ATTORNEY FOR APPELLANT:

JOHN PINNOW
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOHN McDOWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0606-CR-287
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0511-FC-194605

December 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

John McDowell appeals his convictions for robbery, a class C felony, possession of paraphernalia, a class A misdemeanor, and the determination that he is a habitual offender. We affirm.

Issue

We restate the issue as whether the trial court abused its discretion in admitting evidence recovered from McDowell's hotel room.

Facts and Procedural History

On the evening of November 9, 2005, McDowell entered the lobby of the Extended Stay Hotel in Indianapolis wearing a white cloth across the lower portion of his face. He told the clerk, Sanela Keric, "Give me the money." Tr. at 53. Keric handed McDowell the cash drawer, from which he grabbed all the bills, totaling $155. McDowell thanked her and left. Keric called 911 and described McDowell as wearing a white shirt and grey sweatpants and having blue eyes and a clean-shaven head.

Officer Anthony Patz was the first to respond. After speaking to Keric, he broadcast the suspect's description and searched the parking area surrounding the Extended Stay Hotel. Just east of the hotel entrance, Officer Patz noticed a white pillowcase lying in the bushes. Two eyeholes had been cut out, apparently as an attempt to create a makeshift mask. Keric identified the pillowcase as the white cloth that McDowell had used to cover his face.

In the meantime, officers began searching the area for a suspect matching McDowell's description and notifying nearby businesses of the incident. About forty-five minutes later, the bartender of the Free Spirit Lounge at the nearby Dollar Inn called 911 to report that a

man matching the suspect's description had entered the bar. Officers responded and found McDowell sitting at the bar. After taking McDowell outside, they informed him that he was a suspect in a crime, to which McDowell said, "What, did someone steal something?" *Id*. at 158, 189.

Officers brought Keric to the Dollar Inn parking lot to identify McDowell as the person who had taken the money. Officer Patz shined the squad car's spotlights and white lights on McDowell. Although the officers instructed him to stand straight and look ahead, McDowell looked from side-to-side and down to the ground, making it difficult to see his face. Keric confirmed that McDowell's clothes matched the robber's, but she was unable to make a positive identification. Keric returned with the officers to the Extended Stay Hotel, where she was shown the surveillance tape. While watching the video, Keric excitedly exclaimed, "Oh my God, that's him." *Id*. at 192, 218, 251. Keric insisted that the man who robbed her was the person she had been shown in the Dollar's Inn parking lot. She attributed her previous inability to make the identification to poor lighting and the fact that McDowell refused to look straight ahead.

McDowell was arrested and placed in the back of Deputy Chad Melloh's car for questioning. Once finished, Deputy Melloh removed McDowell from his car and in doing so noticed a long, thin, metal tube with a scorched end resting on the floorboard. The tube had copper scrubbers in one end and appeared to be paraphernalia used to ingest crack cocaine. During the search of McDowell's person, officers located a hotel key for room 130 at the Dollar Inn, as well as $93 in cash. The Dollar Inn desk clerk showed Detective Kevin Kelly some of Dollar Inn's pillowcases, which contained the same manufacturer's tag and were

almost identical in design to the one that had been found outside the Extended Stay Hotel. The Dollar Inn also confirmed that McDowell had checked in and paid $70.90 for two nights on November 8, 2005.

Having concluded that McDowell was staying in room 130 at the Dollar Inn, Detective Kelly gave Detective Marc Sullivan information needed for preparation of a search warrant affidavit. Based on the affidavit, a magistrate issued a search warrant authorizing a search of room 130 of the Dollar Inn for a pillow without a pillowcase, a pillow with a pillowcase, U.S. currency, a cutting instrument, and identification in the name of John Wesley McDowell.

Pursuant to the warrant, Detective Kelly searched room 130 of the Dollar Inn. The key taken from McDowell opened the door. Inside, a pillow was found that was missing a pillowcase. There was a piece of cloth, torn from the bottom of a chair and thrown in the wastebasket, which had two eyeholes poked out of it. Detective Kelly also located an identification card bearing McDowell's name and additional drug paraphernalia.

On November 14, 2005, the State charged McDowell with robbery and possession of paraphernalia. On January 13, 2006, the State amended the information to include a habitual offender charge. On April 10, 2006, McDowell filed a motion to suppress, claiming that the search warrant affidavit lacked probable cause. The trial court denied the motion, and the case went before a jury. On April 11, 2006, McDowell was found guilty as charged. McDowell now appeals.

Discussion and Decision

McDowell argues that the trial court abused its discretion in admitting evidence seized from his hotel room. "The trial court has broad discretion in ruling on the admissibility of evidence." *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). We will only reverse upon a showing of an abuse of that discretion. *Curley v. State*, 777 N.E.2d 58, 60 (Ind. Ct. App. 2002). "An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law." *Id.* In our review, we will not judge witnesses credibility or reweigh evidence, but will consider only the evidence most favorable to the court's ruling. *Smith v. State*, 780 N.E.2d 1214, 1216 (Ind. Ct. App. 2003).

McDowell specifically contends that the search warrant affidavit lacked sufficient information to link him to room 130 of the Dollar Inn and that therefore the search violated his rights under the Fourth Amendment.[1] It is the responsibility of the magistrate issuing a search warrant to determine, based on all the circumstances set forth in the affidavit, whether there is a fair probability that the search of a particular place will lead to the discovery of contraband or evidence of a crime. *Query v. State*, 745 N.E.2d 769, 771 (Ind. 2001). As the reviewing court, we are required to determine whether the magistrate had a "substantial basis" for concluding that probable cause existed. *Id.* "Substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on

[1] "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 person or things to be seized. U.S. CONST. amend. IV.

whether reasonable inferences drawn from the totality of the evidence support the determination." *Houser v. State*, 678 N.E.2d 95, 99 (Ind. 1997). In our review, "we consider only the evidence presented to the issuing magistrate and may not consider post hoc justifications for the search." *Query*, 745 N.E.2d at 771.

The principles of the Fourth Amendment's protections against unreasonable searches and seizures are codified in Indiana Code Section 35-33-5-2, which details the information to be included in a search warrant affidavit. *State v. Spillers*, 847 N.E.2d 949, 953 (Ind. 2006). The statute provides in pertinent part:

> [N]o warrant for search or arrest shall be issued until there is filed with the judge an affidavit:
> (1) particularly describing:
> (A) the house or place to be searched and the things to be searched for; or
> (B) particularly describing the person to be arrested;
> (2) alleging substantially the offense in relation thereto and that the affiant believes and has good cause to believe that:
> (A) the things as are to be searched for are there concealed; or
> (B) the person to be arrested committed the offense; and
> (3) setting forth the facts then in knowledge of the affiant or information based on hearsay, constituting the probable cause.

Ind. Code § 35-33-5-2(a). The affidavit is required to establish a logical nexus between the suspect and the location to be searched. *See Hensley v. State*, 778 N.E.2d 484, 488 (Ind. Ct. App. 2002) (finding lack of probable cause where the affidavit failed to indicate that defendant lived in home to be searched).

In our case, the affidavit describes the location to be searched, the items to be searched for, and Detective Kelly's reasoning behind the consideration of McDowell as a suspect. It did not mention, however, that the officers had discovered the key to room 130 on

McDowell's person and had determined that McDowell was a registered guest at the Dollar Inn. We agree with McDowell that the search warrant was invalid for lack of probable cause, as it did not sufficiently set forth the facts known by Detective Kelly that established the necessary nexus between McDowell and the hotel room Detective Kelly wanted to search.

The State argues that the good faith exception to the warrant requirement should apply. However, the good faith exception is not applicable when the warrant is based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Jaggers v. State*, 686 N.E.2d 180, 184 (Ind. 1997) (citing *United States v. Leon*, 468 U.S. 897, 923 (1984)). "The lack of any nexus is a critical part in assessing the reasonableness of the officer's reliance on the warrant." *Figert v. State*, 686 N.E.2d 827, 832 (Ind. 1997). We, too, find that the exception does not apply, as the affidavit on which the warrant was based lacked any connection between McDowell and the Dollar Inn's room 130.[2] For these reasons, we agree with McDowell that the trial court abused its discretion in admitting the seized evidence.

We must now determine whether the admission of the evidence obtained during the illegal search was harmless error. In so doing, we must determine, beyond a reasonable doubt, that the evidence complained of did not contribute to the conviction. *Chapman v. California*, 386 U.S. 18, 24 (1967). Excluding the evidence seized during the search of room

[2] The State asks that we reconsider our decision in *Hensley*, 778 N.E.2d 484, and find that obvious omissions will not invalidate a search warrant where the issuing magistrate could readily infer the missing evidence. In *Hensley*, the court reiterated that the logical connection between the items to be seized and the place to be searched is a core concept of jurisprudence. *Hensley*, 778 N.E.2d at 489. We decline to reconsider *Hensley* and excuse omissions of "obvious" evidence.

130, we find that there is sufficient evidence supporting McDowell's convictions for robbery and possession of paraphernalia. McDowell was apprehended in the immediate area, shortly after the robbery occurred. His behavior at apprehension was suspicious and during the show-up identification was evasive, as he refused to look straight ahead as requested by the officers. Additionally, Keric, the hotel clerk, made a positive identification of McDowell as the robber after seeing the video surveillance tape.[3] She stated that he was wearing the same clothes as during the incident and matched her earlier description as having a clean-shaven head and blue eyes. The pillowcase that was found outside the Extended Stay Hotel matched those used by the Dollar Inn, and not those used by the Extended Stay Hotel. Lastly, McDowell had a room key for the Dollar Inn, a hotel in which he was registered for a two-night stay. This evidence is sufficient to prove his commission of the robbery, even when the items seized from his hotel room are excluded.[4] As for McDowell's possession of paraphernalia, Deputy Melloh found a long, thin metal pipe with a scorched end containing copper scrubbers in his police car right after McDowell had been questioned there and before the search of the hotel room was conducted. Therefore, the additional evidence from the hotel room serves only as cumulative evidence on this charge. We therefore find the trial court's error to be harmless and affirm McDowell's convictions.

Affirmed.

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[3] The surveillance tape was offered into evidence so that the jury could make their own assessment of identification.

[4] The seized items include a pillow without a pillowcase, another pillow with a pillowcase matching the one found at the crime scene, an identification card with McDowell's name on it, and a piece of fabric, torn from the hotel room chair, that had two eyeholes poked out, presumably in an attempt to fashion a makeshift mask.

SULLIVAN, J., and SHARPNACK, J., concur.