon J. Low

Attorneys: Dee W. Smith, Ogden, for Appellant
 Mark L. Shurtleff and Marian Decker, Salt Lake City,
 for Appellee

Before Judges Bench, Greenwood, and McHugh.

PER CURIAM:

Kirk Vaughan Kelsey appeals from his conviction of assault by a prisoner. See Utah Code Ann. § 76-5-102.5 (2003). Kelsey argues that the district court abused its discretion by refusing to exclude evidence of threats Kelsey made after the assault on a fellow prisoner. We affirm.

Kelsey argues that statements he made directly after he assaulted another prisoner, in which he threatened to kill the other prisoner and to sexually assault the guard until the guard died, should have been excluded under rule 403 of the Utah Rules of Evidence.¹ The decision to admit evidence under rule 403 of the is reviewed for abuse of discretion. See State v. Dibello, 780 P.2d 1221, 1227 (Utah 1989). This court "will only conclude the trial court abused its discretion if the ruling 'was beyond the limits of reasonability.'" State v. Lindgren, 910 P.2d 1268, 1271 (Utah Ct. App. 1996) (citations omitted). Rule 403 states: "Although relevant, evidence may be excluded if its probative

¹Two of these statements occurred within approximately fifteen seconds of the assault. Other statements occurred a few minutes later after Kelsey was placed in a holding cell.

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Utah R. Evid. 403. "Unfair prejudice" means "'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" State v. Maurer, 770 P.2d 981, 984 (Utah 1989) (citations omitted).

When dealing with the admissibility or exclusion of evidence under rule 403, usually "the presumption is in favor of admissibility." Dibello, 780 P.2d at 1229. However, in a few select cases the presumption shifts to the proponent of the evidence to show that the probativeness outweighs the evidence's unfair prejudice. See id. Kelsey's statements do not fall within these categories. Accordingly, it was his burden to demonstrate that any unfair prejudice outweighed the probative value of the evidence.

The district court determined that the statements made by Kelsey were "remarkably probative" because the statements were made within a few minutes, if not a few seconds, of the assault. Because of the close proximity to the assault, the evidence assisted the jury in determining Kelsey's frame of mind at the time of the assault, i.e., one of anger and outrage that could lead to an intentional assault. See Utah Code Ann. § 76-5-102.5 (requiring evidence of intent to cause injury as element of offense). The importance of such evidence was even higher due to the fact that the victim was a reluctant witness who testified that Kelsey merely brushed him with his fingers. Thus, the probative value of the evidence was substantial.

Kelsey argues that because the statements were crude and outrageous, they had the effect of evoking a prejudicial emotional response from the jury. Kelsey argues that this prejudicial emotional response substantially outweighed the probative value of the evidence. We disagree. While the remarks certainly were crude and outrageous, we cannot conclude that the district court abused its discretion in determining that the danger of undue prejudice did not substantially outweigh the probative value of the evidence. See State v. Jaimez, 817 P.2d 822, 825 (Utah Ct. App. 1991) (concluding defendant failed to demonstrate that the probative value of statements he made immediately after causing injury to a jail, alleging that he had sex with prison guard's wife, was outweighed by the risk of

unfair prejudice). We therefore hold that the district court acted within its discretion in admitting the evidence.

Affirmed.

Russell W. Bench,
Associate Presiding Judge

Pamela T. Greenwood, Judge

Carolyn B. McHugh, Judge