[Cite as *State v. Thomas*, 2020-Ohio-3637.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

EDWARD THOMAS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0132; 19 MA 0034

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 18-CR-325

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor*, Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Wesley A. Johnston, P.O. Box 6041, Youngstown, Ohio 44501, for Defendant-Appellant.

Dated: June 30, 2020

Robb, J.

{¶1} Defendant-Appellant Edward Thomas appeals from his burglary conviction entered in the Mahoning County Common Pleas Court after a jury trial. He raises issues with the sufficiency of the evidence, the weight of the evidence, the effectiveness of counsel due to the failure to retain a DNA expert, and the legality of the arrest warrant. Appellant also appeals the denial of his new trial motion. He claims an affidavit from his co-defendant constituted newly discovered evidence requiring a new trial. For the following reasons, Appellant's conviction is affirmed.

STATEMENT OF THE CASE

{¶2} On February 5, 2018, just before 4:00 a.m., a burglary was reported to 911 by a homeowner in Boardman, Ohio. The homeowner was sleeping when he noticed the beam of a flashlight and saw a hooded intruder in his bedroom. The homeowner said, "Hey." The intruder shined the flashlight in his eyes and then fled the home. Due to the circumstances, he could not describe the intruder. (Tr. 145, 151).

{¶3} The police noticed two sets of fresh footprints in the snow leading to the house; the footprints separated with one set leading to the back of the house and one set leading to the front door. (Tr. 161, 171). One point of entry was the kitchen window above the sink which the homeowner found open. The police observed the screen on the ground below the window and a broken box for a hose, which the intruder apparently used when climbing through the window. (Tr. 161). The homeowner noted that he regularly left that window unlocked. (Tr. 147). The police discovered a set of fingerprints (from three fingers) on the inside of the window frame; an unspecified print was also found on the inside of a kitchen cabinet door. (Tr.178).

{¶4} Drawers in the kitchen and bedrooms had been ransacked. An entire nightstand drawer containing $2,000 in $1 bills was stolen, as was the homeowner's checkbook. (Tr. 146). Other items collected from house, including jewelry, had been placed in a bag but left behind. (Tr. 160). The homeowner was very upset and was to contact the police after he checked more thoroughly for missing items. (Tr. 166). The

homeowner's son visited the next day and found a glove on the floor in his father's bedroom. (Tr. 154). As his father never wore gloves, he brought the glove to the kitchen and showed his father, who said the glove did not belong to him. (Tr. 149, 154). They called the police, and an officer retrieved the glove for testing. (Tr. 155, 197-198).

{¶5} The BCI ascertained that the fingerprints from the inside of the kitchen window frame belonged to Cory Cochrane. (Tr. 219). The print from the cabinet was not suitable for use in a search of the computerized system since its orientation was unknown and the fingerprint expert could not ascertain whether it was a print from a finger or a palm. (Tr. 219, 223). Upon comparing it with a print card on file, it was inconclusive as to whether it belonged to Cochrane, and the police did not submit the homeowner's prints for exclusion as requested by BCI. (Tr. 220, 224).

{¶6} Thereafter, the DNA results from a swab of the inside of the glove were completed by BCI. A mixture of DNA was recovered. The major profile matched that of Appellant Edward Thomas (to the precision of one in one trillion). (Tr. 235). When the police received the DNA report, a complaint was filed against Appellant in the Mahoning County Court, Area Number 2. After he was bound over, a joint indictment was filed on April 12, 2018 against Appellant and Cory Cochrane, charging them with second-degree felony burglary.

{¶7} The case against Appellant was tried to a jury on October 23 and 24, 2018. Testimony was presented by the homeowner, his son, the homeowner's niece, two responding police officers, the detective, the crime scene officer who collected the fingerprints, the BCI fingerprint expert, the officer who collected the glove, and the BCI DNA expert. The jury returned a guilty verdict, and the court sentenced Appellant to eight years in prison. Appellant filed a timely notice of appeal from the October 29, 2018 sentencing entry, resulting in appellate case number 18 MA 0132.

{¶8} On January 3, 2019, Appellant filed a motion for a new trial. In pertinent part, he argued that he was entitled to a new trial based on the affidavit of his co-defendant who claimed Appellant was not involved. The trial court denied the motion on

January 7, 2019. Appellant was granted leave to file a delayed appeal, resulting in appellate case number 19 MA 0034. The cases were consolidated on appeal.

ASSIGNMENT OF ERROR 1: SUFFICIENCY

{¶9} Appellant sets forth five assignments of error, the first of which provides:

"Thomas' conviction was based on insufficient evidence as a matter of law and the Court erred by denying Thomas' Crim. R. 29 Motion."

{¶10} Whether the evidence is legally sufficient to sustain a conviction is a question of law dealing with adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The requirement of sufficient evidence is a due process protection. *Id.* We review the denial of a Crim.R. 29 motion for acquittal under the same standard as is employed for reviewing the sufficiency of the evidence. *See, e.g.*, Crim.R. 29(A) (referring to insufficient evidence as the basis for acquittal); *State v. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996).

{¶11} A conviction cannot be reversed on the grounds of insufficient evidence unless the reviewing court determines that no rational juror could have found the elements of the offense proven beyond a reasonable doubt after viewing the evidence in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). Rational inferences to be drawn from the evidence are also evaluated in the light most favorable to the state. *State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999). *See also Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (using reasonable inferences to ascertain both basic and ultimate facts in evaluating the due process requirement of sufficient evidence).

{¶12} Appellant was found guilty of burglary in violation of R.C. 2911.12(A)(2), which states:

> No person, by force, stealth, or deception, shall * * * Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present

> or likely to be present, with purpose to commit in the habitation any criminal offense * * *.

Appellant contests the element of identity, stating the evidence was insufficient to prove that he was the person who committed the burglary.

{¶13} First, he suggests the origin of the glove is suspect because the homeowner's son found it hours after the burglary and the police did not find it while walking through the house. He says the police would have noticed if a glove was on the bedroom floor. However, multiple witnesses testified that there were belongings, including clothing, scattered about the scene. (Tr. 146, 160, 165, 170-171, 185). Moreover, the homeowner's son testified to his discovery of the glove and said there may have been a shirt partially over the glove. (Tr. 154-156). An evaluation of witness credibility is not involved in a sufficiency review as the question is whether the evidence is sufficient if believed. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79, 82; *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001). Sufficiency involves the state's burden of production rather than its burden of persuasion. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶14} Next, Appellant takes issue with the BCI scientist's testimony that the swab from the glove contained a mixture of DNA, which included a male DNA profile that was sufficient for comparison (matching Appellant's DNA) and additional DNA of insufficient quality or quantity for comparison. (Tr. 230). Appellant believes it is important that the scientist could not identify how many other profiles were in the mixture. (Tr. 238). However, the scientist testified that the major profile matched Appellant's DNA with a statistic of one in one trillion. (Tr. 235). The fact that the swab also contained "additional data that was not suitable for comparison" does not mean there was insufficient evidence that Appellant's DNA was on the glove. His profile was the major contributor to the sample. The weight to be assigned to competing inferences is a factual question that lies within the province of the jury as opposed to a legal question, and weight of the evidence is discussed in the next assignment of error.

{¶15} Lastly, Appellant states that even if it was his DNA, the presence of a glove with his DNA in the bedroom where the intruder was first spotted does not sufficiently

prove he was at the residence, suggesting someone could have worn the glove that he wore in the past. He suggests the state was required to present corroborating evidence of his presence and notes that the state did not obtain a search warrant to look for evidence in his residence or vehicle and did not present evidence that he knew Cochrane (whose fingerprints were found on the inside of the kitchen window frame).

{¶16} The state points out: there were two set of footprints approaching the house; since Cochrane's fingerprints were clearly left on the inside of the window used as the initial point of entry, Cochrane was not wearing gloves when he grasped the window frame; items were missing from the homeowner's bedroom; the homeowner startled an intruder in his bedroom; the glove was found in that room; the glove did not belong to the homeowner; and Appellant was the major contributor to the DNA obtained from the glove. From this, the state concludes some rational trier of fact would be entitled to find beyond a reasonable doubt that Appellant committed the burglary.

{¶17} Circumstantial evidence inherently possesses the same probative value as direct evidence. *State v. Treesh*, 90 Ohio St.3d 460, 485, 739 N.E.2d 749 (2001), citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus (when the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no longer a requirement for such evidence to be irreconcilable with any reasonable theory of innocence). "DNA evidence identifying a defendant as a major contributor to the DNA profile found on an object linked to a crime is sufficient evidence to sustain a conviction." *State v. Martin*, 11th Dist. Lake No. 2017-L-005, 2019-Ohio-22, ¶ 93, quoting *State v. Eckard*, 3d Dist. Marion No. 9-15-45, 2016-Ohio-5174, ¶ 33 (where the homeowner found a strange crowbar after the police left and the defendant was a major contributor to the DNA found on the crowbar, this was sufficient circumstantial evidence of his identity), citing *State v. Brown*, 8th Dist. Cuyahoga No. 98881, 2013-Ohio-2690, ¶ 31, 35 (the evidence was sufficient where the defendant's DNA profile was the major contributor to a sample collected from a shirt connected to the crime, notwithstanding the existence of unidentified minor contributors).

{¶18} In reviewing for sufficiency, we view "the probative evidence *and the inferences reasonable drawn therefrom*" in the light most favorable to the

state. (Emphasis added.) *Filiaggi*, 86 Ohio St.3d at 247. The question is merely whether "*any* rational trier of fact" could have found Appellant's identity as one of the burglars proven beyond a reasonable doubt. (Emphasis original.) *See State v. Getsy*, 84 Ohio St.3d 180, 193, 702 N.E.2d 866 (1998). Where the defendant was the major contributor to the DNA on a strange glove found in the burglary victim's bedroom, one rational inference is that the defendant dropped his glove in the bedroom as he fled upon being startled by the homeowner he awakened. The fact that another suspect's fingerprints were found on the interior of the window frame at the point of entry does not detract from this observation as the police noticed two fresh sets of footprints in the snow leading to the house. The fact that the other suspect left fingerprints on the point of entry suggests that he was not the one wearing the glove and confirms the indications that there were two intruders. Some rational trier of fact can find the elements of burglary, including Appellant's identity as one of the intruders, established beyond a reasonable doubt. This assignment of error is overruled.

ASSIGNMENT OF ERROR 2: MANIFEST WEIGHT

{¶19} Appellant's second assignment of error contends:

"Thomas' convictions were against the manifest weight of the evidence in violation of the due process clause of the Constitution [citations omitted]."

{¶20} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other" and involves the persuasive effect of the evidence in inducing belief. *Thompkins*, 78 Ohio St.3d at 387 (but is not a question of mathematics). A weight of the evidence review considers whether the state met its burden of persuasion, as opposed to the burden of production involved in a sufficiency review. *See id.* at 390 (Cook, J., concurring).

{¶21} When a defendant claims a conviction is contrary to the manifest weight of the evidence, the appellate court is to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, 78 Ohio St.3d at 387. The weight to be given the evidence is primarily

for the trier of the facts. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶22} Additionally, in a case tried by a jury, only a unanimous appellate court can reverse on the ground that the verdict was against the manifest weight of the evidence. *Thompkins*, 78 Ohio St.3d at 389, citing Ohio Constitution, Article IV, Section 3(B)(3). The power of the court of appeals to sit as the "thirteenth juror" is limited to the exceptional case in order to preserve the jury's role with respect to issues surrounding the credibility of witnesses and the weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387, 389.

{¶23} As mentioned above, Appellant emphasizes that the glove was not found by responding police officers when they walked through the house. He suggests the glove containing his DNA could have been planted by the person who later said they found it. However, multiple witnesses testified that there were belongings, including clothing, scattered about the scene. (Tr. 146, 160, 165, 170-171, 185). The crime scene investigator explained that he was mainly concerned with surfaces for recovering prints and that he could not obtain prints from clothing. (Tr. 186, 193). The homeowner was described as very upset, very scared, and distraught, and he did not attempt a full clean-up or inventory while the police officers were still present. (Tr. 160, 165-166, 170). Moreover, the homeowner's son testified about his discovery of the glove; he said there may have been a shirt partially covering it. (Tr. 154-156). He did not know Appellant or Cochrane. (Tr. 154). The jury was able to judge his credibility as he testified. The trier of fact occupies the best position from which to weigh the evidence and judge the credibility of each witness by observing gestures, voice inflection, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶24} Contrary to Appellant's next argument, there was no need for the homeowner's son to identify the glove retrieved by police as the one he found. The son testified he found one glove in the bedroom, set it on the counter, and left it there for the police to retrieve. (He also indicated the manner in which he carried the glove to the counter.) (Tr. 154). The homeowner indicated the glove did not belong to him, and he

expressed his belief that the glove was dropped by the intruder. (Tr. 148-149). The officer who responded to the son's call noted that the homeowner never touched the glove. The officer used latex gloves to place the glove in the paper bag. He testified that the glove admitted into evidence was the glove he retrieved from the counter. (Tr. 197). He was able to so testify due to the procedure of bagging, sealing, labeling, logging, and locking that he used. (Tr. 198-199). Without objection, there was also testimony that the police sent the glove to BCI, where the evidence was logged into their tracking system and held in a vault until examination. (Tr. 227, 250-251). Appellant objected to the admission of the glove into evidence due to the state's failure to ask the homeowner's son if the glove labeled by the police and BCI was the glove he found. (Tr. 267). However, the chain of custody was established from the scene to the evidence locker and beyond (which can be more accurate than asking a person to testify whether the glove is the same as the one they found more than eight months before).

{¶25} In challenging the weight of the evidence, Appellant also says he is a shorter person and this would not match the description of the intruder provided to the police by the homeowner. The first responding officer testified the homeowner said, "from laying down it appeared the individual was kind of tall," but the homeowner also advised that he had been sound asleep and could not even discern if the intruder was a male or female. (Tr. 160). When defense counsel asked the homeowner if he told the police the intruder was tall, the homeowner said the intruder appeared to be of average height and noted he was "still half asleep when he shined the light in my eye and it is hard to tell." (Tr. 151).

{¶26} It was for the jury to judge the import of a sleeping homeowner's fleeting impression as to the height of a hooded burglar while the homeowner is lying on his bed in the dark in the middle of the night and suddenly has a flashlight beam shined into his eyes by an intruder. The positions and comparative elevation levels of the witness and the suspect at the time the suspect was observed are considerations for the jury in weighing the evidence. *See, e.g., State v. Brand*, 1st Dist. Hamilton No. C-150590, 2016-Ohio-7456, ¶ 23 (the witness's observation of an intruder and her estimation of his

height could have been affected by the fact that she had first encountered him while she stood a few steps above him).

{¶27} Next, Appellant suggests that the significance of recovering his DNA profile from the sample taken from the glove was diminished by the existence of additional data which was insufficient for comparison. He finds it concerning that the BCI scientist could not say how many people contributed to the additional data. (Tr. 238). As stated above, the swab contained "additional data that was not suitable for comparison" because it was of insufficient quantity or quality. (Tr. 235). The data that was sufficient for comparison matched Appellant's DNA with a statistic of one in one trillion. Appellant was the "major contributor" to the DNA obtained from the swab of the glove. Appellant suggests it was unreasonable to find that the presence of his DNA in the glove indicated he was in the house where the glove was found after a burglary.

{¶28} However, this was one reasonable conclusion to draw from the presence of his DNA in a glove dropped during a burglary. *See, e.g., Eckard,* 3d Dist. No. 9-15-45 at ¶ 33 (finding the jury did not lose its way by finding the defendant participated in the burglary where he was the major contributor to DNA found on a crowbar left at the scene); *Brown*, 8th Dist. No. 98881 at ¶ 16-19, 42 (the conviction was not against the manifest weight of the evidence where material used as a mask and left at the scene had the defendant's DNA profile as the major contributor, even though the sample contained at least two minor contributors as well and the DNA on other items did not match the defendant). *See also State v. Littlejohn*, 8th Dist. Cuyahoga No. 101549, 2015-Ohio-875, ¶ 34-37 (where the witnesses could not identify the defendant, but gloves dropped during the crime contained a mixture of major and minor DNA contributors with the defendant as the major contributor).

{¶29} When more than one competing interpretation of the evidence is available and the one chosen by the jury is not unbelievable, we do not choose which theory we believe is more credible and impose our view over that of the jury. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). In an appeal after a criminal jury trial, the discretionary power to grant a new trial on manifest weight grounds can be exercised only when a unanimous appellate court agrees it is presented with an exceptional case where the evidence weighs heavily against the conviction and the

jury clearly lost its way. *Thompkins*, 78 Ohio St.3d at 387, 389. This court concludes that the jury did not clearly lose its way in finding Appellant was the person who dropped the glove in the bedroom and thus was the burglar startled by the homeowner. Accordingly, this assignment of error is overruled.

ASSIGNMENT OF ERROR 3: ASSISTANCE OF COUNSEL

{¶30} Appellant's third assignment of error contends:

"Thomas was denied his right to effective assistance of counsel at trial when trial counsel failed to obtain an expert, failed to investigate, and failed to file a Motion to Dismiss based on defective arrest warrant."

{¶31} A claim of ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If the performance was not deficient, then there is no need to review for prejudice and vice versa. *See State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). In evaluating an alleged deficiency in performance, our review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 142-143, 538 N.E.2d 373 (1989) (there are "countless ways to provide effective assistance in any given case"), citing *Strickland*, 466 U.S. at 689. A court should not second-guess the strategic decisions of counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶32} On the prejudice prong, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *Carter*, 72 Ohio St.3d at 558. Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d at 142, fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶33} First, Appellant states it is clear from the record that no expert was consulted as he was found to be indigent and his court-appointed counsel did not seek

funds from the court. Appellant alleges that defense counsel was ineffective by failing to obtain an expert to investigate the state's DNA results, testify, and help prepare questions to use in cross-examining the BCI forensic scientist. However, the case law does not support Appellant's position that if DNA is the sole evidence of identity, then the defense must obtain an independent DNA expert in order to render effective assistance of counsel. *See, e.g., State v. Houston*, 8th Dist. Cuyahoga No. 108156, 2019-Ohio-4787, ¶ 12-13 (rejecting the argument that trial counsel was ineffective for failing to effectively challenge the only evidence against the defendant, which was a mixture of touch DNA).

{¶34} "As an initial matter, the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." *State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d 225 (1993), citing *State v. Thompson*, 33 Ohio St.3d 1, 9, 514 N.E.2d 407 (1987) (trial counsel's failure to obtain a forensic pathologist to "rebut" the issue of rape was not ineffective assistance of counsel). Where the state has a DNA expert, a decision to refrain from seeking a DNA expert can be tactical as there may be a concern an additional expert might uncover more incriminating evidence. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 97 (finding it was a tactical decision to rely on cross-examination instead of obtaining an expert as the results of defense DNA testing might not have turned out to be favorable to the defense); *State v. Adams*, 7th Dist. Mahoning No. 18 MA 0116, 2019-Ohio-4090, ¶ 51, citing *State v. Krzywkowski*, 8th Dist. Cuyahoga No. 83599, 2004-Ohio-5966, ¶ 21-22 and *State v. Glover*, 12th Dist. Clermont No. CA2001-12-102, 2002-Ohio-6392, ¶ 25.

{¶35} Even "debatable trial tactics do not establish ineffective assistance of counsel," and the extent and scope of cross-examination falls within the realm of trial strategy. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 146. In fact, counsel need not even cross-examine every witness. *Foust*, 105 Ohio St.3d 137, at ¶ 87 (where the defendant complained about the effectiveness of counsel's cross-examination of the state's DNA expert), citing *State v. Campbell*, 90 Ohio St.3d 320, 339, 738 N.E.2d 1178 (2000).

{¶36} In addition, there is nothing in the record showing a reasonable probability that an additional DNA expert would have changed the result. *See State v. Mundt*, 115

Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 118 (rejecting a capital defendant's argument on this topic where the record did not "show a reasonable likelihood that the outcome of the trial would have been different had his counsel obtained a DNA expert"). There is no indication that "the result of a trial was unreliable or the proceeding fundamentally unfair" as a result of the lack of an expert to check the work of the BCI forensic scientist. *See Carter*, 72 Ohio St.3d at 558, citing *Lockhart*, 506 U.S. at 369. In accordance, this allegation of ineffective assistance of counsel is overruled.

{¶37} The second argument made under this assignment of error is that trial counsel was ineffective by failing to file a motion to dismiss on the basis of a defective arrest warrant. On March 12, 2018, a burglary complaint was filed against Appellant in the county court, and an arrest warrant was issued. He was apprehended on the warrant the next day. After the preliminary hearing, Appellant was bound over to the grand jury. He was indicted by the grand jury and then convicted by a jury.

{¶38} Initially, we note that defense counsel moved to dismiss the case at the start of the preliminary hearing based on Appellant's belief that the signature on the warrant and affidavit must be accompanied by an official seal and the seal was not visible on the copy of the warrant he received or on a copy filed on March 12, 2018 when the complaint was filed. (Prelim.Hrg. 2-3). The county court found the documents complied with the law. *See, e.g.,* Crim.R. 4(C)(1) (describing the form of a warrant); R.C. 2935.18 (providing sample language which is specifically said to be sufficient); R.C. 2935.19 (describing the form of an affidavit).

{¶39} We note the file contains an original warrant signed in blue ink on March 12, 2018, which was filed when the warrant was returned to the court on March 15, 2018, after Appellant's arrest. The raised seal is present over the signature on the warrant, and the warrant attaches and incorporates by reference the signed affidavit. We also refer to the discussion infra on the effect of a subsequent indictment.

{¶40} In any event, Appellant now claims counsel should have filed a motion to dismiss at the preliminary hearing for other reasons. First, he suggests defense counsel was ineffective by failing to seek dismissal by claiming there was no probable cause to bind him over. However, at the end of the preliminary hearing, defense counsel did specifically move to dismiss by alleging a lack of probable cause to bind over to the grand

jury. (Prelim.Hrg. 19). Counsel noted the fingerprint discovered on the point of entry showed someone else broke into the residence and argued there was no evidence showing how the glove with Appellant's DNA got into the residence. *Id.* As counsel did move to dismiss for lack of probable cause at the preliminary hearing, this particular allegation of ineffective assistance of counsel is without merit.

{¶41} Appellant's main contention (under part two of the third assignment of error on ineffective assistance of counsel) is that his attorney should have asked to dismiss the case based on an alleged lack of probable cause to support the arrest warrant. As he supports the allegation of deficient performance and prejudice by citing to his arguments within the next assignment of error, we continue the analysis infra.

ASSIGNMENT OF ERROR 4: ARREST WARRANT

{¶42} Pointing to the federal and state constitutional requirement of probable cause for an arrest warrant, Appellant's fourth assignment of error argues:

"Trial court erred by not dismissing Thomas's case due to defective arrest warrant."

{¶43} Article I, Section 14 of the Ohio Constitution is nearly identical to The Fourth Amendment to the United States Constitution, which provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In felony cases, the state constitutional warrant clause provides the same protection as the Fourth Amendment. *State v. Jones,* 143 Ohio St.3d 266, 2015-Ohio-483, 37 N.E.3d 123, ¶ 12.

{¶44} Where a person challenges his arrest while seeking to suppress evidence obtained from the arrest, a reviewing court determines whether the issuing magistrate had a substantial basis for concluding probable cause existed. *State v. Tibbetts*, 92 Ohio St.3d 146, 153, 749 N.E.2d 226 (2001) (where the defendant moved to suppress statements made after his arrest). The probable cause test for a constitutionally valid arrest requires facts and circumstances sufficient to warrant a prudent man in believing that the defendant committed an offense. *Id.* Underlying "all the definitions" of probable

cause is "a reasonable ground for belief of guilt"; "as the very name implies, we deal with probabilities." *Brinegar v. United States*, 338 U.S. 160, 174-175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

{¶45} Appellant generally states the affidavit lacked probable cause to support the issuance of the arrest warrant. *Citing* Crim.R. 4(A)(1) (if it appears from the complaint or an affidavit filed with the complaint that there is probable cause to believe the defendant committed the offense, an arrest warrant {or a summons in lieu of warrant} shall be issued by a judge, magistrate, or officer designated by the judge). To the extent Appellant is relying on the argument set forth in his sufficiency assignment of error (suggesting it is not incriminating to find a person's DNA on an item left during a burglary), it is observed: if the presence of his DNA was sufficient evidence of his identity, then it satisfied the lesser test of probable cause. To the extent he contests the content of the affidavit, a discussion of the incorporated attachments would be warranted (but is not mentioned in the brief).

{¶46} In seeking the arrest warrant, the affiant-detective attested to his investigation of the factual basis for the crime and to his review of the police file in performing his law enforcement functions. The affiant specifically incorporated by reference an attachment containing the information he relied upon; each page was time-stamped to show it was filed with the affidavit. Included in the incorporated documents was a recitation of the investigation on the night of the burglary, the evidence receipt showing the recovery of a glove, which was believed by the homeowner to be the suspect's glove, and the BCI report showing the DNA on the glove matched Appellant's DNA profile.

{¶47} Moreover, even in cases where an arrest warrant was issued without a proper incorporation of probable cause in the affidavit, a subsequent conviction in common pleas court is not automatically invalidated. Here, the arrest warrant was issued because Appellant's DNA was found on a glove dropped in a bedroom by the burglar; the police already had Appellant's DNA on file. No evidence was obtained as a result of Appellant's arrest, and he was thereafter indicted by a grand jury. Contrary to Appellant's suggestion, the affidavit used to support an arrest on a county court

complaint does not affect the jurisdiction of the common pleas court to proceed on an indictment.

{¶48} "Even if an arrest is illegal, it does not affect the validity of a subsequent criminal proceeding based on a valid indictment." *Sopko v. Maxwell*, 3 Ohio St.2d 123, 124, 209 N.E.2d 201 (1965). *See also United States v. Crews*, 445 U.S. 463, 474, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980) ("An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction"); *State v. Henderson*, 51 Ohio St.3d 54, 56, 554 N.E.2d 104 (1990) (an illegal arrest does not invalidate a subsequent conviction which is otherwise proper). "The jurisdiction of the court is invoked by the return of a valid indictment and is not based on the process by which an accused is taken into custody or the findings made on the preliminary examination. Any defect or irregularity in either the arrest or preliminary examination does not affect the validity of the accused's conviction." *Dowell v. Maxwell*, 174 Ohio St. 289, 290, 189 N.E.2d 95 (1963). "An accused in a felony case is not tried upon the affidavit filed against him but on the indictment by the grand jury." *Foston v. Maxwell*, 177 Ohio St. 74, 76, 202 N.E.2d 425 (1964).

{¶49} As no evidence was obtained from Appellant's arrest, there was no issue with suppression, and because he was thereafter indicted by a grand jury (with a summons being issued), any issue with the complaint, arrest warrant, affidavit, or preliminary hearing was moot or cured. *See, e.g., State v. Rogers*, 10th Dist. Franklin No. 17AP-610, 2018-Ohio-1073, ¶ 13-14 ("the issuance of a grand jury indictment renders any defect in the complaint or warrant moot" and said defects do not affect the subject matter jurisdiction of the common pleas court); *State v. Hess*, 7th Dist. Jefferson No. 02 JE 36, 2003-Ohio-6721, ¶ 17 ("An indictment generally renders any defects in the proceedings arising from the complaint moot"); *State v. Dykes*, 11th Dist. Lake No. 92-L-078 (Dec. 17, 1993) (the legality of the arrest does not affect the validity of a subsequent criminal proceeding based on a valid indictment issued by a grand jury as "any defects in his arrest were ultimately cured by the grand jury's finding of probable cause"); *State v. Washington*, 30 Ohio App.3d 98, 99, 506 N.E.2d 1203 (8th Dist.) (1986) ("The general rule is that a subsequent indictment by the grand jury renders any defects in the preliminary hearing moot"); *State v. Chandler*, 1st Dist. Hamilton No. C-790218 (May 28,

1980) ("Assuming arguendo that the arrest was somehow illegal, any defect in the arrest was cured when the grand jury invoked the trial court's jurisdiction by handing down a valid indictment"); *State v. Holmes*, 3d Dist. Putnam No. 12-79-9 (Apr. 16, 1980) (where the conviction was based on a grand jury indictment and no evidence on which the conviction rests was the fruit of the arrest, the validity or invalidity of the pre-indictment arrest was irrelevant to the validity of the conviction).

{¶50} Accordingly, the common pleas court had jurisdiction to conduct a trial on the indictment and enter judgment on the jury's verdict of conviction. The arguments related to probable cause are overruled.

ASSIGNMENT OF ERROR 5: NEW TRIAL

{¶51} Appellant's fifth and final assignment of error deals with his post-trial motion and provides:

"Trial court erred by denying Thomas' Motion for New Trial."

{¶52} Appellant filed a motion for new trial on January 3, 2019, which was timely to the extent it relied on newly discovered evidence. *See* Crim.R. 33(B) (within 120 days of the verdict for newly discovered evidence; within 14 days for all other grounds). Pursuant to Crim.R. 33(A)(6), a new trial may be granted on the defendant's motion where his substantial rights were materially affected because "new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial."

{¶53} A motion for new trial cannot be granted "unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial." Crim.R. 33(E)(5). The trial court has discretion in deciding whether to grant a new trial on the basis of newly discovered evidence. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 85, citing *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993).

{¶54} Appellant argues a new trial was warranted because his jointly indicted co-defendant (Cory Cochrane) "confessed" in an affidavit dated November 29, 2018, which was a month after the verdict in Appellant's case. In the affidavit attached to the new trial motion, Cochrane said Appellant was his friend who "only sold me a car and inside the car he left some gloves in the trunk which I had at the time of the crime." After referring

to his February arrest for burglary, he stated: "Edward Thomas was never with me at the time of any of this" and "Edward Thomas had no knowledge or awareness of what had taken place or what was going on." Appellant argues that the court abused its discretion in denying his new trial motion because this affidavit satisfies the factors set forth in *Petro*.

{¶55} In *Petro*, the Supreme Court held the defendant must show that the new evidence: "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus. Nevertheless, this discretionary decision should not be reversed absent a gross abuse of discretion. *Id.* at 507-508.

{¶56} Appellant says the affidavit should be considered credible because Cochrane incriminated himself within it. However, Cochrane's disclosure of his presence at the scene and participation in the burglary was cumulative to other testimony. Cochrane's fingerprints were discovered on the inside frame of the window used as the point of entry. He was jointly indicted with Appellant for the same burglary, and Cochrane took a plea deal. (At the sentencing hearing the day after the jury verdict, the parties discussed how Cochrane received a favorable deal in the burglary case in return for his cooperation in an unrelated case where he testified against a shooter.) Although Cochrane's fingerprints were discovered on the inside frame of the window used as the point of entry, Appellant's DNA was found on a glove in the bedroom. The testimony against Appellant at trial indicated that two people were involved in the burglary; the police noticed two fresh sets of footprints leading to the house in the snow in the middle of the night.

{¶57} Cochrane's specific claim that he had Appellant's "gloves" (plural) during the burglary is contradictory to the evidence at trial which established Cochrane left three fingerprints on the entry point. The trial court may weigh the credibility of an affidavit submitted in support of a motion for a new trial. *State v. Shakoor*, 7th Dist. Mahoning No. 10 MA 64, 2010-Ohio-6386, ¶ 27. If Cochrane had been wearing

the gloves, then he would not have left a clear set of fingerprints on the entry point. In addition, considering all of the circumstances, this court concludes it was within the trial court's discretion to find the affidavit did not disclose a *strong* probability of a different result upon a new trial with Cochrane's testimony.

{¶58} Furthermore, Appellant did not show the evidence (1) was newly discovered and (2) could not have been discovered before trial in the exercise of due diligence. On this topic, Appellant points to the date of the affidavit and concludes that because it was dated a month after trial, he did not have the evidence and could not have obtained it. However, whether this evidence was known before trial or could have been obtained for trial cannot be assumed based on the date the affidavit was signed. The affidavit did not explain why Cochrane's statement was not obtained until after trial. Furthermore, if the affidavit is true, then Appellant knew Cochrane had this information. The fact that Cochrane's fingerprints were found on the entry point was disclosed at the preliminary hearing and during discovery. And again, they were jointly indicted. It has been observed that newly discovered does not mean newly available. *See State v. Howard*, 8th Dist. Cuyahoga No. 101359. *See also State v. McGlothin*, 1st Dist. Hamilton No. C-060145, 2007-Ohio-4707, ¶ 41. Appellant elected not to call the affiant as a witness at trial. *See Howard*, 8th Dist. 101359 at ¶ 55.

{¶59} In sum, this court concludes the trial court did not make an unreasonable decision in weighing the *Petro* factors and denying a new trial under Crim.R. 33(A)(6). This assignment of error is overruled.

{¶60} For all of the foregoing reasons, Appellant's conviction is affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.