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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0047**

State of Minnesota,  
Respondent,

vs.

Alden Fairbanks, Jr.,  
Appellant.

**Filed April 22, 2008  
Affirmed  
Toussaint, Chief Judge**

Cass County District Court  
File No. K9-05-1285

Lori Swanson, Attorney General, Jennifer A. Service, Assistant Attorney General, 1100 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2128; and

Earl E. Maus, Cass County Attorney, Cass County Courthouse, 300 Minnesota Avenue, Post Office Box 3000, Walker, MN 56484 (for respondent)

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Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge;  
and Crippen, Judge.\*

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## **UNPUBLISHED OPINION**

**TOUSSAINT**, Chief Judge

Appellant Alden Fairbanks, Jr. challenges his conviction of felon in possession of a firearm, reckless discharge of a firearm, terroristic threats, and fourth-degree criminal damage to property, arguing that the evidence was insufficient to support his conviction. Appellant further argues he is entitled to a new trial because the trial court gave a no-adverse-inference instruction to the jury without obtaining appellant's consent on the record. Because the jury could have reasonably concluded that appellant was guilty of the offenses with which he was charged and because the jury instruction did not result in prejudicial error, we affirm.

## **DECISION**

In June 2005, Leech Lake police officers responded to a shooting of a parked car. An 11-year-old eyewitness told the police that she was in her yard at the time of the shooting. Immediately before the shooting, she observed three individuals approach from across the street. She recognized appellant as one of the individuals and noticed that he was wearing a grey shirt and was carrying a silver handgun. She subsequently identified appellant as the shooter from a photographic line-up. At trial, the jury heard a portion of a recorded telephone call, in which someone called "Bro" confessed to the shooting, stating, "I went over there shot [the] car up, sh-t I don't give a f-ck. (Laughs)." The eyewitness, along with several others, testified that appellant's nickname was "Bro."

Appellant argues that the evidence was insufficient to sustain the verdict. In considering a claim of insufficient evidence, this court's review "is limited to a

painstaking analysis of the record to determine whether the evidence, when viewed in the 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). We must review the evidence in the light most favorable to the verdict and will assume that the jury disbelieved any testimony that conflicts with the verdict. *State v. Daniels*, 361 N.W.2d 819, 826 (Minn. 1985). 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted). We defer to the jury’s determination of witness credibility and the weight to be given to each witness’s testimony. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990).

Appellant highlights several discrepancies in the evidence to support his insufficiency of the evidence claim. First, appellant points out that a police officer searched him approximately two hours before the shooting and did not find a weapon. But appellant does not demonstrate how this invalidates the jury’s verdict. Even if appellant did not have a gun two hours before the shooting, this does not preclude a jury from determining that he had a gun two hours later.

Second, appellant argues that because the 11-year-old eyewitness testified at trial that she was not certain appellant was the man who shot the car, the evidence is insufficient to prove that appellant was the shooter. But uncertainty in identification testimony affects the weight of the identification and is strictly a consideration for the jury. *State v. Ellingson*, 283 Minn. 208, 210, 167 N.W.2d 55, 56 (1969). Further, lack of

in-court identification will not preclude a conviction where there is corroborating evidence. *State v. Griffin*, 386 N.W.2d 792, 794 (Minn. App. 1986), *review denied* (Minn. June 19, 1986). Here, the jury heard the eyewitness testify that her memory of the shooting was better at the time of the incident than it was at trial. The eyewitness testified to the contents of her statements to police in which she stated that appellant was the shooter and positively identified appellant from a photographic line-up. It was for the jury to determine whether the eyewitness's identification at the time of the shooting was more reliable than her uncertain identification testimony at trial. Because we view the evidence in the light most favorable to the verdict, we must assume the jury believed the eyewitness's positive identification of appellant at the time she made the police report.

Finally, appellant argues that the evidence was insufficient because the state did not corroborate the taped confession, and therefore there was no independent corroboration that appellant was the shooter. But appellant misstates the law. The statute states, "A confession of the defendant shall not be sufficient to warrant conviction without evidence that the offense charged has been committed." Minn. Stat. § 634.03 (2004). Here, the state presented evidence that the crime occurred: two police officers testified to the bullet holes in the car, several witnesses testified that they heard gunshots, and the 11-year-old eyewitness testified that the shooter was aiming his gun at the car. The statute does not require that the confession be corroborated by evidence that the defendant committed the offense.

To the extent that appellant is suggesting that the evidence was insufficient to conclude that he is "Bro"—the caller on the taped confession—his argument lacks merit.

Numerous witnesses testified that appellant's nickname was "Bro" and that they recognized "Bro's" voice on the taped confession as being that of appellant's. The jury was also shown a photograph of appellant's arm, which contained a large tattoo that read "BRO." On this record, viewed in the light most favorable to the jury's verdict, there is sufficient evidence to sustain appellant's convictions.

Appellant argues that he is entitled to a new trial because the judge gave a no-adverse-inference instruction to the jury without obtaining his consent on the record. Specifically, the judge instructed the jury: "The defendant has a right not to testify. This right is guaranteed by the federal and state constitutions. You should not draw any inference from the fact that the defendant has not testified in this case." After reviewing the proposed jury instructions, appellant did not request any changes. Further, after the judge read the jury instructions, he asked if appellant had any objections; appellant had none.

Because appellant never objected to the instruction at trial, we review for plain error. *See State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002). For there to be plain error: (1) there must have been an error; (2) the error was plain; and (3) the error must have affected the defendant's substantial rights. *Id.* A "defendant who fails to object to the no-adverse-inference instruction bears a heavy burden of showing that substantial rights have been affected." *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006).

In Minnesota, the trial court may give a no-adverse-inference instruction "*only if* the defendant requests the court to do so." *Id.* (emphasis in original). If the defendant requests the instruction, the court or defense counsel "must make a record of the

defendant's clear consent and insistence that the instruction be given." *Id.* (quotation omitted). Because the record does not contain appellant's consent to the giving of the instruction, giving it was an error and that error was plain. Further, respondent State of Minnesota concedes that the trial court erred in giving the instruction without appellant's consent. Thus, the first two prongs of the plain error test have been satisfied.

Next, this court must evaluate the third prong—whether the error affected appellant's substantial rights. The third prong "is satisfied if the error was prejudicial and affected the outcome of the case." *Id.* An error is prejudicial "when there is a reasonable likelihood that the giving of the instruction would have had a significant effect on the jury's verdict." *Darris*, 648 N.W.2d at 240.

In this case, the primary issue was the identity of the shooter. The state presented substantial direct and circumstantial evidence regarding the identity of the shooter. Given the totality of the evidence, it is unlikely that the no-adverse-inference instruction had a significant effect on the jury's verdict. Aside from claiming that "the connection between appellant's silence and guilt was too direct and too natural for the jury to resist," appellant offers no evidence that his substantial rights have been affected. Appellant has not met his heavy burden of satisfying the plain error test, and he is not entitled to a new trial.

**Affirmed.**