***Upchurch v. State*, No. 02-21-00084-CR (Tex. App.-Ft. Worth, Nov. 23, 2022)**
Attorneys. Harmony M. Schuerman (appellate), Curtis Fortinberry (trial)

Issue & Answer. The State introduce a lot of evidence regarding a heinous prior assault committed by the defendant against the same victim in the instant case. The evidence included pictures and medical treatment for the burns the defendant inflicted five years prior. Did the trial court err in finding this evidence was not substantially more prejudicial than probative under Rule 403? **Yes, but harmless.**

Facts. In 2014 the defendant set the complainant on fire-he doused her in gasoline while she sat in a car then lit her and the vehicle on fire. For this assault, the defendant was convicted of aggravated assault causing serious bodily injury upon his guilty plea. In 2018 the complainant married the defendant and shortly after he struck her in the throat during an altercation. For the 2018 assault the defendant was convicted in 2019 upon his guilty plea. In 2019 the defendant hit the complainant again in the head. The State indicted the defendant for assault-family-violence with a previous conviction. The State did not use the 2014 assault-by-fire as the indictment-based jurisdictional enhancement, instead they relied on the 2018 throat-punch. Nonetheless, the trial court permitted the State to present a detailed account of what transpired in 2014, including the complainant's medical records, photographs of the complainant's injuries, the gas can, the torch and the car involved in the fire. Counsel lodged a "strenuous" objection to this evidence in a hearing outside of the jury's presence and asserted that it should be excluded for its prejudicial impact under Rule 403. In his words,

as soon as they hear he set her on fire, poured gas, set her on fire, then the trial is over. They're not going to hear another word of testimony regarding the case in chief that we're here on. All they're going to hear is: He set her on fire.

The trial court overruled the defendant's objection but insisted that counsel object again during trial. Things became more confusing when the State offered its evidence. When the State offered the medical records, and photographs of the gas can, torch, and car, counsel stated "no objection." When the State sought to admit photographs of the complainant's injuries, counsel maintained his Rule 403 objection.

Analysis. A Rule 403 probative-versus-prejudicial-effect objection triggers a balancing test by which the court must consider the following factors: (1) probative force of the evidence, (2) proponent's need, (3) tendency to suggest a decision on improper basis, (4) tendency to confuse or distract, (5) tendency the jury will give undue weight, and (6) how quickly the State can present the evidence. Here the assault-by-fire was probative of the nature of the relationship between the defendant and the complainant and showed his intent to commit an assault in the instant case. However, the state had little if any need for this evidence-and if it were important to the State's case, they could have offered a certified judgment rather than revealing the "horrific details of a crime that was disproportionately more heinous than the offense Appellant committed in this case." It is difficult to imagine a jury who would not be affected by this evidence "in some irrational but indelible way." The State contends the assault-by-fire helped explain the complainant's decision to not call the police on the day of the instant offense and her decision to continue visiting the defendant until two weeks before the trial. But if

anything, the fact that the complainant was set on fire by the defendant makes the complainant's subsequent conduct bewildering. Under these considerations, the admission of the prior assault evidence was erroneous. However, it was also harmless. Because counsel seemed to have waived his objection to medical records but maintained his objection to the pictures, the pictures merely depict what is described in the medical records. Moreover, the evidence of guilt was overwhelming. A single witness-the complainant-says it happened and remembered how it happened and the police officer believed her.

Comment. I mean . . . this opinion took an abrupt U-Turn. It went from "how could the jury not have focused on the horrific details of the prior offense" to "no biggie" in the matter of a couple of paragraphs. Makes me think of the penguins from Madagascar "you didn't see anything [mysteriously waiving flippers and retreating into a hole]."