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## YEAR 2005 CASE SUMMARIES

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By  
**The Honorable Pat Garza**

Associate Judge  
386th District Court  
San Antonio, Texas

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### **Denial of motion to sever six counts of aggravated sexual assault not error. [In the Matter of D.L.](05-3-05B)**

**On February 23, 2005, the Tyler Court of Appeals held motion to sever six counts of aggravated sexual assault proper because legal elements of proof were similar for each victim, the cases shared common witnesses and fact patterns, and defendant made no showing that evidence of the extraneous offenses would not have been admissible in severed cases.**

05-3-05B. In the Matter of D.L., \_\_\_ S.W.3d \_\_\_, No. 12-03-00071-CV, 2005 Tex.App.Lexis 1447 (Tex.App.— Tyler 2/23/05).

Facts: Around the first of April in 2002, C.L. was sleeping with his grandmother, M.L. In the middle of the night, M.L. was awakened by C.L., who was "on all fours," still asleep, and crying out: "[B.S.], help me! Stop! Stop! [D.L.], you're hurting me! Stop it! Get off of me." C.L. was approximately four years old at the time.

The next morning, C.L.'s grandmother asked him if somebody "had been messing with him." C.L. told his grandmother that D.L. "put his thing up my ass. I was crying. I was trying to get away." Later in the day, M.L. questioned B.S. and S.L., two of C.L.'s older cousins, about whether they had "fooled" with C.L. The boys went outside for a short time. Upon their return, S.L. stated that it was D.L. and that D.L. "got both me and [B.S.]."

M.L. reported the information to the Gregg County Sheriff's Office. Detective Tim Bryan, the investigator who spoke to M.L., notified Child Protective Services and also set up interviews for C.L., S.L., and B.S. at the Child Advocacy Center of East Texas. In separate interviews, each child restated his allegations against D.L. At least one of the children told the interviewer that D.L. had also sexually assaulted another cousin, C.H., and a neighbor, R.H. All of the alleged victims were under the age of fourteen.

A grand jury certified the State's third amended petition in which it alleged that D.L. had engaged in delinquent conduct by committing aggravated sexual assault against C.H., S.L., B.S., C.L., and R.H. See *TEX. PEN. CODE ANN. § 22.021(a)(2)(B)* (Vernon Supp. 2004-2005) (aggravated sexual assault occurs where sexual assault is committed against a person who is younger than fourteen). The State also alleged that D.L. used or exhibited a deadly weapon, a knife, during the incident involving R.H. The matter proceeded to a jury trial. The jury found D.L. guilty on all counts and made a deadly weapon finding. D.L. was sentenced to probation for ten years and removed from his home. By agreement of the parties, D.L. was placed in the managing conservatorship of the Texas Department of Protective and Regulatory Services, who placed D.L. at a juvenile sex offender treatment facility. He was also required to register

as a sex offender. This appeal followed.

Held: Affirmed

Opinion: In his second issue, D.L. urges that the trial court erred in denying his motion to sever the six counts of aggravated sexual assault for separate trials. Citing *Texas Penal Code section 3.04*, D.L. acknowledges that he has no right to mandatory severance. See *TEX. PEN. CODE ANN. § 3.04(c)* (Vernon 2003) (no right to severance for aggravated sexual assault committed against a victim younger than 17 years of age at time offense committed). However, he points out that the trial court has the discretion to grant a severance if the court determines that the defendant or the State would be unfairly prejudiced by the joinder of offenses. See *id.*

We first note that D.L.'s reliance on *section 3.04* is misplaced. The Texas Rules of Civil Procedure govern juvenile proceedings unless otherwise provided. See *TEX. FAM. CODE ANN. § 51.17(a)*; ***In re J.K.R.***, 986 S.W.2d 278, 285 (Tex. App.--Eastland 1998, *pet. denied*). The Juvenile Justice Code contemplates liberal joinder of offenses, but no specific provision addresses joinder and consolidation of actions. Because no specific provision exists, the Texas Rules of Civil Procedure apply as directed by *section 51.17. Id.*

*Texas Rule of Civil Procedure 41* permits the consolidation of suits filed separately and the severance and docketing as separate suits of actions that have been improperly joined. *TEX. R. CIV. P. 41*. Moreover, actions that involve common questions of law or fact may be consolidated by the trial court. *TEX. R. CIV. P. 174(a)*. A trial court has broad discretion in the matter of severance and consolidation of actions. ***Liberty Nat'l Fire Ins. Co. v. Akin***, 927 S.W.2d 627, 629, 39 Tex. Sup. Ct. J. 934 (Tex. 1996). Therefore, a trial court's decision to deny a severance will not be reversed unless it has abused its discretion. See *id. at 630*. When all the facts and circumstances of the case require separate trials in order to prevent manifest injustice, when there is no fact or circumstance that supports or tends to support a contrary conclusion, and when the legal rights of the parties will not be prejudiced thereby, then there is no room for the exercise of discretion. ***In re C.P.***, 998 S.W.2d 703, 710 (Tex. App.-Waco 1999, *no pet.*) (citations omitted). In that instance, a trial court has a duty to order separate trials. *Id.*

Here, D.L. was alleged to have committed aggravated sexual assault against five victims. Thus, the legal elements of proof were similar for each count of the State's petition. With one exception, the alleged victims were D.L.'s cousins and had at one time lived in the same home with him. Each offense was alleged to have occurred in the family residence or in a "club house" that the children frequented. The cases share common witnesses, particularly since one or more of the alleged victims stated that he had seen D.L. sexually assault other victims named in the State's petition. The cases also share common fact patterns in that the alleged sexual assaults were similar and occurred under similar circumstances. Finally, D.L. has made no showing that evidence of the extraneous offenses would not have been admissible in severed cases. See *TEX. R. EVID. 404(b)* (evidence of other crimes, wrongs, or acts may be admissible for purposes of showing motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident); see also ***In re C.P.***, 998 S.W.2d at 711 (likely that trial court's refusal to sever was not an abuse of discretion where evidence of extraneous acts was admissible).

Conclusion: We hold that the trial court did not abuse its discretion in denying D.L.'s motion for severance. D.L.'s second issue is overruled.

