[Cite as *State v. Hendrix*, 2012-Ohio-2832.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-043**
- vs -	:	
ERIN HENDRIX,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 10 CR 000588.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel,* Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp,* Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Erin Hendrix, appeals from the judgment of the Lake County Court of Common Pleas denying her motion to dismiss her 22-count indictment as well as the judgment of conviction entered against her for complicity to contaminate a substance for human consumption or use. For the reasons discussed in this opinion, we affirm the trial court's judgments.

{¶2} H.H., appellant's daughter and the victim in this case, was born on September 24, 2007. At the time of H.H.'s birth, the Hendrix family lived in Bellaire, Belmont County, Ohio, where appellant was employed as a chemistry, physics, and natural sciences teacher at Bellaire High School and Rick was a pastor at a local church.

{¶3} Several months after her birth, in November of 2007, H.H. was taken to Pittsburgh Children's Hospital where the family met with pediatrician Dr. Benjamin Bolser. According to the doctor, the Hendrixes had concerns regarding H.H.'s failure to gain weight, issues with her hearing, problems with vomiting, and general failure to thrive. After testing, heath care professionals also discovered H.H. had critically low calcium and blood sugar levels.

{¶4} In early 2008, H.H. was diagnosed with CHARGE Syndrome, a congenital disorder that slows physical and mental development. The physical manifestations of CHARGE Syndrome can include clefts in the irises of the eyes; heart defects; blockages of the nasal passages; retardation of growth and development; non-specific genital and urinary problems; and hearing abnormalities.

{¶5} On February 28, 2008, appellant brought H.H. in to visit Dr. Bolser due to concerns she had regarding, what she believed were odd movements of H.H.'s head and potential seizures. The doctor observed some abnormal movement in H.H. but considered the child to be otherwise stable. Dr. Bolser nevertheless scheduled an EEG for H.H. on the following day. On the morning of February 29, 2008, however, Dr. Bolser encountered appellant and H.H. outside his office. The doctor noticed that the

child was notably fussy and pale. Instead of proceeding with the EEG, he told appellant to take H.H. to the emergency room.

{¶6} H.H. went to the emergency room where she was lethargic, had an ashen-blue appearance, and was suffering from profound diarrhea. She was later transferred to the ICU where medical staff inserted a tracheostomy tube to clear the child's airways as well as a gastrostomy tube for feeding. H.H. was also diagnosed with a blood disorder called methemoglobinemia, which, according to Dr. Bolser, caused her bluish appearance. And, upon reviewing H.H.'s X-rays, medical staff observed a "retained contrast material in [H.H's] GI tract." Such a phenomenon usually occurs when a patient consumes barium to highlight an area of the abdomen. According to Dr. Bolser, however, H.H. had not been administered any recent contrast material.

{¶7} Given her persisting symptoms, H.H.'s blood lead levels were tested on March 8, 2008. The test results yielded a dangerously high reading of 135 micrograms per deciliter ("M/D") of blood. According to Dr. Bolser, any reading above ten in a one-year-old child is cause for medical concern; H.H. was five months old at the time of the reading.

{¶8} Tests ultimately revealed that the opaque contrast material observed in H.H.'s X-ray was actually a collection of lead flecks that had accumulated in the child's stomach. Doctors were unable to determine specifically how or when the lead was introduced into H.H's body; given the child's age, however, it was clear that the poisonous metal was introduced to her system by another.

{¶9} H.H. remained in the hospital until March 26, 2008. During her stay, she was given intravenous EDTA chelation therapy. Chelators, such as EDTA, are

medications used in lead and other heavy metal poisoning cases. Chelators bind to the lead in the blood and permit the body to release the poison via urination. After approximately two weeks of treatment, H.H.'s blood lead level reduced dramatically to 36 M/D. H.H. was ultimately sent home with her parents to continue oral chelation therapy using a chelator called Suximer.

{¶10} Medical toxicologist Dr. Anthony Pizon treated H.H. from March of 2008, after her initial test revealed the dangerously high blood lead level, through June of 2009. According to Dr. Pizon, lead poisoning commonly occurs in two specific populations, adults who work with or around the poison and toddlers who accidently poison themselves by consuming the substance, e.g., eating lead paint chips. Because H.H. did not fit either profile, the source of her exposure, while exogenous (from an outside source) remained a mystery. To rule out general environmental contamination, both appellant and H.H.'s father were tested for exposure. Their lead levels were zero. Water sources were tested as well as the family home. All tests were negative.

{¶11} Dr. Pizon then requested a sample of H.H.'s powdered formula to test it for the presence of lead. Appellant brought a can of the formula to the hospital in March of 2008, but when the doctor sought to retrieve it, it had disappeared and was never recovered. Dr. Pizon then asked if appellant had H.H.'s liquid medications available for testing. According to the doctor, appellant became anxious and her face went red at the suggestion. Stuttering, she admitted she had the medications and gave them to the doctor. Two of the three medications, Pepcid and Robinul, tested positive for lead; the third, a calcium supplement, did not.

{¶12} With respect to the poisoned medications, Dr. Pizon ruled out accidental contamination because they came from separate pharmacies and there had been no reports of other patients suffering from lead poisoning as a result of being treated with either Pepcid or Robinul. Moreover, Dr. Pizon concluded that the amount of lead found in the medications was insufficient to trigger H.H.'s heightened 135 M/D lead reading and therefore contamination had to come from an additional exogenous source or sources.

{¶13} After her release in late March of 2008, H.H. returned to the hospital on April 8, 2008 for tests of her blood lead level. H.H.'s test returned a reading of 58 M/D. Although the level had increased from the previous low of 36 M/D, the elevated reading was not a surprise given the nature of a lead poisoning case. Once an individual is exposed, lead remains in the body's tissues and bones. Hence, after the blood is "cleaned" and the poison voided with the assistance of chelation therapy, lead from the bones and tissues invariably leaches back into the blood stream. In any given case, therefore, within three weeks of chelation treatment, a patient will experience a "rebound" in his or her blood lead levels. Given these points, the 58 M/D blood lead level reading represented an expected rebound that was medically consistent with a lead poisoning case.

{¶14} Nevertheless, Dr. Pizon noted that the chelation therapy seemed to be acting inconsistently. When H.H. was given IV chelation with EDTA, her blood lead levels fell sharply; when she was sent home with oral Suximer, however, her blood lead levels would, in Dr. Pizon's words, "skyrocket." For example, H.H.'s blood lead levels went from 58 M/D on April 8, 2008, her initial "rebound," to 97.4 M/D on May 8, 2008.

While her levels decreased to 60 M/D on June 7, 2008, they rose again to 71 M/D on June 23, 2008. And, between late July and early August of 2008, her blood level readings rose from 74.7 M/D to 84 M/D. By October 3, 2008, the levels decreased to 72 M/D. Dr. Pizon remained confounded by the persistent fluctuations. The inconsistencies and relatively rapid spikes, according to Dr. Pizon, "pharmacologically, medically, just made no sense."

{¶15} Dr. Pizon was aware that some chelators may bind lead to tissue and increase absorption of the poison rather than cause it to be released in the urine. In order to be certain the oral Suximer was not triggering such a response, in December of 2008, Dr. Pizon placed H.H. on oral Suximer chelation in the hospital. When nurses administered the treatment, Dr. Pizon observed the levels went down nicely. According to the doctor, such a result was odd, "not because it's not what we expect, but it was strange because it's not what was typically happening with [H.H] over the previous treatments."

{¶16} While it was clear to Dr. Pizon H.H. had been poisoned by an exogenous source, it was still unclear, in his mind, the specific means by which she was poisoned. Taking all the data into consideration, the doctor concluded that the initial poisoning could not be responsible for the repeated spikes in her blood level. Similarly, Dr. Pizon did not believe the lead flecks found in H.H.'s stomach could explain the erratic spikes in the child's blood lead levels. The doctor underscored, lead in an individual's body, unless it is reintroduced, leaches *slowly*, not aggressively into the blood. And, even though the re-exposure could still occur in an accidental fashion, the doctor, and other

hospital personnel, became more and more concerned that H.H. was suffering from an ongoing malicious poisoning.

{¶17} In late June of 2009, the Hendrix family moved from Belmont County, Ohio to Lake County, Ohio because Rick Hendrix was transferred to the Mentor United Methodist Church. The family moved into the parsonage, which, it bears noting, tested negative for lead.

{¶18} On July 7, 2009, appellant took H.H. to visit her new pediatrician, Dr. Susan Dykeman. Aware of H.H.'s history, the doctor decided to test the child's blood lead levels, the results of which were 51.2 M/D. Dr. Dykeman considered this reading high and referred the child to pediatric toxicologist Dr. Lawrence Quang at Rainbow Babies and Children's Hospital in Cleveland.

{¶19} On July 13, 2009, Dr. Quang met with appellant and H.H. He considered the child's lead level high and her medical history rather suspicious. Like Dr. Pizon, Dr. Quang emphasized that an ordinary case of child lead poisoning occurs between the ages of nine months and four years; when children have the gross motor skills to move about and the fine motor skills to pick up and place things into their mouths. As H.H. was never developmentally advanced enough to move or independently put anything in her mouth, she was not within the typical population of children who suffer from accidental lead poisoning. Furthermore, H.H.'s lead levels regularly went beyond what Dr. Quang opined was the initial rebound level after chelation was administered. Dr. Quang consequently observed that, unless poison was reintroduced, her case defied the more than seven decades of medical research in this area.

{¶20} Given these points, Dr. Quang initiated another blood lead level test which returned a blood lead level of 67.8 M/D, over 16 points higher than the test results received only a week earlier. Dr. Quang admitted H.H. to the hospital and, because the hospital did not have IV EDTA available, he sought permission from appellant to treat the child with Suximer chelation. Appellant refused permission, asserting Suximer had been previously used but was ineffective. The doctor offered a third option, a more toxic chelator called D-penicillamine. According to Dr. Quang, H.H. stood a 30 percent chance of an adverse reaction being treated with D-penicillamine, as opposed to a two to three percent chance using Suximer. Because, however, appellant was entitled to refuse treatment, the doctor was obligated to respect the decision. Fortunately, D-penicillamine worked and, by late July of 2009, H.H.'s blood lead level decreased into the mid-40s, where it remained for the next several months.

{¶21} On July 24, 2009, after considering H.H.'s case and speaking with his medical team, Dr. Quang, concluded appellant was involved in the introduction of lead into the child's system. He therefore contacted the department of job and family services and, given the circumstances of the case, the Mentor Police Department was notified. The department immediately launched an investigation. And, after speaking with social workers from the Lake County Department of Job and Family Services, officers obtained a search warrant for the Hendrix's home.

{¶22} On July 25, 2009, Mentor Police executed the warrant and, while searching a first floor spare bedroom, officers found a back pack in a closet. Inside the backpack was a double-bagged sandwich baggie containing white powder. Appellant acknowledged that she used the backpack for teaching; she denied, however, any

knowledge of the contents of the baggie. When she reached for the baggie, the on-scene detective handling the evidence moved it from her reach. According to Detective Colleen Petro of the Mentor Police Department, appellant's cheeks flushed bright red and her eyes welled with tears. After being tested, the powder in the baggie was identified as lead nitrate, a colorless, near-tasteless, water soluble form of lead. On July 27, 2009, emergency custody of H.H. was granted to the Lake County Department of Job and Family Services.

{¶23} During the investigation, officers were able to confiscate two bottles of lead nitrate from the school where appellant formerly worked in Belmont County, a newer bottle and an older bottle. The bottles and the lead found in the baggie were sent to the Center for Disease Control for lead isotope ratio comparisons. After analysis, the samples could neither be identified nor excluded as the sources of lead in H.H.'s body. Although these tests were inconclusive, former Bellaire High School Principal Mike Sherwood was able to confirm that appellant submitted a requisition form for lead nitrate on August 1, 2007 that was filled in September of 2007; and, on October 14, 2008, she submitted a second requisition form for lead nitrate that was filled on December 31, 2008. As only one newer bottle of lead nitrate was recovered from the school, the other recently purchased bottle was unaccounted for and never recovered.

{¶24} Meanwhile, Dr. Quang was still concerned about the lead flecks resting in H.H.'s stomach mucosa. He considered surgery, but after consulting with pediatric surgeons, he concluded the risks of irreversible internal damage were too great. After further investigation, Dr. Quang found research indicating that a class of drugs called biophosphonates, generally used to combat the effects of osteoporosis in menopausal

women, had a tendency to remove lead in the human body which is released into the bloodstream as bones age and breakdown. Although biophosphonates are not FDA approved for children, the doctor thought he could carefully monitor the effects of the medication on H.H. and, if they work, avoid the surgical option. After receiving approval from the pediatric clinical research review committee at the hospital, H.H. was placed on a biophosphonate called Pamidronate. During her treatment, H.H.'s blood lead level dropped from 45 M/D to 35 M/D then, finally to 25 M/D where it remained in equilibrium.

{¶25} Not only was the Pamidronate therapy effective in further stabilizing H.H.'s blood lead level, it allowed Dr. Quang to conclude that the main contributor of her endogenous (internal) exposure was lead being released from the bone. From this, the doctor further posited that the lead flecks found in H.H.'s stomach were of negligible significance, essentially negating the need for surgery. That is, to the extent Pamidromate specifically addressed lead levels released from the bone and H.H.'s blood lead levels precipitously decreased on the medication, the extant lead flecks in her stomach contributed, at most, slightly to the profound lead intoxication from which H.H. had been suffering.

{¶26} After thoroughly reviewing H.H.'s medical charts and the data from H.H.'s treatment history, Dr. Quang opined that lead was exogenously reintroduced into H.H.'s system on nine different occasions between February of 2008 and July of 2009. Dr. Pizon concluded H.H. was re-poisoned on ten separate occasions. And, in hindsight, Dr. Pizon noted that H.H.'s symptoms upon admission to the hospital in February of 2008 were consistent with acute lead nitrate poisoning. Chemically, lead nitrate poisoning causes, inter alia, lethargy and explosive diarrhea, and, perhaps most

significantly, the nitrate component of the lead salt causes methemoglobinemia, resulting in a cyanotic or bluish appearance.

{¶27} Both toxicologists agreed that had H.H. not been treated aggressively after her lead levels tested at 135 M/D, she would have died. And, according to Dr. Quang, any lead exposure to a child in the first two years of life will cause permanent, irreversible damage to the brain. Such exposure impairs the movement and reception of neurotransmitters, chemicals that, in essence, facilitate brain function. Dr. Quang also pointed out that lead poisoning in a child causes cellular apoptosis, a condition describing cell death. Exposure, therefore, impairs a child's ability to learn, causes significant behavioral difficulties, and, in fact, causes sub-normal intelligence. In H.H.'s case, Dr. Quang opined, the initial exposure caused the child to lose between 27 and 40.5 IQ points.

{¶28} Dr. Quang further noted that lead exposure is deleterious to kidney function, causing kidney disease, hypertension and, predisposes an individual to strokes and heart attacks later in life. Finally, the doctor pointed out lead in the bone has a half life of 20 to 30 years and thus, while it can be managed, will continue to leach into the blood stream over the course of a patient's lifetime. These points, according to Dr. Quang, will undermine H.H.'s ability to reach her full potential, particularly if her full potential was already compromised by potentially severe pre-existing developmental delays due to the CHARGE Syndrome diagnosis.

{¶29} On September 29, 2010, appellant was secretly indicted on twenty-two felony charges involving the lead poisoning of her daughter, H.H. The first six counts of the indictment charged appellant with contaminating a substance with lead or lead

nitrate for human consumption or use, in violation of R.C. 2927.24(B)(1), all first-degree felonies. (Counts 1 through 6) Counts 1, 3, and 5, alleged a penalty enhancement specification that the amount of lead or lead nitrate involved was sufficient to cause death. Counts 2, 4, and 6 alleged a penalty enhancement specification that the offenses resulted in serious physical harm to the victim

{¶30} Appellant was also charged with attempted aggravated murder, in violation of R.C. 2903.01(C) and R.C. 2923.02(A), a first-degree felony (Count 7); attempted felony murder, in violation of R.C. 2903.02(B) and R.C. 2923.02(A), a first-degree felony (Count 8); felonious assault, in violation of R.C. 2903.11(A)(1), a second-degree felony (Count 9); and two counts of endangering children, in violation of R.C. 2912.22(A) and R.C. 2912.22(B)(1), third and second-degree felonies, respectively (Counts 10 and 11). The remaining eleven counts in the indictment were complicity charges mirroring the first eleven counts, although out of order; to wit: Count 12 alleged complicity to aggravated murder; Count 13 alleged complicity to attempted felony murder; Count 14 alleged complicity to felonious assault; Count 15 alleged complicity to endangering children; Count 16 alleged complicity to endangering children; and Counts 17 through 22 alleged complicity to contaminating a substance for human consumption or use, each setting forth the same penalty enhancement specification listed in Counts 1 through 6.

{¶31} On September 30, 2010, appellant waived her right to be present at her arraignment and the trial court entered "not guilty" pleas on her behalf. Several pretrial motions were filed by defense counsel and eventually denied by the trial court, including a motion to dismiss the indictment. Additionally, defense counsel filed a motion to

dismiss Counts 8 and 13, relating to the attempted felony murder and complicity to attempted felony murder charges, which the trial court denied.

{¶32} On February 28, 2011, the matter proceeded to jury trial after which appellant was found guilty of felonious assault, both counts of endangering children, and all 11 counts of complicity. She was acquitted of the first eight counts in the indictment alleging she was the principal offender in all crimes. The trial court merged all foregoing counts with Count 18 thereby entering a judgment of conviction on one count of complicity to contaminating a substance for human consumption or use that resulted in serious physical harm to the victim. Appellant was subsequently sentenced to life imprisonment with parole eligibility after 15 years. She now appeals and assigns seven errors for this court's consideration.

{¶33} For her first assignment of error, appellant alleges:

{¶34} "The trial court erred to the prejudice of the defendant-appellant when it overruled her motion to dismiss the defective indictment in violation of her right to indictment under the Ohio Constitution and due process under the United States and Ohio Constitutions.

{¶35} Under this assignment of error, appellant first argues the counts alleged in her indictment were duplicitous and therefore violated her rights to grand jury presentment, proper notice and due process. In particular, appellant argues the state's medical experts identified between nine or ten particular incidents in which, they opined, the victim had been intentionally poisoned with lead. Each count, however, alleged a continuous course of criminal conduct occurring in one or more of three separate counties during a 17 month period. Appellant therefore maintains every count included

in her indictment was duplicitous and therefore the trial court was required to dismiss the instrument in its entirety. We do not agree.

{¶36} Section 10 of Article I of the Ohio Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury * * *." This provision guarantees a defendant that she will be tried on the same essential facts on which the grand jury based its probable cause finding. *See Harris v. State*, 125 Ohio St. 257, 264 (1932).

{¶37} In criminal procedure, the term "duplicity" connotes the joining of two or more offenses in the same count of an indictment. *State v. Fitzpatrick*, 11th Dist. No. 2009-L-030, 2010-Ohio-710, ¶31. In other words, "[a]n indictment is duplicitous if it sets forth separate and distinct crimes in one count." *United States v. Kakos*, 483 F.3d 441, 443 (6th Cir.2007). Pursuant to Crim.R. 8(A), two or more offenses may be charged in the same indictment; each offense, however, must be charged in a separate count. If more than one offense is charged in a single count, the indictment is duplicitous. *See Fitzpatrick*, at ¶32, citing *State v. Allen*, 8th Dist. No. 62713, 1993 Ohio App. LEXIS 2806, *8 (June 3, 1993).

{¶38} In this case, appellant was charged in a 22-count indictment with 22 discrete "continuing course of conduct" offenses which allegedly occurred between February 19, 2008 and July 27, 2009. Specifically, Counts 1 through 6 charged appellant, as a principal offender, with contaminating a substance for human consumption, each with differing substances and specifications, all felonies of the first degree. Count 7 alleged attempted aggravated murder, a felony of the first degree. Count 8 alleged attempted murder, a felony of the first degree. Count 9 alleged

felonious assault, a felony of the second degree. Count 10 alleged endangering children, a felony of the third degree. Count 11 alleged endangering children, a felony of the second degree. Count 12 alleged complicity to attempted aggravated murder, a felony of the first degree. Count 13 alleged complicity to attempted murder, a felony of the first degree. Count 14 alleged complicity to felonious assault, a felony of the second degree. Count 15 alleged complicity to endangering children, a felony of the third degree. Count 16 alleged complicity to endangering children, a felony of the second degree. And, counts 17 through 22 alleged complicity to contaminating a substance for human consumption, all felonies of the first degree.

{¶39} The foregoing charges demonstrate that, on its face, the indictment is not duplicitous. The indictment itemizes 22 separate counts, all of which separately set forth the elements necessary to convict on each discrete offense. The manner in which the charges are worded and the statutes appellant was alleged to have violated are specific to each count. We therefore hold appellant's indictment does not join two or more separate offenses into any one count.

{¶40} This conclusion notwithstanding, appellant asserts the indictment, as filed, created a risk that she was tried for crimes for which she was not indicted. Appellant suggests that, given the broad timeframe and multiple counties in which the offenses could have taken place during the "course of conduct," it is "questionable" the state's evidence at trial related to the essential facts found by the grand jury in issuing the indictment. We do not agree.

{¶41} First of all, this argument presumes the indictment was duplicitous. As discussed above, this assumption, as a matter of law, lacks merit. Regardless of this

conclusion, it is unclear, and appellant fails to specifically elucidate how, or which crimes, she could have been tried and convicted of other than those upon which she was indicted. The indictment in this case charged appellant with crimes to which the evidence presented at trial corresponded. Moreover, the evidence conformed to the timeframe and jurisdictions in which the prohibited course of conduct was alleged to have occurred in the indictment. Put simply, appellant's allegation that she was "likely" convicted of crimes other than those set forth in the charging instrument is without basis.

{¶42} Further, an indictment, which is a mere accusation, is issued by a grand jury based upon a finding of probable cause. *See e.g. State v. Sanders*, 92 Ohio St.3d 245, 271 (2001). Because the issuance of an indictment is premised upon a lower quantum of proof than that of a criminal trial, the prosecution will not produce the exact same sworn testimony to obtain the charging instrument that it produces at trial. This, however, does not imply the evidence adduced at trial was premised upon different facts than those which prompted the grand jury to return the true bill in this case. Any assertion to the contrary is mere unsupported conjecture. We therefore hold appellant's argument lacks merit.

{¶43} Next, appellant asserts the allegedly open-ended nature of the indictment raises a question as to whether the grand jury actually had a meeting of the minds regarding the criminal conduct upon which each count of the indictment was premised. Appellant's contention suggests grand jury proceedings necessitate complete consistency amongst grand jurors regarding their relative evaluation or interpretation of the evidence that is the basis for a probable cause determination. We do not agree.

{¶44} In the context of a petit jury, the Ohio Supreme Court has held that even though Crim.R. 31(A) requires juror unanimity on each element of the crime, jurors need not agree to a specific way in which each element is established. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶38. We hold this rule applies with equal force to a grand jury. The indictment demonstrates that, between February 19, 2008 and July 27, 2009, appellant engaged in a course of conduct, throughout several jurisdictions, that allowed the grand jury to conclude there was probable cause to charge her with 22 separate crimes. Although Crim.R. 6(F) requires seven of nine grand jurors to concur that probable cause exists to indict, this does not imply that these jurors must specifically agree on the manner in which they arrive at their determination in light of the evidence. See *State v. Minifee*, 8th Dist. No. 91017, 2009-Ohio-3089, ¶57 (applying the rule in *Gardner* to a challenge to a grand jury's probable cause determination). After all, different jurors may be persuaded by different facts, yet still agree on an underlying conclusion. Namely, that the facts, as each grand juror understands them, are sufficient to establish probable cause to charge a defendant with particular crimes. For these reasons, appellant's argument lacks merit.

{¶45} Next, appellant contends the indictment potentially deprived her of a unanimous jury verdict. Appellant asserts that the jury could have returned a verdict on a single count without agreement as to the factual basis of that conclusion. On the authority of *Gardner*, there is no requirement that a jury decide unanimously which of several possible sets of facts make up a particular element, so long as there is unanimity that each element of the charged crime was proved. Accordingly, appellant's argument lacks merit.

{¶46} Appellant next asserts the indictment contained invalid, overlapping, "carbon-copy" counts. She contends the multiple, overlapping counts violated her right to due process and her right to be protected from double jeopardy. Carbon copy counts violate due process as they fail to give a criminal defendant adequate notice of the particular charges to mount a defense *See Russell v. United States*, 369 U.S. 749, 763-764 (1962); furthermore, the double jeopardy clause is implicated to the extent carbon copy counts fail to adequately specify facts differentiating the offenses and thus do not adequately protect against re-indictment and retrial on the same charges or multiple punishments for the same offense. *See Valentine v. Koneth*, 395 F.3d 626, 634 (6th Cir. 2005). Appellant asserts each of the 12 counts charging her with contaminating a substance for human consumption, as both a principal and a complicitor, are carbon copies of one another. In support of her argument, appellant relies primarily upon *Valentine*.

{¶47} In *Valentine,* the Sixth Circuit Court of Appeals affirmed the district court's grant of habeas corpus relief to the defendant on all but one of his convictions, holding the 40-count indictment failed to distinguish the factual bases of the charges. In arriving at its conclusion, the court observed that "[w]hen prosecutors opt to use such carbon-copy indictments, the defendant has neither adequate notice to defend himself, nor sufficient protection from double jeopardy." *Id.* at 636. Upon review, we find *Valentine* distinguishable from the instant matter.

{¶48} The indictment in *Valentine* charged the defendant with 20 counts of child rape, all of which was identically worded and undifferentiated; and 20 counts of felonious sexual penetration, which were also identically worded and not differentiated.

In this case, appellant was charged, as a principal offender with contaminating substances for human consumption in six counts and as a complicitor to contaminating substances for human consumption in six counts. As discussed above, the crimes were alleged to be part of a course of conduct occurring between February 19, 2008 and July 27, 2009.

{¶49} Counts 1 and 2 alleged appellant was a principal offender based upon the mingling of lead and/or lead nitrate with food, drink, nonprescription drug, prescription drug, or pharmaceutical product. While ostensibly undifferentiated, each count included a *separate specification*; to wit, count one specified that "[t]he amount of poison, hazardous chemical, or other harmful substance involved an amount sufficient to cause death if ingested or used by a person." And, Count 2 specified that "[t]his offense resulted in serious physical harm to a minor female victim." The counts were therefore discrete, distinguishable charges against which appellant could defend without concern that double jeopardy would be violated.

{¶50} Counts 3 and 4 alleged appellant was a principal offender based upon the mingling of lead and/or lead nitrate with Pepcid. And, Counts 5 and 6 alleged appellant was a principal offender based upon the mingling of lead and/or lead nitrate with Robinul. These counts contained the same specifications as Counts 1 and 2. Counts 3 and 4, as well as Counts 5 and 6 were therefore separate and distinct counts that were not identically worded or undifferentiated. Counts 17 through 22 reiterated the foregoing charges, but, instead of charging appellant as a principal in the offenses, charged her as a complicitor. Thus, Counts 1 through 6 are distinct from Counts 17 through 22 and therefore the latter cannot be considered "carbon copies" of the former.

{¶51} Appellant next asserts the indictment was "multiplicitous" and therefore violated her constitutional rights. An indictment is multiplicitous where it charges a single offense in multiple counts. *See e.g. State v. Ross*, 9th Dist. No. 09CA009742, 2012-Ohio-536, ¶69. "[T]he vice of a multiplicitous indictment lies in the possibility of multiple punishments for a single offense in violation of the cumulative punishment branch of the Double Jeopardy Clause of the Fifth Amendment." *State v. Childs*, 88 Ohio St.3d 558, 561 (2000). Even if counts are multiplicitous, however, merging them for purposes of sentencing, pursuant to R.C. 2941.25, will cure any threat of double jeopardy. *Id.*

{¶52} Appellant asserts that coupling Counts 1 and 2, Counts 3 and 4, and Counts 5 and 6 rendered these charges multiplicitous. She further contends that charging Counts 12 through 22 were multiplicitous because the complicity charges were based upon the same conduct as that alleged in counts one through eleven. We do not agree.

{¶53} Count 1 alleged appellant contaminated food, drink, a nonprescription drug, a prescription drug, or a pharmaceutical product with lead in an amount sufficient to cause death; Count 2, alternatively, alleged appellant contaminated one or more of the various substances alleged in Count 1 and that contamination resulted in serious physical harm. Counts 3 and 4 alleged the same specifications as set forth in Counts 1 and 2, but alleged appellant contaminated Pepcid with lead; and, similarly, Counts 5 and 6 alleged the same specifications as stated under Counts 1 and 2, but appellant contaminated Robinul with lead. The course of conduct alleged that appellant, between February 19, 2008 and July 27, 2009, committed the foregoing crimes. Given these

points, the indictment can be reasonably read to charge appellant with six distinct offenses each of which occurred at some point during the 15-month timeframe alleged in the instrument. These counts are therefore not multiplicitous.

{¶54} Furthermore, Counts 12 through 22, while alleging appellant committed the same underlying crimes as those set forth under Counts 1 through 11, alleged appellant was complicit in those offenses. Contrary to appellant's argument, the counts were not arbitrarily divided or separated; rather, it was completely reasonable for the grand jury to charge appellant in the alternative to jointly exhaust the charges upon which it found probable cause to indict. And, regardless of these points, because appellant could not, as a matter of law, be convicted as a principal and a complicitor for the same crime, the counts cannot be considered multiplicitous.

{¶55} Finally, the jury acquitted appellant on Counts 1 through 8. Although it found appellant guilty on Counts 9 through 22, she was eventually sentenced *only* on Count 18; the remainder of the counts on which the jury returned a verdict of guilty were merged with Count 18 for purposes of sentencing. As appellant was sentenced only on Count 18, any concern relating to multiplicity was cured by operation of R.C. 2941.25.

{¶56} Appellant next asserts the indictment was unconstitutional as the penalty enhancement specifications attached to each contamination count failed to set forth a mens rea. We do not agree.

{¶57} Appellant was indicted on six counts of contaminating a substance for human consumption as a principal and six counts as a complicitor, all in violation of R.C. 2927.24(B)(1). In each of the twelve counts, the grand jury affixed one of two penalty enhancement specifications set forth under R.C. 2927.24(E)(1). With respect to

the principal charges, appellant acknowledges that Counts 1 through 6 and Counts 17 through 22 properly charged her with contaminating substances with lead. Appellant argues, however, that the specifications, viz., that, in the odd-numbered charges, the amount of lead was sufficient to cause death and, in the even-numbered charges, the contamination resulted in serious physical harm to a minor female, failed to include a culpable mental state. As such, she concludes, all twelve counts for contamination were deficient and should have been dismissed.

{¶58} Appellant's argument lacks merit because a penalty enhancement specification, such as those set forth under R.C. 2927.24(E)(1), is not a criminal offense unto itself. *State v. Miller*, 6th Dist. No. L-08-1314, 2009-Ohio-3908, ¶11 citing *State v. Belcher*, 8th Dist. No. 98254, 2007-Ohio-6317; *see also State v. Stevens*, 2d Dist. No. 23817, 2010-Ohio-4766, ¶18. "[A] specification is, by its very nature, ancillary to, and completely dependent upon, the existence of the underlying criminal charge or charges to which the specification is attached." *State v. Nagel*, 84 Ohio St.3d 280, 286 (1999). Hence, a penalty enhancement specification is not an offense, by itself, but simply serves to increase the penalty of the underlying crime. *Miller*, *supra*, at ¶12.

{¶59} As the penalty enhancements set forth under R.C. 2927.24(E)(1) are not offenses separate from contaminating a substance for human consumption, they did not require proof of a culpable mental state separate from the commission of the predicate offense. *See e.g.*, *Stevens*, *supra.* Appellant's argument that the indictment was flawed because the penalty enhancement specifications failed to set forth a mens rea is therefore without merit.

{¶60} Appellant next asserts that the indictment is fatally flawed as it failed to provide her express notice that a conviction under R.C. 2927.24(B)(1) could result in a life sentence. Again, we do not agree.

{¶61} A violation of R.C. 2927.24(B)(1), contaminating a substance for human consumption, is a felony of the first degree for which, ordinarily, a defendant may be sentenced up to eleven years in prison. R.C. 2927.24(E)(1), however, provides in relevant part:

{¶62} [i]f the offense involved an amount of poison * * * or the other harmful substance sufficient to cause death if ingested or used by regarding a violation of division (B)(1) of this section * * * or if the offense resulted in serious physical harm to another person, whoever violates division (B)(1) * * * of this section shall be imprisoned for life with parole eligibility after serving fifteen years imprisonment.

{¶63} Consequently, if the jury finds, beyond a reasonable doubt, that either of the specifications set forth under section (E)(1) apply, the offender must receive a sentence of 15 years to life.

{¶64} The indictment in this case properly informed the defendant of the specifications attached to the predicate offense and specifically stated, in each count, that "[t]he penalty for a violation of this offense is pursuant to R.C. 2927.24(E)(1)." Appellant was aware of the substantive nature of the enhancement specifications against which she was required to defend and placed on notice that the penalty for a conviction under R.C. 2927.24(B)(1) and (E)(1) is life imprisonment. We therefore hold the indictment was neither insufficient nor misleading.

{¶65} Appellant's first assignment of error is without merit.

{¶66} For her second assignment of error, appellant asserts:

{¶67} "The trial court erred to the prejudice of the defendant-appellant when it overruled her motion to dismiss the charges of attempted felony-murder and complicity to attempted felony-murder in violation of her right to due process as guaranteed by the United States and Ohio Constitutions."

{¶68} Appellant contends that the counts in the indictment alleging attempted felony murder and complicity to attempted felony murder failed to state an offense and, as a result, the trial court erred in not dismissing these charges. Appellant argues that one cannot purposefully or knowingly attempt to accomplish an unintended result, such as the death of another in the course of committing an offense of violence. While appellant's argument is conceptually persuasive, we hold the decision not to dismiss these charges was harmless error.

{¶69} In Count 8, appellant was charged with attempted felony murder, in violation R.C. 2903.02(B) and R.C. 2923.02(A). The former provides, in relevant part: "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree * * *." The attempt statute states, in relevant part that "[n]o person, purposely or knowingly * * * shall engage in conduct that, if successful, would constitute or result in the offense."

{¶70} An "attempt" is typically referred to as an inchoate crime. *See e.g. In re Phillips*, 5th Dist. No. CT2001-0051, 2002-Ohio-1581, 2002 Ohio App. LEXIS 1684, *7 citing Black's Law Dictionary (6th ed. 1991) 761. In other words, the crime of "attempt" is committed prior to and in preparation for an additional offense. An attempt requires

the specific intent to bring about a criminal result as well as a significant overt act in furtherance of that intent. *See State v. Williams*, 8th Dist. No. 72659, 1999 Ohio App. LEXIS 1446, *10 (Apr. 1, 1999). Although an attempt is a complete offense in itself, it presumes the underlying crime for which the offender has prepared has not been completed.

{¶71} Felony murder, alternatively, involves an inadvertent homicide resulting from the commission of a felony of violence. *See e.g. State v. Mays*, 2d Dist. No. 24168, 2012-Ohio-838, ¶6. By definition, therefore, a felony murder charge requires both a felony of violence *and* an unintended death. The victim, in this case, however, survived. Not only is it impossible to attempt to cause an unintended result, one cannot specifically intend to commit a crime that statutorily requires a homicide where no death occurs. We therefore hold the trial court should have dismissed the counts of attempted felony murder and complicity to attempted felony murder as both counts charge crimes which are logically impossible.

{¶72} That conclusion notwithstanding, appellant was acquitted of attempted felony murder and, although the jury returned a verdict of guilty on complicity to attempted felony murder, this count was merged with the conviction for complicity to contaminating a substance for human consumption. By operation of R.C. 2941.25(A), Ohio's merger statute, appellant was not convicted of complicity to attempted felony murder. As appellant's substantial rights were not violated, the trial court's failure to dismiss the counts for failure to state offenses was harmless as a matter of law.

{¶73} Appellant's second assignment of error is not well taken.

{¶74} For her third assignment of error, appellant alleges:

{¶75} "The defendant-appellant's constitutional rights to indictment, trial in the county where the offense is alleged to have been committed and due process were violated when the trial court gave an inappropriate venue instruction over defense objection in contravention of the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution."

{¶76} Under this assignment of error, appellant argues the trial court erred in overruling her objection to jury instructions relating to proof of venue. She claims the jury instructions, as given, were inconsistent with the venue language set forth in the indictment and therefore violated her right to be tried on the same essential facts upon which the grand jury found probable cause. We do not agree.

{¶77} Each count in appellant's indictment set forth the following allegation:

> **{¶78}** On or between the 19th Day of February, 2008 and the 27th day of July, 2009, as a part of a course of criminal conduct with offenses committed in different jurisdictions in which one of the offenses or any element of one of the offenses occurred in Lake County, State of Ohio, said conduct originating in Belmont County and occurring in Lake County and Cuyahoga County, State of Ohio * * *

{¶79} The trial court provided the following jury instructions on venue:

> **{¶80}** It is alleged that any one or more of the offenses charged or any element of one or more of the offenses charged, took place in Lake County, Ohio. The right of this court to try the Defendant depends upon proof that an offense or element of an offense was committed in this county. When it appears beyond a reasonable doubt that an

offense or any element of an offense was committed in any of 2 or more counties or jurisdictions, but it cannot be reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any of those counties or jurisdictions. When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. (Emphasis added.)

{¶81} The foregoing allegation and instructions implicate the language of R.C. 2901.12, Ohio's venue statute, which provides, in relevant part.

{¶82} (A) The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed.

{¶83} * * *

{¶84} (G) When it appears beyond a reasonable doubt that an offense or any element of an offense was committed in any of two or more jurisdictions, but it cannot reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any of those jurisdictions.

{¶85} (H) When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried

for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. * * *

{¶86} Appellant takes issue with the portion of the instructions taken from R.C. 2901.12(G). Appellant argues this language conflicts with allegations in the indictment, which implicate R.C. 2901.12(H), because it states that the jury was not required to find that an offense or element of the offense occurred in Lake County. While the added instruction does not match the allegation in the indictment, we find no error.

{¶87} It is well established that venue is neither jurisdictional nor a material element of any crime. *State v. Henderson*, 11th Dist. No. 99-T-001, 2000 Ohio App. LEXIS 4579, *29 (Sept. 29, 2000), citing *State v. Calhoun*, 11th Dist. No. 960G01971, 1997 Ohio App. LEXIS 1336, *5 (Apr. 4, 1997). Venue must nevertheless be proved by the prosecution beyond a reasonable doubt unless waived by the accused. *State v. Dengg*, 11th Dist. No. 2008-P-0063, 2009-Ohio-4101, ¶33; *see also State v. Brothers*, 11th Dist. No. 2000-T-0085, 2001 Ohio App. LEXIS 5636, *14 (Dec. 14, 2001). "Since venue is neither jurisdictional nor a material element of a criminal offense, the indictment is only required to contain an allegation that the offense was committed within the jurisdiction of the court." *State v. Singleton*, 10th Dist. No. 01AP-632, 2002 Ohio App. LEXIS 778, *6 (Feb. 26, 2002) citing *Henderson*, *supra.* Because venue must be proved beyond a reasonable doubt, however, a trial is necessary to establish its sufficiency.

{¶88} Appellant does not challenge the adequacy of the indictment's allegation of venue. Rather, appellant asserts the trial court erred in providing a jury instruction

relating to venue that was different from that alleged in the indictment. Appellant's argument is without merit.

{¶89} Section 10, Article I of the Ohio Constitution states that a defendant shall be tried "in the county in which the offense is alleged to have been committed * * *." The Supreme Court has stated that "[t]he primary purpose of the constitutional provision is to fix the place of trial." *State v. Draggo*, 65 Ohio St.2d 88, 90 (1981). In *Draggo*, the Court further acknowledged that:

> **{¶90}** R.C. 2901.12(G) and (H) are statutory reflections of the modern mobility of criminals to perform unlawful deeds over vast geographical boundaries. The above-noted statutory provisions effectuate a sensible, efficient approach to justice by permitting one court to hear a matter which has roots in several court jurisdictions. *Draggo*, *supra.*

{¶91} With these points in mind, we disagree with appellant's argument that the state was bound to prove the elements of the crimes *must have*, beyond a reasonable doubt, occurred within Lake County to prove venue. Such a holding would not only render R.C. 2901.12(G) meaningless, it would function to grant an offender immunity from prosecution if the location of a crime could not be specifically identified. *See State v. Reinhardt*, 9th Dist. No. 08CA0012-M, 2009-Ohio-1297, ¶19. Such an outcome would be manifestly absurd and contrary to the orderly and efficient administration of criminal justice.

{¶92} The importance of the concept of venue is to afford a defendant the right to be tried in the vicinity of her alleged criminal activity. *State v. Meridy*, 12th Dist. No.

CA2003-11-091, 2005-Ohio-241, ¶12. The necessity of proving venue is to prevent the state from indiscriminately seeking a favorable location for trial or selecting an inconvenient forum that could disadvantage a criminal defendant. *Id.*, *see also State v. Loucks*, 28 Ohio App.2d 77, 82 (4th Dist.1971). The court's jury instructions were consistent with the foregoing policies and, moreover, were an accurate statement of venue law set forth under R.C. 2901.12(G) and (H). And, because the instructions conformed to the evidence produced at trial, we conclude the trial court acted within its discretion when it issued the instructions on venue. *See State v. Stokes*, 7th Dist. No. 08-MA-39, 2009-Ohio-4820, ¶57. We therefore hold the instructions did not undermine appellant's right to be tried upon the same essential facts upon which the grand jury found probable cause to charge her in the indictment.

{¶93} Appellant's third assignment of error is overruled.

{¶94} For her fourth assignment of error, appellant asserts:

{¶95} "The trial court erred when it denied the defendant-appellant's request for a verdict form addressing venue in violation of her rights to due process and fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United State[s] Constitution and Sections 10 and 16, Article I of the Ohio Constitution."

{¶96} Appellant argues the trial court committed reversible error when it rejected her "proposed additional verdict form" requesting the jury to specify, for each guilty verdict, what elements, if any, it found she had committed in Lake County. We do not agree.

{¶97} The Ohio Supreme Court has observed that "[s]pecial verdicts by juries are required only where specifically mandated by statute." *State v. Cook*, 65 Ohio St.3d

516, 525 (1992) citing *State v. Jenkins*, 15 Ohio St.3d 164 (1984). As we are aware of no statute that required the court to submit the special verdict form to the jury in this case, and appellant does not indicate such a statute exists, then, by implication, the court's decision declining to give the form was within its discretion.

{¶98} Appellant, however, contends the trial court abused its discretion by not submitting the special verdict form to the jury because, without the form, it is impossible to know what offenses or elements of the offenses served to anchor venue in Lake County. As discussed under appellant's third assignment of error, however, R.C. 2901.12(G), if applicable, serves to eliminate any need to conclusively locate the offenses or any of their specific elements in the county which is the situs of the trial.

{¶99} To wit, R.C. 2901.12(G) specifically confers venue upon *any* of the counties in which it appears, beyond a reasonable doubt, the crimes occurred *but* it cannot be determined which specific county or counties the offenses or elements of the offenses were committed. Given the evidence, it was not necessarily clear where the offenses or elements of the offenses were committed. As a result, the jury was properly instructed, pursuant to R.C. 2901.12(G), that, if they found, beyond a reasonable doubt, that the offenses and their elements were jointly and exhaustively committed in Lake, Belmont, or Cuyahoga counties, then the state met its burden and proved venue in Lake County. Special verdict forms regarding the jury's findings vis-à-vis which offenses or elements of those offenses occurred in Lake County were therefore unnecessary. The trial court did not act unreasonably in declining to submit appellant's special verdict forms to the jury.

{¶100} Appellant's fourth assignment of error is without merit.

{¶101} Appellant's fifth assignment of error provides:

{¶102} "The defendant-appellant was deprived of her constitutional rights to [a] fair trial and due process when the trial court admitted irrelevant and misleading testimony regarding an alleged prior bad act and her character as a high school chemistry teacher."

{¶103} At trial, the state introduced testimony from Mike Sherwood, the former principal of the high school in Belmont County where appellant was formerly employed. In addition to testifying to two requisitions appellant placed with the school for lead nitrate between August of 2007 and October of 2008, Mr. Sherwood also was asked, on direct examination, about any issues he had with the manner in which appellant managed a specific chemical spill occurring in her classroom. Mr. Sherwood testified he was made aware of a thermometer that broke and leaked mercury onto the floor of the lab. The school ultimately called the EPA to clean the spill due to concerns for student and faculty safety. According to Mr. Sherwood, however, appellant did not feel the spill was a serious problem, explaining she once had a professor in college who had eaten mercury to demonstrate the chemical was relatively harmless.

{¶104} Prior to the state introducing the foregoing testimony, defense counsel, anticipating the anecdote, objected on relevancy grounds. In response to the objection, the state asserted the information was relevant because it illustrated how appellant used unorthodox and extreme methods in the classroom by haphazardly exposing students to dangerous situations. The trial court overruled the objection, observing the testimony had "some arguable relevance."

{¶105} On appeal, appellant argues the trial court abused its discretion in overruling the objection. She contends the chemical spill and her statements regarding the relative safety of mercury are completely irrelevant to whether she poisoned her daughter. And, she further asserts, any arguable probative value the testimony possessed was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

{¶106} Unless otherwise prohibited, evidence is relevant and admissible if it in any way tends to make a consequential fact more or less probable. *State v. Tate*, 11th Dist. No. 2010-L-1450, 2011-Ohio-6848, ¶44, citing Evid.R. 401 and 402. A trial court must nevertheless exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). Furthermore, to the extent instances of a defendant's other acts does not violate the foregoing tenets, such evidence may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B).

{¶107} The evidence of the chemical spill was, at best, tenuously related to matters in issue at trial. While the other acts testimony was arguably probative of whether appellant, via her potentially reckless attitude toward chemicals, endangered her daughter pursuant to the four endangering children counts, we agree with appellant that it was unrelated to whether she knowingly poisoned her daughter or was complicit in such a poisoning. Simply because the testimony was not relevant to those charges, however, does not necessarily imply appellant was unfairly prejudiced by its admission.

{¶108} In this case, the testimony could have assisted appellant's defense by showing that she did not believe the chemicals she used in her lab were particularly dangerous to humans. Such an interpretation would tend to negate or undermine the state's theory that appellant knowingly poisoned the victim with lead nitrate. In other words, a juror could have concluded that appellant's involvement in the poisoning was a result of her careless management of the chemicals, which she was otherwise using in a legitimate manner on a day-to-day basis. We therefore perceive no unfair prejudice and do not agree that the testimony could have confused the issues or misled the jury.

{¶109} Appellant's fifth assignment of error is without merit.

{¶110} For her sixth assignment of error, appellant alleges:

{¶111} "The trial court erred to the prejudice of the defendant-appellant when it denied her motion for acquittal made pursuant to Crim.R. 29(A)."

{¶112} "An appellate court reviewing whether the evidence was sufficient to support a criminal conviction examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the mind of the average juror of the defendant's guilt beyond a reasonable doubt." *State v. Troisi*, 179 Ohio App.3d 326, 329, 2008-Ohio-6062 (11th Dist.) The inquiry does not permit the reviewing court to reweigh the evidence; instead, the appropriate inquiry asks whether, after viewing the evidence most favorably to the state, whether the jury could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

{¶113} Appellant first asserts the state failed to offer sufficient evidence of venue. As discussed above, although venue is not a material element of the crime, proper

venue must be established beyond a reasonable doubt. *See Dengg*, *supra*, at ¶33. We hold the state met its burden of production.

{¶114} As discussed in appellant's third assignment of error, in a case where the evidence demonstrates, beyond a reasonable doubt, that the charged crimes were committed in two or more counties, but it cannot reasonably be determined in which county the crimes were actually committed, the trial may be held in any of those counties. R.C. 2901.12(G). The evidence in this case demonstrated that, during the relevant timeframe, appellant, with her husband and the victim, resided in Bellaire, in Belmont County, Ohio, from the time of the victim's birth, in September of 2007 until late June of 2009. On June 30, 2009, the family moved to Mentor, Lake County, Ohio. And, after moving to Mentor, the victim was treated for lead poisoning at Rainbow Babies and Children's Hospital in Cleveland, Cuyahoga County, Ohio.

{¶115} In February of 2008, while the family lived in Belmont County, the victim, at five months old, was found to have a blood lead level of 135 M/D. Anything above a test result of ten in a one-year-old is a cause of concern. While living in Belmont County, H.H.'s blood lead levels suspiciously rose when she was not on IV chlelator treatment. And, after receiving aggressive treatments in the hospital, the levels would decrease to a more stable level. And, while living in Belmont County, appellant had ordered lead nitrate on three occasions between August of 2007 and October of 2008.

{¶116} Furthermore, after moving to Lake County, on July 7, 2009, the victim received a lead test at University Premier Pediatrics in Mentor that revealed a heightened blood lead level of 51.2 M/D. Because of the number, the victim was referred to Dr. Quang at Rainbow Babies and Children's Hospital in Cuyahoga County.

Six days later, Dr. Quang tested the victim's blood lead level, which resulted in a lead reading of over 67 M/D. After a search warrant was executed on the Hendrix Lake County home, Mentor Police found a baggie of lead nitrate located in a bedroom closet inside appellant's backpack.

{¶117} Considering the foregoing facts, the state introduced evidence sufficient, viewed in a light most favorable to the prosecution, to prove beyond a reasonable doubt, that the crime or an element of the crime of which appellant was convicted occurred within one, two, or all of the counties alleged in the indictment. But, at the same time, the evidence was not such that one could reasonably determine which county the offense or elements of the offense, in fact, occurred. While living in Belmont County, the victim could have been regularly poisoned at the family home or possibly administered lead en route to the hospital in Pittsburgh. After moving to Lake County, the victim could have been poisoned in the Mentor home; at the Lake County pediatrician's office; at Rainbow Babies and Children's Hospital in Lake County, or while being driven to any of her doctor's appointments in Lake County or Cuyahoga County.

{¶118} It is clear that the victim was poisoned by an external source. While the exact location of the administration could not be precisely identified, given the evidence, it can be inferred that, beyond a reasonable doubt, the offense occurred within Lake, Belmont, or Cuyahoga Counties. Thus, there was sufficient evidence introduced for venue to be established in Lake County under R.C. 2901.12(G).

{¶119} Additionally, viewing the evidence in the prosecution's favor demonstrates the state produced adequate circumstantial evidence relating to appellant's conduct in Lake County to overcome a motion for acquittal on venue. The evidence revealed that,

after the family moved to Mentor, the victim's lead test results returned a high reading. And, at a checkup six days later, the level spiked to a critically high amount. Finally, lead nitrate was found in appellant's belongings in her Mentor home. These points, taken together, are enough for a reasonable juror to find that appellant committed the offense of complicity to contaminating a substance for human consumption or an element of that offense, beyond a reasonable doubt, in Lake County.

{¶120} Appellant next argues the state failed to produce sufficient evidence to convict her of complicity to contaminate a substance with lead for human consumption that resulted in serious physical harm. We do not agree.

{¶121} R.C. 2927.24(B)(1) sets forth the elements of the foregoing crime. To convict appellant in this case, the state was required to produce sufficient evidence that appellant knowingly aided and abetted another in mingling lead with food, drink, a nonprescription drug, a prescription drug, or a pharmaceutical product, knowing or having reason to know, that the substance may be ingested or used by another person.

{¶122} At trial, the evidence demonstrated that after the initial exposure creating a blood lead level of 135 M/D, H.H.'s level eventually decreased to 36 M/D after two weeks of IV EDTA chelation treatment. H.H. returned home to her parents on March 26, 2008 to receive oral Suximer chelation therapy and, on April 8, 2008, H.H.'s blood lead level rebounded to 58 M/D several weeks after chelation. According to Dr. Quang this was not abnormal. In May of 2008, however, the child's blood lead level spiked to over 97 M/D, a level which, according to Dr. Quang was "unnatural." And, over the course of the next 13 months, Dr. Quang observed that, while in the Hendrixes' custody,

her levels would transcend the expected rebound level of 58 M/D, sometimes significantly, without explanation.

{¶123} Moreover, according to Dr. Pizon, the only aspect of H.H.'s treatment that was consistent was the inconsistent results of the oral versus the IV chelation. Dr. Pizon testified that the IV chelation functioned to reduce H.H.'s lead levels as predicted; when she was sent home with appellant, however, the oral Suximer chelator appeared to make her levels rise. Eventually, the doctor placed H.H. on oral Suximer chelation in the hospital, where appellant was not allowed to administer care, and the oral chelator did decrease the lead levels as expected.

{¶124} The evidence also demonstrated that H.H. suffered from lead nitrate poisoning; lead nitrate was found in appellant's possession in her home and, although she was a chemistry teacher, appellant placed two orders of lead nitrate at or near the time of H.H.'s birth and a year after the child was born. Even though there was no direct evidence to specifically demonstrate appellant actually poisoned H.H. or aided and abetted in the child's poisoning, viewed in a light most favorable to the prosecution, there was adequate circumstantial evidence upon which the jury could conclude appellant was guilty, beyond a reasonable doubt, of complicity to contaminate a substance for human consumption or use.

{¶125} With respect to the serious physical harm penalty enhancement specification, the phrase "serious physical harm" is defined as one of the following:

{¶126} (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶127} (b) Any physical harm that carries a substantial risk of death;

{¶128} (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some substantial incapacity;

{¶129} (d) Any physical harm that involves some permanent disfigurement or that involves some temporary serious disfigurement;

{¶130} (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged intractable pain. R.C. 2901.01(A)(5)(a).

{¶131} It is undisputed that the victim was poisoned with lead. According to toxicologists Drs. Pizon and Quang, the victim's initial blood lead level reading of 135 was sufficient to cause death absent treatment. Dr. Pizon specifically testified the victim "would have died had she not been treated aggressively for her lead poisoning. I'm convinced of that. It's not easily studied as you can imagine. But prior to having good or decent treatments for lead poisoning, we know that children with levels greater than 70, 60 percent of the time died. So her level was almost double that. So her chances of surviving - - also considering how her hospital course was going, it wasn't going well - - that she almost certainly would have died."

{¶132} Moreover, Dr. Quang testified, at length, regarding the permanent effects lead exposure has on a child under two years of age. According to his testimony, a child, such as H.H., suffering from lead poisoning will have permanent and irreversible brain damage, the effect of which will impair her ability to learn, cause behavioral difficulties, and greatly affect her intelligence quotient, in H.H.'s particular case, a loss of between 27 and 40.5 IQ points. Dr. Quang also testified that a child like H.H. will have a greater occurrence of kidney disease and hypertension, which leads to a higher

probability of strokes or heart attack. Given these points, there was sufficient evidence to prove, beyond a reasonable doubt, H.H. suffered serious physical harm.

{¶133} Appellant's sixth assignment of error is without merit.

{¶134} For her seventh and final assignment of error, appellant contends:

{¶135} "The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶136} When considering a challenge to the weight of the evidence, this court sits as a "thirteenth juror," weighing the evidence, considering the credibility of testimony, and evaluating whether the jury lost its way such that a manifest injustice occurred. *See e.g. State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). Although this analysis requires an appellate court to consider whether the state met its burden of persuasion, where evidence is susceptible to more than one interpretation, a reviewing court must defer to the jury's findings. *Warren v. Simpson*, 11th Dist. No. 98-T-0183, 2000 Ohio App. LEXIS 1073, (Mar. 17, 2000). In effect, "[t]he discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin*, *supra*, at 175.

{¶137} It is well settled that circumstantial evidence and direct evidence possess the same probative values. *State v. Jenks*, 61 Ohio St.3d 259, 272 (1991). Thus, proof beyond a reasonable doubt may be established by circumstantial evidence, direct evidence, or a combination of each. *Id.*

{¶138} Appellant first argues that Dr. Quang's testimony indicates he could have testified to an artificially low rebound measurement. Instead of a rebound blood lead level of 58 M/D, appellant asserts Dr. Quang's testimony indicates H.H.'s rebound level

may have been as high as 70 or 75 M/D. If so, appellant contends any level occurring below 70 M/D could be persuasively viewed as within a legitimate rebound level. Appellant therefore asserts the evidence of H.H.'s re-exposure was greatly exaggerated and, as a result, her conviction was against the manifest weight of the evidence. We do not agree.

{¶139} Dr. Quang specifically testified that if one assumed that the rebound level of 70 M/D, then any later measurement showing levels below that would be within expectation. Dr. Quang, however, contested the basis of this assumption as applied to this case. He testified that the 58 M/D reading was taken three weeks after chelation and, in his professional medical opinion, three weeks is within the appropriate and reasonable standard of care for measuring rebound levels. Acknowledging that there was an upward trend subsequent to this measurement, e.g., approximately 70 M/D between four and five weeks after chelation, the doctor maintained that the data obtained at three weeks out, i.e., 58 M/D was an appropriate rebound figure in this case.

{¶140} Dr. Quang did not waiver from his testimony that the appropriate rebound measurement was 58 M/D. The jury was able to evaluate the doctor's conclusion in light of defense counsel's cross-examination on this issue. Given the testimony as a whole, the jury did not err if it chose to accept Dr. Quang's testimony in lieu of defense counsel's suggestion vis-à-vis the appropriate rebound figure.

{¶141} Of course, we have no way of knowing what the jury chose to believe regarding H.H.'s rebound measurement. Even if the jury found defense counsel's suggestion plausible, the evidence still demonstrated that H.H.'s blood lead level

exceeded 70 M/D on five separate occasions after the initial exposure and exceeded 75 M/D on two separate occasions. Because there was unequivocal evidence that H.H. was re-exposed to lead after the initial treatment, it is inconsequential whether the rebound was 75, 70, or 58 M/D. Appellant's initial argument is not well-taken.

{¶142} Next, appellant points out that, in November of 2008, H.H. was admitted to the hospital and her parents agreed to have restricted access to the child. During this time, however, H.H.'s blood lead level rose from 31 M/D to 55 M/D. Appellant therefore asserts the jury lost its way as a reasonable person can only conclude that such a spike, as well as others, were a result of an endogenous source, e.g., lead flecks in the stomach mucosa.

{¶143} Appellant's argument that the increase in H.H.'s blood lead levels while in the hospital, relatively isolated from her parents, was a function of an internal source is, indeed, reasonable. Such a conclusion, however, does not undermine the jury's conclusion that H.H. was a victim of poisoning from an exogenous source either before or both before and after her November 2008 hospital stay.

{¶144} First of all, appellant's suggestion that the lead flecks in H.H.'s stomach could have caused a substantial spike in her lead levels is refuted by Dr. Quang's implementation of the biophosphonate drug Pamidronate. According to the doctor, Pamidronate is a bone stabilizer that tends to remove lead build-up in bones as the body ages. When he used this medication, not only did H.H.'s blood lead levels decrease and stabilize at 25 M/D, he was also able to infer that the lead flecks in the child's body were not a meaningful contributor to her blood lead levels.

{¶145} With respect to appellant's general argument regarding the endogenous source of the spike, Dr. Quang testified that lead stored in the body can be released, sometimes in a greater quantity than it would typically leach into the system simply by the passage of time. Following Dr. Quang's testimony, if, while in the hospital, H.H. was accidentally bumped, such an innocent event could have caused a sudden release of lead into her system without the aid of an external re-introduction of the toxin. Because there was evidence that H.H. was poisoned by an external source on several occasions prior to the November 2008 admission *and* there was evidence that internal sources can release lead *after* the poison had been introduced (and, as here, re-introduced), the jury's verdict is consistent with the weight of the evidence.

{¶146} Appellant next contends that the absence of any direct evidence that she poisoned, or specifically assisted in the poisoning of H.H., militates heavily against the jury's verdict. In particular, she points to various witnesses who acknowledged she appeared to be an attentive and compassionate parent who went out of her way to ensure H.H. was receiving the best care available.

{¶147} As noted above, it is not necessary for the prosecution to prove a criminal offense by direct evidence. *Jenks*, *supra.* And, notwithstanding appellant's points regarding her outward comportment when in public, the greater weight of the circumstantial evidence in this case weighed in favor of a conviction.

{¶148} First, lead nitrate was found in appellant's possession. When discovered, appellant denied knowing what the substance was, but her physical reaction, according to Mentor Police, belied her denial: Her face turned red and tears welled in her eyes. Similarly, when Dr. Pizon asked if he could test H.H.'s non-chelator medications in

appellant's possession, she became flushed and began to stutter. These medications tested positive for lead.

{¶149} Moreover, appellant had access to lead nitrate via her employment as a science teacher; according to the evidence, she had lead nitrate in her lab and, on two specific occasions, one immediately before H.H.'s birth and another a year after her birth, appellant ordered the poison using the school's requisition process. Two jars of lead nitrate were recovered from the school's lab; one jar was over 30 years old and the other was relatively new. The absence of the second new jar, however, was never explained.

{¶150} Finally, it was well-established that appellant was H.H.'s primary caregiver. H.H., after the initial exposure, received IV chelation which successfully reduced her blood lead levels. When being treated at home with an oral Suximer chelator, however, H.H.'s blood lead levels routinely spiked. While there was some evidence introduced via Drs. Bolser's and Pizon's testimony that some chelators, including oral Suximor, could increase lead absorption rather than increase its release, H.H. responded favorably to oral Suximer chelation *in the hospital*. The theory that H.H. was experiencing an adverse reaction to Suximer chelation was consequently eliminated as an explanation of H.H.'s erratically elevated lead levels. Given the medically and pharmacologically anomalous nature of the abrupt increases in H.H.'s blood lead levels, and in light of the child's medical history, Dr. Pizon and Quang testified H.H. was a victim of a systematic, non-accidental re-exposure to lead.

{¶151} These points, considered in their totality, demonstrate the jury did not lose its way when it concluded appellant was guilty, beyond a reasonable doubt, of

complicity to contaminate a substance for her infant daughter's consumption resulting in serious physical harm to the child.

{¶152} Appellant's final assignment of error is without merit.

{¶153} For the reasons discussed in this opinion, appellant's seven assignments of error are not well taken. The judgments of the Lake County Court of Common Pleas at issue in this appeal are therefore affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.