

State of Wisconsin:

Circuit Court:

Milwaukee County:

State of Wisconsin,

Plaintiff,

v.

Case No. 2010CF000487

Luis Gamboa,

Defendant.

**Motion to Dismiss Counts Four and Six of Amended Information for the Reason
that the Charges are Multiplicitous**

Please take notice that on the 14th day of June, 2010 at 1:30 p.m., or as soon thereafter as counsel may be heard, the above-named defendant, by his attorney, Jeffrey W. Jensen, will appear before that branch of the Milwaukee County Circuit Court presided over by the Hon. Jeffrey Wagner and will then and there move the court to dismiss counts four and six of the amended information for the reason that those charges are multiplicitous. The charges are multiplicitous because each charges alleges a violation of the same statutory provision, and the facts alleged are clearly part of a continuing offense.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of June, 2010.

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By: _____

Jeffrey W. Jensen
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Luis Gamboa,

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**Memorandum of Law in Support of Motion to Dismiss Counts Four and Six of
Amended Information for the Reason that the Charges are Multiplicitous**

Background

On February 8, 2010, the defendant, Luis Gamboa (hereinafter "Gamboa") was charged in an original information with (1) child abuse causing great bodily harm; and, (2) child neglect causing great bodily harm. The neglect charge was alleged to have taken place from November 25, 2009 to January 20, 2010. Gamboa waived his preliminary hearing, and then entered a not guilty plea.

On May 20, 2010, the State, over Gamboa's objection, was permitted to file an amended information which alleged two additional counts of child neglect (counts four and six) causing great bodily harm. Count four alleges the neglect involved was for the child's "failure to thrive" from August 6, 2009 to January 20, 2010. Count six alleges that it was for failing to disclose "abuse/shaking of the baby" to hospital authorities. This count was alleged to have occurred between November 25, 2009 and January 20, 2010.

Argument

I. The charges are multiplicitous because child neglect is clearly a continuing offense, and it is not an additional volitional act on the part of the defendant for each action which he fails to take.

The double jeopardy provisions of the state and federal constitutions protect a defendant from being punished twice for the same offense. See *State v. Anderson*, 219 Wis. 2d 739, 746, 580 N.W.2d 329, 332 (1998). Multiplicitous charges occur when a single criminal offense is charged in more than one count. See *id.* We employ a two-prong test to analyze claims of multiplicity: "1) whether the charged offenses are identical in law and fact; and 2) if the offenses are not identical in law and fact, whether the legislature intended the multiple offenses to be brought as a single count." *Id.* at 746, 580 N.W.2d at 333.

Gamboa has made a "continuous offense" challenge to the charges against him, i.e., he challenges the multiple charges brought under one statutory section. See *id.* at 747, 580 N.W.2d at 333. Thus, the charges are identical in law; the only question is whether the charges are identical in fact. An offense is not significantly different in fact unless the defendant's acts are separated in time, of a significantly different nature or required a separate volitional act. See *State v. Hirsch*, 140 Wis. 2d 468, 473, 410 N.W.2d 638, 640 (Ct. App. 1987).

The key here, of course, is that the facts alleged in the criminal complaint (and in the amended information) allege the same time period, do not allege any different behavior by Gamboa, nor any additional volitional act by Gamboa.

A. The behavior alleged is not of a significantly different nature

Counts four and six do not allege behavior that is materially different from the behavior that is alleged in count two; that is, counts four and six allege that Gamboa neglected his child over the same period. The common meaning of "neglect" is to "fail to do something; leave something undone." In a very real sense, then, *neglect* is not behavior, it is the failure to take action. Here, the information alleges that Gamboa merely continued to fail to take action to care for his child. Thus, there is no material difference in the behavior alleged between counts two, four, and six. This is significant because Sec. 948.21, Stats., provides that, "Any person who is responsible for a child's welfare who, *through*

his or her actions or failure to take action, intentionally contributes to the neglect of the child . . ." Thus, under the statute, neglect may occur by action, as well as by inaction.

Here, though, the additional counts allege continued inaction on the part of Gamboa (i.e. no materially different form of behavior).

B. There is no additional volitional act by Gamboa

A related, but slightly different point is that Gamboa's pattern of neglect, as alleged in the criminal complaint, required no additional volitional act on his part. As mentioned above, neglect is not an act-- it is the *failure* to act. The failure to act is, by definition, a continuing offense so long as the person continues to fail to act.

Apparently, the State is on the opinion that is a separate violation of Sec. 948.21, Stats., for each thing that should be done for the child, but which the parent leaves undone. That is, the State seeks to file an additional charge for failure to cause the child to thrive, for failing to seek medical attention, and for failing to disclose the shaking/abuse to the medical personnel.

Initially, it should be emphasize that the State utterly fails to explain the difference between failing to seek medical attention, and failing to disclose to medical personnel the true source of the injuries.

Nonetheless, neglect of a child requires the State to prove a negative; that is, that the parent failed to care for his child. If it were a separate violation of the statute for each thing that *should have been done for the child*, but which was left undone, there would literally be no end to the number of charges available under the statute. Under the State's misguided theory, if a parent failed to care for a child (i.e. took no action to parent the child), a separate offense could be charged for each meal the child missed, for each time the child was injured but medical attention was not sought, for each time the parent failed to put the child to bed on time, for each time the parent failed to properly supervision the child. The list of ways in which a child may be neglected is lengthy, but it is not necessary to recite the entire litany. The point is well made. Child neglect is a continuing offense.

Conclusion

For these reasons, it is respectfully requested that the court dismiss counts four and six of the amended information for the reason that the counts are multiplicitous.

Dated at Milwaukee, Wisconsin, this _____ day of June, 2010.

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

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