

NO. 34967-1-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

Delbert Beatty,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY                       
                    VERITY

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APPEAL FROM THE SUPERIOR COURT FOR LEWIS COUNTY  
The Honorable Nelson E. Hunt, Judge  
Cause No. 05-1-00282-9

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BRIEF OF RESPONDENT

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Michael Golden  
Lewis County Prosecuting Attorney  
Attorney for Respondent

PM 1-3-07

**TABLE OF CONTENTS**

I. ISSUE PRESENTED ..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT.....4

    A.    APPELLANT'S CONVICTIONS OF  
          ATTEMPTED CHILD MOLESTATION IN THE  
          FIRST DEGREE, AND CONSPIRACY TO  
          COMMIT CHILD MOLESTATION IN THE FIRST  
          DEGREE DO NOT VIOLATE DOUBLE JEOPARDY  
          .....4

    B.    COURT ORDERED DNA SAMPLE UPON  
          CONVICTION DOES NOT VIOLATE  
          APPELLANT'S CONSTITUTIONAL RIGHTS  
          .....7

IV. CONCLUSION .....7

REQUEST FOR COSTS .....7,8

## TABLE OF AUTHORITY

### Table Of Cases:

<u>State v. Blank</u> , 131 Wn.2d 230, 910 P.2d 545 (1996) .....	8
<u>State v. Bobic</u> , 140 Wn.2d 250, 996 P.2d 610 (2000) .....	4
<u>State v. Dent</u> , 123 Wn.2d 467, 869 P.2d 392 (1994) .....	5
<u>State v. Surgeg</u> , 122 Wn.App. 448, 459-60, 94 P.3d 345, Review granted, 153 Wn.2d 1008 (2005) .....	6
<u>United States v. Iannelli</u> , 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 91975) .....	7

### Statutes:

RCW 9A.28.020 .....	5
RCW 9A.44.083 .....	5
RCW 43.43.754 (1) .....	7
RCW 10.73.160 .....	8

### Court Rules:

RAP 14.2 .....	7
RAP 14.3 .....	7

## **ISSUES PRESENTED**

- A. Under the Washington or Federal Constitutions, does a conviction for Conspiracy and Attempt violate Double Jeopardy provisions?
  
- B. Under the Washington or the Federal Constitutions, are the Appellant's Constitutional rights violated by a court order requiring the collection of a biological sample for DNA database purposes?

### **I. STATEMENT OF THE CASE**

The Appellant was convicted as a co-defendant following a bench trial of Conspiracy to Commit Child Molestation in the First Degree and Attempted Child Molestation in the First Degree. They were charged as co-defendants for acts that occurred on, about or between January 1, 2005 and April 1, 2005. Both the Appellant and his co-defendant waived their rights to a jury trial. CP 34. They were tried jointly on December 7, 2005 by the Honorable Judge Nelson E. Hunt. Judge Hunt convicted both the Appellant and his co-defendant. At sentencing, the judge ruled that two charges encompassed the same criminal conduct, calculating the offender score as zero and sentencing both to 51 months per count to run concurrently. RP 340-341.

The evidence presented at trial showed that COUNTRYMAN and BEATTY were in a dating relationship. RP 12-7-05, 58, 243, 263.

COUNTRYMAN and her two young children, including the victim in this case, intermittently stayed at BEATTY'S residence. RP 12-7-05, 58. The applicable facts for the issue presented indicate that several weeks before the incident in question, COUNTRYMAN and BEATTY conspired to molest COUNTRYMAN'S daughter, C.E.C. DOB 5-14-94. On more than one occasion, the two of them would have grooming sessions in the bedroom where they would call C.E.C. into the bedroom and talk about sex. RP 12-7-05, 67-71. During these sessions would be in various states of undress. RP 12-7-05, 68. Besides the sex-talk session, approximately before the incident BEATTY and COUNTRYMAN took C.E.C. shopping and purchased thong undies for her. RP 1-7-05, 72, 73, 74.

The evidence presented at trial indicated that COUNTRYMAN and BEATTY asked her to model the undies for BEATTY. BEATTY told her that the "body is beautiful so it should be shown." He also told her that she is sexy and has a cute bubble butt.

BEATTY took C.E.C. with him to work. He would in the woods using heavy equipment. When he took her to work, he had her sit on his lap and talked to her about sex and about how sexy she was. He also rubbed her back and buttocks. RP 12-7-05, 92-94.

On the night in question, COUNTRYMAN dressed her daughter in a black negligee and had her get into bed with she and BEATTY. RP 12-7-05, 72, 73. BEATTY was wearing underwear, COUNTRYMAN had on a negligee with no underwear. RP 12-7-05 77, 78. BEATTY went under the bedcovers and got on top of her mother who was laying with her arms over the covers. C.E.C. testified that BEATTY was moving his dead up and down as her mother made disgusting noises that made her want to throw up. RP 12-7-05 79. C.E.C. could hear BEATTY breathing and it made her so sick that she went to the bathroom to throw up. RP 12-7-05 81, 82. COUNTRYMAN (BEATTY'S co-defendant) followed her daughter into the bathroom and asked her if she would let BEATTY give her an orgasm for payback for saving her life. RP 12-7-05 82, 83. COUNTRYMAN also told her daughter that she would rather have BEATTY give her an orgasm than some creep. RP 12-7-05 84.

When they went back to the bed, COUNTRYMAN got under the covers and BEATTY asked if C.E.C. wanted to see what she was doing. RP 12-7-05 84. BEATTY was under the bed covers up to his waist and her mother's head was under the covers. RP 12-7-05, 85. C.E.C. heard sucking noises while BEATTY sat there smiling. RP 12-7-05 86. BEATTY asked C.E.C. if she would like him to give her an orgasm. RP

12-7-05 86, 87. When she said no, he asked if she would like to have her mother give her an orgasm, or she give her mother an orgasm. RP 12-7-05 88. When BEATTY asked C.E.C. if she wanted to give her mother an orgasm, COUNTRYMAN replied, 'I've always wanted a lesbian experience.'" RP 12-7-05, 88. BEATTY attempted to talk C.E.C. into allowing him to give her an orgasm. RP 12-7-05 88.

BEATTY told her he would help her relax by rubbing her "sciatic nerve." RP 12-7-05 89. BEATTY rubbed her buttocks. BEATTY rubbed her thigh getting closer and closer to her genitals. As he attempted to rub her genitals, he touched them briefly, but C.E.C. she closed her legs and kept them closed, so he could not touch her privates further. RP 12-7-05 89, 90.

## II. ARGUMENT

### A. THE CONVICTIONS FOR CONSPIRACY TO COMMIT CHILD MOLESTATION IN THE FIRST DEGREE AND THE ATTEMPT TO COMMIT CHILD MOLESTATION IN THE FIRST DEGREE DO NOT SHARE THE SAME ELEMENTS OR FACTS AND THEREFORE DO NOT CONSTITUTE DOUBLE JEOPARDY

A conspiracy is an agreement to carry out a criminal scheme together with a substantial step in pursuance of the agreement. State v. Bobic, 140 Wn.2d 250, 996 P.2d 610 (2000). The punishable criminal

conduct is the plan to carry out the scheme. State v. Bobic, 140 Wn.2d. Conspiracy is an inchoate crime, not a completed crime and therefore, any number of acts in the days preceding the attempted sexual assault could be labeled the substantial step that completed the crime of conspiracy. State v. Dent, 123 Wn.2d 467, 476, 869 P.2d 392 (1994).

Criminal Attempt includes the intent to commit a crime; and an act which is a substantial step towards the commission of that crime. RCW 9A.28.020. In this case, the crime is Child Molestation in the First Degree the elements of which are that the defendant, who is over 24 months older than the child, who is under 12 years of age, took a substantial step towards touching the child's genitals for sexual gratification. RCW 9A.44.083.

The elements for Conspiracy are not the same as the elements for Attempted Child Molestation in the First Degree. The criminal conduct in Conspiracy is the plan—the agreement—to carry out the scheme. The criminal conduct in Attempted Child Molestation is the attempt to touch the genitals of the child for sexual gratification.

Further, the facts constituting the offenses are different as well. The planning and substantial step in pursuance of the Conspiracy occurred at different times and places than did the Attempted Child Molestation.

COUNTRYMAN and BEATTY concocted a plan to use C.E.C. for sexual gratification. The plan took time and effort and lead to one night in which C.E.C. was taken into the bedroom in a black negligee. The substantial steps constituting Conspiracy include the grooming sessions that COUNTRYMAN and BEATTY instigated in the months and weeks before the Attempted Child Molestation in which the two of them would call the child into the bedroom, in various stages of undress, and have talks about sex with her. The substantial steps constituting Conspiracy include the trip to the store to purchase thong undies; and making the victim model the undies. Another act in furtherance of the conspiracy occurred on the day BEATTY took C.E.C. to work. He again talked to her about sex and rubbed her body. These acts were designed to get her comfortable with something she would normally be uncomfortable with. These acts occurred on different days, and times, locations from the act that constitutes the Attempted Child Molestation. Remember, the substantial steps for Conspiracy are the steps in furtherance of the agreement, not the steps that constitute the offense.

The substantial steps that constitute the Attempted Child Molestation include dressing the victim in the black negligee, taking her into the bedroom, performing sexual acts in front of her, coaxing her into

participating in sexual acts with BEATTY and with herself, and BEATTY rubbing her buttocks and attempting to rub her genitals.

The conspiracy and the attempt to commit child molestation are not the same for double jeopardy purposes. The Appellant can be held accountable for both in the absence of contrary legislative intent. See, United States v. Iannelli, 420 U.S. 770, 777-78, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975).

**B. APPELLANT’S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE COURT ORDERING THE COLLECTION OF A BIOLOGIACL SAMPLE FOR DNA DATABASE PURPOSES.**

The state does not undertake an unreasonable search under the Fourth Amendment by collecting a biological sample from a convicted felon without a warrant pursuant to RCW 43.43.754(1) for purposes of establishing a DNA database so as to identify incarcerated felons and deter recidivism. State v. Surge, 122 Wn.App. 448, 459-60, 94 P.3d 345, review granted, 153 Wn.2d 1008 (2005). [Argued on 26 May, 2005].

**III. CONCLUSION**

Based on the foregoing facts, authority, and argument, the appellant fails to meet his burden, and the State respectfully requests this Court to deny the appeal. Pursuant to RAP 14.2 and 14.3 and RCW

10.73.160, the State respectfully requests that Beatty be required to pay all taxable costs of this appeal, including the cost of the reproduction of briefs, verbatim transcripts, clerk's papers, filing fee, and the State's statutory attorney's fees. State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997).

Respectfully submitted this 2<sup>nd</sup> day of January, 2006.

JEREMY RANDOLPH,  
Lewis County Prosecuting Attorney

By:



TERRI J. GAILFUS, WSBA # 30489

Deputy Prosecuting Attorney

CERTIFICATE

I certify that on 1-3-07(post office closed 1-2-07 due to death of President Ford) I mailed a copy of the foregoing Brief of Respondent by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

Vanessa M. Lee  
Washington Appellate Project  
1511 Third Avenue, Suite 701  
Seattle, WA 98101

Delbert Beatty  
DOC # 889544  
C/O Twin Rivers Corrections Center  
P.O. Box 888  
Monroe, WA 98272

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

DATED this 2<sup>nd</sup> day of January 2006.

[Signature]  
Terri J. Gailfus  
Attorney for Respondent  
WSBA No. 30489