**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-1679**

State of Minnesota,
Respondent,

vs.

Warsame F. Mohamed,
Appellant.

**Filed September 15, 2009**
**Affirmed**
**Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-08-9350

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

## U N P U B L I S H E D  O P I N I O N

**BJORKMAN**, Judge

In this appeal from his conviction of aiding and abetting first-degree aggravated robbery, appellant argues that the evidence is insufficient to support his conviction and that the district court erred in instructing the jury. We affirm.

## FACTS

At approximately 10:45 p.m. on February 21, 2008, A.S. was walking near the corner of Franklin Avenue and 21st Avenue in Minneapolis. Three men approached him and asked for a cigarette. A.S. refused and the men attacked him from behind. They pushed A.S. to the ground, and one man choked A.S. while the other two kicked and beat him; A.S. momentarily "blacked out." The men took A.S.'s wallet and left.

When A.S. regained consciousness, he ran to his nearby apartment for help, then went back outside and called 911 on his cell phone. Minneapolis Police Officers James Golgart and Christopher Humphrey were at a nearby gas station and quickly responded to the call. When A.S. saw Golgart approaching, A.S. yelled, "Here are those guys who just assaulted me and robbed me," and pointed toward three males walking northbound on 21st Avenue approximately 20 to 25 yards from Golgart. Although there "might have been" a few people on Franklin Avenue, the three men were the only people on 21st Avenue. Golgart issued a radio alert regarding the suspects, yelled to the three men to stop, and identified himself as a police officer. Golgart walked toward the men and, when they did not stop, yelled again. They turned and looked at Golgart, then one of them threw something and they "took off running." With the assistance of two other

responding police officers, Golgart and Humphrey pursued and apprehended all three men; one of them was appellant Warsame Mohamed. After the suspects had been secured, Golgart returned to the area where he had seen one of the men throw something and discovered A.S.'s wallet.

Mohamed subsequently agreed to speak with police and acknowledged giving a false name at the time of his arrest. Mohamed also admitted that he ran from Golgart but denied involvement in the robbery. He told police "that he had been drinking since noon that day and didn't recall very much about what happened."

Mohamed was charged with aiding and abetting first-degree aggravated robbery, in violation of Minn. Stat. §§ 609.05, .245, subd. 1 (2006). At trial, A.S. identified Mohamed as one of the men who had robbed him. The jury found Mohamed guilty. This appeal follows.

## D E C I S I O N

### I. The evidence is sufficient to support Mohamed's conviction.

Mohamed first argues that the evidence is insufficient to support his conviction. In considering a claim of insufficient evidence, our review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). As a reviewing court, we must assume that the jury "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the

requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Mohamed contends that the state failed to prove that he was one of the three men who robbed A.S. *See State v. Gluff*, 285 Minn. 148, 151, 172 N.W.2d 63, 65 (1969) (requiring sufficient proof of identity to support conviction). Identification presents a question of fact, which the jury determines. *State v. Yang*, 627 N.W.2d 666, 672 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). A conviction "can rest on the uncorroborated testimony of a single credible witness." *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (quotation omitted). Evidence of identification need not be positive and certain. *Gluff*, 285 Minn. at 150-51, 172 N.W.2d at 64. Inconsistencies in testimony and conflicts in evidence generally do not require reversal; they are merely factors for the jury to consider when making credibility determinations. *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995); *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004).

A.S. positively identified Mohamed as one of the men who robbed him, which generally is sufficient to prove identity. *See Foreman*, 680 N.W.2d at 539. Mohamed disputes the reliability of A.S.'s identification, arguing that A.S.'s ability to observe his assailants was impaired by his alcohol consumption, the stress of the robbery, and the fact that A.S. was facedown and momentarily unconscious during the robbery. Mohamed also asserts that A.S.'s identification testimony was unreliable because his initial description to the officers of his assailants' clothing was inconsistent with the clothing

Mohamed was wearing when he was arrested. But the weight and credibility of testimony is uniquely for the jury to determine. Here, the jury heard testimony regarding all of the factors Mohamed relies on to discredit A.S.'s identification. The jury also heard testimony that the area where A.S. was robbed was well lit and that the assailants spoke directly to A.S. before the robbery, affording him an opportunity to see and identify them. And the jury heard extensive testimony regarding what the robbers were wearing at the time they were arrested and possible reasons for the inconsistencies in A.S.'s descriptions of their clothing. In short, the jury could have reasonably credited A.S.'s identification testimony.

Even if the jury doubted A.S.'s testimony, there was strong circumstantial evidence that Mohamed was one of the robbers, rather than "in the wrong place at the wrong time," as he suggests. *See State v. Guy*, 409 N.W.2d 248, 251 (Minn. App. 1987) (recognizing that conviction may stand even if victim witness provides conflicting identification testimony "if circumstantial evidence offered is strong enough to exclude any reasonable hypothesis of innocence"), *review denied* (Minn. Sept. 18, 1987). A.S. specifically indicated that he was robbed by three men, two of whom were speaking Oromo, a language spoken in Ethiopia. Shortly after the robbery, three men were walking together down an otherwise empty street in the immediate vicinity of the robbery. The three men, Mohamed admittedly among them, ran away when confronted by a police officer and one of them threw A.S.'s wallet on the ground. *See State v. Bias*, 419 N.W.2d 480, 485 (Minn. 1988) (recognizing that "flight suggests consciousness of

guilt"). All three were apprehended, and Mohamed's two companions identified themselves as being from Ethiopia.

Viewing A.S.'s identification of Mohamed in light of this circumstantial evidence, and viewing the entire record in the light most favorable to the jury's verdict, we conclude that the evidence amply supports Mohamed's conviction.

**II. The district court did not err in instructing the jury.**

Mohamed also argues that the district court materially misstated the law on accomplice liability when instructing the jury but concedes that he did not object to the instruction at trial. Failure to object to jury instructions generally constitutes a waiver of the issue on appeal. *State v. White*, 684 N.W.2d 500, 508 (Minn. 2004). However, we may consider such issues under the plain-error doctrine. "The plain error standard requires the defendant to show (1) error (2) that was plain and (3) that affected the defendant's substantial rights." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). If the defendant establishes all three of these factors, we also must decide whether the error seriously affected the fairness and integrity of the judicial proceedings. *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001). We review jury instructions "in their entirety to determine whether they fairly and adequately explain the law of the case." *State v. Peterson*, 673 N.W.2d 482, 486 (Minn. 2004).

"A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1. But accomplice liability also extends to "any other crime committed in pursuance of the intended crime if

reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." Minn. Stat. § 609.05, subd. 2; *see* 10 *Minnesota Practice*, CRIMJIG 4.01 (2006). Here, the district court instructed the jury in accordance with both subdivisions.

Mohamed argues that the district court erred in instructing the jury on accomplice liability under subdivision 2 because that subdivision "was not alleged as a liability theory by the State, nor did the evidence support such a charge." This argument has merit. The state charged Mohamed and his two companions with robbing A.S. "acting alone or intentionally aiding, advising, hiring, counseling or conspiring with each other." Although the complaint simply cites section 609.05 without referring to a particular subdivision, the language of the complaint mirrors subdivision 1. By instructing the jury on subdivision 2, the district court arguably instructed the jury on an uncharged theory of accomplice liability.

But the inclusion of this additional instruction does not constitute plain error. First, the district court's instruction was a verbatim recitation of the recommended jury instruction on accomplice liability. *See* CRIMJIG 4.01; *see also State v. Sutherlin*, 396 N.W.2d 238, 241 (Minn. 1986) (finding no plain error in instructing jury according to CRIMJIG). The instruction fairly and adequately stated the law on accomplice liability by requiring the jury to find that Mohamed intentionally acted together with the two other men to rob and harm A.S.; it did not, as Mohamed contends, invite the jury to convict Mohamed "without regard to his intent."

Second, instructing the jury on an uncharged theory of accomplice liability does not mandate a finding of reversible error. In *State v. DeVerney*, a case similar to this one, the appellant challenged his conviction of aiding and abetting first-degree murder because the district court instructed the jury on both subdivisions 1 and 2 of the accomplice-liability statute when he had only been charged under subdivision 1. 592 N.W.2d 837, 845 (Minn. 1999). The supreme court concluded that, because "aiding and abetting is not a separate substantive offense" and the instruction was consistent with the language of the charging instrument and the state's theory of the case, the inclusion of the additional instruction did not warrant reversal. *Id.* at 846-47.

Mohamed was charged with intentionally acting with two other men to rob A.S. and to cause him bodily harm. The evidence, the state's theory of the case, and the district court's instructions all were consistent with that charge. As in *DeVerney*, the district court's instruction did not result in Mohamed being charged with a different or additional substantive offense. Under these circumstances, the inclusion of an instruction on subdivision 2 of the accomplice-liability statute was not plain error.

**Affirmed.**