STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2386

State of Minnesota,
Respondent,

vs.

Crawford Collier,
Appellant.

Filed May 20, 2008
Reversed and remanded
Wright, Judge

Hennepin County District Court
File No. 05073678

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Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Wright, Judge.

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

WRIGHT, Judge

Appellant challenges his conviction of second-degree intentional murder, arguing that (1) the evidence is insufficient to support the guilty verdict, and (2) prosecutorial misconduct deprived him of a fair trial. We reverse based on prejudicial misconduct and remand for a new trial.

FACTS

A.J. was murdered at approximately 5:00 p.m. on June 21, 2005. Immediately preceding the murder, several witnesses saw A.J. run into the street near the intersection of East Lake Street and Columbus Avenue in Minneapolis, followed by a man with a gun. A.J.'s pursuer discharged one bullet into A.J.'s neck and another into his head. The shooter fled, leaving A.J.'s body in the middle of Lake Street in rush-hour traffic.

Other than the body and bullet fragments lodged inside, the police did not recover any physical evidence related to the murder. Three people who had witnessed the murder from a few feet away while waiting in traffic provided the police with generally consistent descriptions. They described the shooter as a tall, dark-skinned African-American male of medium build who was either bald or had short hair. According to the witnesses, the shooter did not have facial hair or wear eyeglasses, and he was wearing a white tee shirt and dark pants. Within 24 hours after the murder, the eyewitnesses viewed a photographic lineup based on these descriptions. Appellant Crawford Collier's picture was one of those shown to the eyewitnesses. In the photo used in the

photographic lineup, he has a goatee and is not wearing glasses. None of the eyewitnesses selected Collier or anyone else as the shooter from the photographic lineup.

On or before July 14, Sgt. Cheryl Alguire and Sgt. Pete Jackson, who were investigating the homicide, received information that a person known as "Silk," who had recently been robbed near Sunny's bar, was the shooter. Using an electronic database to search for people who use the name "Silk," Collier and 28 other African-American males were identified. The police focused their investigation on Collier because the database also showed that Collier had been robbed near Sunny's bar five days before the murder.

Although Collier had told the police that he did not know his assailants, and the police did not have any evidence placing Collier at the scene of the murder, the police suspected that A.J. was involved in the robbery of Collier and that Collier had killed him in retaliation. On or around July 18, Collier voluntarily consented to Sgt. Jackson's request to meet at the police station. Collier again told Sgt. Jackson that he did not know the men who had robbed him.

In November 2005, the police received information that J.N. also had seen the shooting. During an investigative interview, J.N. informed Sgt. Jackson that he had seen "Silk" shoot A.J. When Sgt. Jackson showed a photographic lineup to J.N., J.N. identified Collier as the person who shot A.J. Collier subsequently was charged with A.J.'s murder.

At trial, the state's theory of the case was that Collier murdered A.J. in retaliation for the robbery. Collier's defense was misidentification. After the state rested, Collier moved for a directed verdict of acquittal, arguing that the state had failed to produce

evidence from which a reasonable jury could find that he was the shooter. The district court denied the motion, and Collier rested without calling any witnesses. The jury found Collier guilty of second-degree intentional murder, in violation of Minn. Stat. § 609.19, subd. 1(1) (2004). The district court denied Collier's motion to set aside the verdict. This appeal followed.

D E C I S I O N

I.

Collier challenges the sufficiency of the evidence to convict him of second-degree intentional murder, Minn. Stat. § 609.19, subd. 1(1) (2004). When reviewing a challenge to the sufficiency of the evidence, we conduct a painstaking analysis of the record to determine whether the fact-finder reasonably could find the defendant guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the verdict and disbelieved any contrary evidence. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence, could conclude beyond a reasonable doubt that the defendant was guilty of the offense. *Alton*, 432 N.W.2d at 756.

We note at the outset that the evidence unequivocally supports a finding that the person who shot A.J. is guilty of second-degree intentional murder. To support a conviction of second-degree intentional murder, the evidence must establish that the person's actions caused the death of a human being. Minn. Stat. § 609.19, subd. 1(1). It

is undisputed that the person who shot A.J. caused his death. In addition, the evidence must establish that the person acted with specific intent to kill, which the jury may infer "from the nature of the killing." *State v. Young*, 710 N.W.2d 272, 278 (Minn. 2006). There is overwhelming evidence that the person who chased A.J. and shot him at close range in the head and neck intended to kill him. The crux of Collier's argument is that the state failed to prove that *he* was the person who murdered A.J. *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 is determined by the jury. *State v. Yang*, 627 N.W.2d 666, 672 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). Evidence of identification need not be positive and certain, *Gluff*, 285 Minn. at 150-51, 172 N.W.2d at 64, and inconsistencies in testimony generally are insufficient to reverse a conviction, *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). 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). If eyewitness testimony is inconsistent, the jury must determine the facts by weighing the witnesses' respective credibility. *Yang*, 627 N.W.2d at 672.

The in-court identification of Collier by taxi-driver M.K. was the most certain of the testimony of the three witnesses who observed the shooting while waiting in traffic. M.K. was stopped at the intersection of Columbus Avenue and Lake Street when he observed A.J. run eastward out of the alley on the north side of Lake Street. M.K. testified that he saw A.J. being chased by two men. When A.J. was approximately three

to five feet in front of M.K.'s taxi, one of the pursuers shot A.J. "at least" three times in the back. A.J. dropped to one knee after the first shot, then the shooter "took at least two more shots" at A.J. A.J. fell in front of the taxi, and M.K. saw the two men flee down the alley. When asked if he could identify the shooter, M.K. referred to Collier and testified that he "looks definitely a lot like definitely he's the guy." M.K. also testified that the shooter was about six feet two inches tall and weighed between 240 and 260 pounds. In addition, M.K. testified that the shooter "didn't really have any hair." But M.K. was impeached with his prior statement to police, which was inconsistent with his in-court description of the shooter's build and weight. M.K. also told the police that the shooter had a short Afro that was perhaps one-half inch long.

K.B., who also was waiting in rush-hour traffic when she saw A.J. run out of the alley, testified that Collier "could be" the shooter but that she was not certain.

D.G., a passenger in M.K.'s taxi, was unable to identify Collier at trial. She explained that, because she was sitting in the back seat on the driver's side of the taxi and the shooting happened so quickly, she did not get a good look at the shooter. But she recalled that the shooter was "not a big man."

J.N. was the only trial witness who unequivocally identified Collier as the shooter. According to J.N., on the day of the murder, he took the bus to south Minneapolis to see A.J. and some friends. During his bus ride he overheard a discussion about the robbery of Silk several days earlier. J.N. met A.J. and walked nine blocks to Lake Street. During their walk, they smoked marijuana and discussed the robbery of Silk. The substance of the conversation, however, was excluded by the district court as inadmissible hearsay.

J.N. and A.J. separated. A.J. went to a corner store on the north side of Lake Street, west of the alley, while J.N. waited near a shop immediately east of the alley. A.J. left the corner store and headed toward J.N. but then turned and walked into the alley. J.N. testified that, while waiting for A.J. to return, he heard shots and then saw A.J. running out of the alley. J.N. observed A.J. trying to "get away from Silk," who was chasing A.J. with a gun. J.N. testified that Silk shot A.J. in the leg and then shot A.J. in the head as he tried to stand. After the final shot, Silk fled down the alley on foot and got into the passenger seat of a car. J.N. identified Collier as "Silk," the person who shot A.J.

J.N.'s testimony was impeached with his prior conviction for providing false information to the police and with his prior inconsistent statements to police when he was in jail on an unrelated armed-robbery charge. For example, J.N. testified that he did not know why A.J. went into the alley, but he had told Sgt. Jackson and Sgt. Alguire that he heard someone call out A.J.'s nickname. And J.N. testified that he knew Collier's name was Silk because "[e]verybody knows Silk." But he had told the officers that he had not heard the name "Silk" until conversations with third parties after the shooting.

Collier relies on the inconsistencies between the testimony of the state's four eyewitnesses to challenge the sufficiency of the evidence. But a conviction can rest on the testimony of a single credible witness. *Foreman*, 680 N.W.2d at 539. And because the jury is able to observe each witness's demeanor during testimony, it is the province of the jury, not an appellate court, both to determine witness credibility and to weigh the evidence. *Yang*, 627 N.W.2d at 672. Thus, when viewing the evidence in the light most

favorable to the verdict, Collier's challenge to the sufficiency of the identification evidence fails.

II.

Collier also argues that he was deprived of a fair trial because of prosecutorial misconduct. When we review a claim of prosecutorial misconduct, we first determine whether misconduct occurred. *State v. Wren*, 738 N.W.2d 378, 390 (Minn. 2007). If indeed such misconduct occurred, we then determine whether that misconduct is sufficiently prejudicial to warrant reversal. *Id.*

A.

At trial, the state's theory of the case focused on Collier's motive to kill A.J. According to the state, A.J., F.M., and S.C. robbed Collier at gunpoint outside Sunny's bar on East Lake Street, and Collier sought retribution by murdering A.J. Collier argues that the prosecutor engaged in prosecutorial misconduct by making arguments that were unsupported by the evidence. Collier also asserts that it was prosecutorial misconduct to call F.M. and S.C. as witnesses because the prosecutor knew that they would refuse to testify in front of the jury and that the prosecutor used their silence in a prejudicial manner.

1.

A prosecutor's closing argument must be based on the evidence produced at trial. *State v. Porter*, 526 N.W.2d 359, 363-64 (Minn. 1995). A prosecutor may comment on reasonable inferences that can be drawn from the evidence. *State v. Washington*, 725 N.W.2d 125, 134 (Minn. App. 2006). But an inference requires the application of logic

and common sense to the underlying evidence. *See Black's Law Dictionary* 781 (7th ed. 1999) (defining an inference as "[a] conclusion reached by considering other facts and deducing a logical consequence from them"). Thus, even though the prosecutor is permitted to argue motive as part of the state's theory of the case, *State v. Ness*, 707 N.W.2d 676, 687 (Minn. 2006), such argument must be tethered to the evidence admitted at trial, *Young*, 710 N.W.2d at 281.

Prosecutorial misconduct can occur when the prosecutor argues facts that are not in evidence. *State v. Steward*, 645 N.W.2d 115, 122 (Minn. 2002). It is improper for the prosecutor to speculate about events that have no factual basis in the record, *Washington*, 725 N.W.2d at 134; to use insinuation or innuendo to "plant in the minds of the jury a prejudicial belief in the existence of evidence which is otherwise inadmissible," *State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994) (quotation omitted); or to intentionally mislead the jury as to inferences it may draw, *State v. White*, 295 Minn. 217, 223, 203 N.W.2d 852, 857 (1973).

Addressing the state's theory of the case, the prosecutor stated in closing argument that Collier reported to the police that he had been robbed by three unknown men on June 16. The prosecutor next argued:

> What else do we know about the robbery? Well, we know that people are talking about it . . . because [J.N.] hears people talking about it on the bus that day, June 21st.
>
> What else do we know about the robbery? We know that [J.N.] and [A.J.] talked about the robbery. He told you that on the walk from Chicago and Franklin from the barbershop on their way up to Lake Street that they discussed this robbery. *Whatever that conversation was, and we'll never know, but whatever that conversation was, it caused*

> *[J.N.] to be so concerned for his friend's safety that they got to change their route on the street*. They have this conversation and all of a sudden the fact [that] cars aren't moving as fast as they should becomes something significant and alarming to [J.N.] *Members of the jury, use your common sense*. *You know what that conversation was about.*
>
> What else do we know about the robbery? We know that two people came in here yesterday and defied a court order to testify. *What does that tell you about that robbery? What does that tell you about who was involved?*
>
> Members of the jury, it should be [A.J.] sitting in this chair. It should be [A.J.] sitting in this chair, answering for an armed robbery that he committed with [F.M.] and [S.C.], instead of [Collier], but [Collier] saw to it that [A.J.] would never live to answer for the crime that he committed. Again, [Collier] made himself judge and jury, and he executed him like an animal in the street so that he would never sit before a jury like yourselves and answer for what he did. That wasn't [Collier's] decision to make. He must be held responsible for what amounts to the ultimate act of revenge. Somebody robs you, you don't get to kill them, you go to the police and you wait for them to do their job.

(Emphasis added.) Collier argues that there was no evidence to support the prosecutor's argument that he killed A.J. in retaliation for being robbed by A.J., F.M., and S.C. The state suggests that J.N.'s testimony supplies the factual basis for inferring that A.J. was one of the robbers because: (1) J.N. overheard people on the bus discussing the robbery of Collier; (2) J.N. later discussed the robbery with A.J.; and (3) J.N. was concerned for his safety and A.J.'s safety as a result of these conversations. Contrary to Collier's argument, our careful review of the record establishes that there was some evidence before the jury from which it could reasonably infer that A.J. may have been involved in some way in the robbery. That J.N. was concerned for his and A.J.'s safety after

discussing the robbery and overhearing others discuss it reasonably may support an inference that J.N. was worried about Collier exacting revenge.

But the inference that F.M. and S.C. were involved in the robbery is without evidentiary support. The jury was presented with no evidence as to the number of men involved in the robbery. Although the state called F.M. and S.C. to testify, they both refused to do so. Beyond their names, the only evidence about F.M. and S.C. that the jury received was Sgt. Jackson's testimony that he spoke with each of them while they were in jail. Although the district court permitted the state to elicit that the robbery was the general topic of those conversations, because the substance of the conversations was not in evidence, there is no evidence to support a reasonable inference that F.M. and S.C. robbed Collier.

The state encouraged the jury to speculate on the substance of the conversations in the absence of any evidentiary support—the substance of the conversation between A.J. and J.N. was excluded as inadmissible evidence and the substance of the police officer's conversations with F.M. and S.C. was not offered. Although a prosecutor is entitled to "considerable leeway" in vigorously presenting the state's case, *State v. Pavlovich*, 245 Minn. 78, 84, 71 N.W.2d 173, 177 (1955), the insinuations here, which lack an evidentiary basis, are beyond the permissible boundaries of forceful advocacy. Notwithstanding the prosecutor's argument to the contrary, F.M.'s and S.C.'s refusal to testify told the jury nothing. In short, the state's argument regarding Collier's motive as a means to establish the identity of the shooter was an impermissible invitation to indulge in open-ended speculation, untethered to any record evidence.

The state suggests that "it is somewhat ironic" that Collier is assigning error to the prosecutor's speculative inferences because defense counsel speculated during closing argument about whether J.N. received favorable treatment in his cases in exchange for incriminating Collier. Because the prosecutor's improper argument was given before defense counsel's argument regarding any benefit to J.N., the invited-reply doctrine is inapposite. *See United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 1044 (1985) (discussing "invited reply" rule for evaluating improper prosecutorial responses to defense misconduct). Moreover, "two improper arguments—two apparent wrongs—do not make for a right result." *Id.* A prosecutor represents the state, a client "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935)).

2.

Collier also argues that it was prosecutorial misconduct to call F.M. and S.C., whom the prosecutor knew would refuse to testify. And Collier argues that the prosecutor intentionally used their silence to prejudice him.

Prior to trial, F.M. and S.C. asserted their Fifth Amendment privilege against self-incrimination. To compel F.M. and S.C. to testify, the district court granted them immunity under Minn. Stat. § 609.09 (2004). Thereafter, when they maintained their refusal to testify, F.M. and S.C. were given the opportunity to consult with counsel. At trial, they continued to indicate that they would not testify despite being advised by the district court that they would be held in contempt if they persisted in their refusals. Over

Collier's objection, the district court directed the prosecutor to call F.M. and S.C. as witnesses. When the prosecutor complied, in the presence of the jury, F.M. and S.C. refused to testify.

Collier asserts that, given their stated intention to remain silent, it was improper to force F.M. and S.C. to demonstrate their refusal in front of the jury. In support of this assertion, he relies on cases that address the problems that arise when a prosecutor calls a co-defendant, co-conspirator, or accomplice who refuses to testify. *See, e.g.*, *State v. Mitchell*, 268 Minn. 513, 130 N.W.2d 128 (1964); *United States v. Maloney*, 262 F.2d 535 (2d Cir. 1959). If a co-defendant or co-conspirator is called unwillingly as a witness, that person is likely to invoke the privilege against self-incrimination. *See Mitchell*, 268 Minn. at 515-16, 130 N.W.2d at 130 (discussing several cases in which co-defendants were called unwillingly and invoked privilege against self-incrimination). When the state calls a co-defendant who invokes the privilege against self-incrimination, "a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused." *Maloney*, 262 F.2d at 537. The potential for prejudice in asserting the privilege in the presence of the jury is high. *Id.* Despite the constitutional status of the privilege, many people view it as "a shelter for wrongdoers" and may "readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Mitchell v. United States*, 526 U.S. 314, 329, 119 S. Ct. 1307, 1315 (1999) (quotation omitted). And just as it is impermissible to infer the defendant's guilt because he invoked the privilege, it is equally impermissible to do the same when someone who is allegedly associated with the defendant invokes it. *Mitchell*, 268 Minn. at 520-21, 130

N.W.2d at 132-33 (citing *Washburn v. State*, 299 S.W.2d 706, 707 (Tex. Crim. App. 1956)). But if the state does not call a person who was allegedly involved in the underlying offense, the jury might assume that the witness's testimony would have been favorable to the defendant. *Id.* at 516, 130 N.W.2d at 130. Thus, "either alternative results in prejudice to one side or the other[,] and it is impossible . . . to lay down any general rule that will cover all instances." *Id.* (quoting *Maloney*, 262 F.2d at 537).

This case, however, presents a variation on the dilemma described above because F.M. and S.C. are not Collier's co-defendants. Indeed, the state claims that Collier was their victim. Thus, the primary concern addressed in these cases—that the jury might treat a co-defendant's constitutional right as evidence of guilt and impute that guilt to the defendant—is not present here. But there is an analogous danger present because the state's theory of the case was that A.J. was murdered to avenge a robbery he committed with F.M. and S.C. Specifically, four interrelated inferences may have been drawn by the jury: (1) F.M. and S.C. refused to testify because they are guilty of robbing Collier; (2) if F.M. and S.C. are guilty of robbing Collier, A.J. also must have been guilty of doing so; (3) if A.J. robbed Collier, Collier had a motive to kill A.J.; therefore (4) Collier must be the shooter.

Nevertheless, it was not improper to call F.M. and S.C. The caselaw is clear that, if the state calls and examines the witness "knowing the privilege [against self-incrimination] will be asserted, 'it is charged with notice of the probable effect of his refusal upon the jury's mind.'" *Id.* (quoting *Maloney*, 262 F.2d at 537). Indeed, if the witness is called in bad faith, the defendant is entitled to a new trial regardless of whether

any actual prejudice can be shown. *Id.* at 517, 130 N.W.2d at 131. But those circumstances are not present here. The privilege against self-incrimination ceases to apply when the witness is granted immunity with respect to the incriminating testimony. *Ullmann v. United States*, 350 U.S. 422, 431, 76 S. Ct. 497, 502-03 (1956). Upon receiving immunity, F.M. and S.C. did not have a valid privilege to invoke or a concomitant legal right to refuse to testify. Moreover, it was reasonable to expect that F.M. and S.C. might rethink their announced refusal once they occupied the witness stand and faced the threat of sanctions for contempt.[1]

The prosecutor, however, committed misconduct by using F.M.'s and S.C.'s refusal to testify to encourage impermissible inferences. During closing argument, the prosecutor encouraged the jury to use F.M.'s and S.C.'s silence as substantive evidence. Specifically, the prosecutor encouraged the jury to use their silence to speculate about Collier's motive:

> [F.M.] and [S.C.] who were here yesterday, as you saw, were ordered by this Court to testify in this case. . . . Those guys defied this Court's order . . . . *They would rather take the consequences of violating a court order than come in here and tell the truth. Think about that. What does that tell you about those guys? What does that tell you about this case? What does that tell you about [Collier]?* . . . What is the significance of that? Two guys over in the jail, nope, not doing it. You're ordered to do it. You're ordered to testify.

[1]The district court has the power to hold a witness in contempt without first requiring the witness to disobey the district court's order in the jury's presence. *See State v. Tatum*, 556 N.W.2d 541, 543 (Minn. 1996) (upholding contempt for witness's refusal, in district court's presence, to testify at upcoming trial); *see also* Minn. Stat. § 588.01, subd. 2. (2006) (punishing "insolent behavior toward the judge *while holding court*" (emphasis added)). But there is no legal authority requiring the witness's refusal to occur without the jury present.

> No, I'm not doing it. *Those guys don't have the courage, they don't have the guts to come in here and tell you what they saw, what they know to be true about this case. You know they have information because the Court ordered them to give it to you. . . . We don't know what it is, and we'll never know because it didn't come in in this case because those guys chose another way out.* They would rather wait and roll the dice and see what happens with violating this Court's order.

(Emphasis added.) This rhetoric urged the jury to infer that, had they not refused to testify, F.M. and S.C. would have admitted that they were the men who, along with A.J., robbed Collier. *See Maloney*, 262 F.2d at 537 (characterizing inference drawn from invocation of Fifth Amendment privilege as "natural, indeed . . . almost inevitable, inference"). The questions capitalized on the belief that the privilege against self-incrimination is "a shelter for wrongdoers" and asked the jurors to assume that F.M. and S.C. committed the robbery with A.J., thereby supplying Collier's motive for murder. *Mitchell*, 526 U.S. at 329, 119 S. Ct. at 1315 (quotation omitted). Contrary to the improper, speculative inferences that the prosecutor's question invited the jury to draw, F.M.'s and S.C.'s refusal to testify told the jury nothing of evidentiary value.[2]

The misconduct here extends beyond encouraging the jury to use F.M.'s and S.C.'s silence as substantive evidence of Collier's motive. When the prosecutor asked, "What does that tell you about [Collier]?", the prosecutor also implied that F.M. and S.C. faced a threat from Collier. This aspect of the closing argument suggests that F.M. and

[2] Moreover, the use of F.M.'s and S.C.'s refusal as substantive evidence of Collier's motive deprived Collier of a meaningful opportunity both to test the reliability of this evidence in "the crucible of cross-examination," *see Crawford v. Washington*, 541 U.S. 36, 61-62, 124 S. Ct. 1354, 1370 (2004) (discussing importance of cross-examination), and to rebut the inferences improperly urged by the state.

S.C. refused to testify out of fear of Collier's vengeance. Although evidence that a witness is afraid of reprisal for his testimony may be relevant to explain inconsistencies in a witness's story, "such evidence is best limited to redirect, after cross-examination has made it clear that such testimony is needed to rebut an attack on the witness's credibility." *Wren*, 738 N.W.2d at 390 (quotation omitted). Without the witnesses' testimony, neither F.M.'s nor S.C.'s credibility was at issue. Indeed, the only suggestion as to why F.M. and S.C. were refusing to testify comes from the prosecutor.

The prosecutor also employed the unsupported fear-of-reprisal theory to bolster J.N.'s credibility by juxtaposing F.M.'s and S.C.'s cowardice with J.N.'s self-sacrificing bravery. The prosecutor argued that J.N.'s "situation probably gets worse" because he testified against Collier:

> The consequences of [F.M.'s and S.C.'s refusal to testify] are their business, that's not your concern, but it tells you a lot about them, *and it tells you a lot about [J.N.] He didn't do that. He came in here. Wasn't fun, I'm sure, to have to come in here and testify in front of [Collier] about what he saw that day but he did it. That's why you should believe him. Compare him to these other guys. Criminals all, but one of them did the honorable thing.* One of them did the right thing, and one of them gave you the final piece of the puzzle that the police needed to solve this case.

(Emphasis added.) But it does not follow from one witness's refusal to testify that another witness's testimony is worthy of belief. *Cf. id.* at 391-92 (stating general rule that one witness is not permitted to testify about credibility of another witness). It was, therefore, improper for the prosecutor to bolster J.N.'s credibility in this manner, particularly given the dearth of evidence linking F.M. and S.C. to the robbery of Collier.

B.

Having concluded that the prosecutor engaged in misconduct, we next consider whether such misconduct deprived Collier of a fair trial. *Francis v. State*, 729 N.W.2d 584, 590 (Minn. 2007) (stating general rule that reversal is warranted "only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial"). The standard used to evaluate whether prosecutorial misconduct was prejudicial depends on whether the defendant objected. *Wren*, 738 N.W.2d at 389. If the defendant objected to the misconduct, we will reverse unless the state establishes that the misconduct was harmless beyond a reasonable doubt. *Id.* at 393-94.[3] Here, because Collier objected on the basis that the prosecutor's arguments were unsupported by the

[3] Under the approach set forth in *State v. Caron*, the threshold for harmlessness varies as a function of the misconduct's seriousness. 300 Minn. 123, 127, 218 N.W.2d 197, 200 (1974). "Unusually serious" misconduct requires reversal unless that misconduct was harmless beyond a reasonable doubt, while "less serious" misconduct was harmless if it did not likely play a substantial role in influencing the jury to convict. *Id.* at 127-28, 218 N.W.2d at 200. It is not entirely clear, however, whether this approach survives after *Ramey*. *See Wren*, 738 N.W.2d at 390 n.9 (commenting on apparent open question of whether *Ramey*, which abrogated *Caron* regarding unobjected-to misconduct, also abrogated *Caron* regarding objected-to misconduct). But even under the *Caron* approach, the misconduct at issue here would fall into the category requiring application of the more stringent harmless-beyond-a-reasonable-doubt standard. *See Caron*, 300 Minn. at 128, 218 N.W.2d at 200 (illustrating "unusually serious" misconduct by citing case where prosecutor improperly introduced evidence of defendant's prior convictions and "less serious" misconduct by citing case where prosecutor injected personal opinion in closing argument).

evidence and improperly used F.M.'s and S.C.'s refusal to testify, we apply the harmless-error test.[4]

A prosecutor has an affirmative obligation to ensure that the defendant receives a fair trial "no matter how strong the evidence of guilt." *Ramey*, 721 N.W.2d at 300. Here, where the record evidence meets the deferential standard for sufficiency, *Alton*, 432 N.W.2d at 756, but is not overwhelming, this obligation is particularly apt. There was no physical evidence connecting Collier to the murder. The witnesses in traffic did not select Collier or anyone else as the shooter from the photographic lineup. Indeed, D.G. failed to identify Collier at all. K.B.'s in-court identification was equivocal. Although M.K. identified Collier in court as the shooter, he also provided testimony that was inconsistent with his initial description. And J.N., who positively identified Collier, had several factors weighing against his credibility.[5]

The state relied primarily on the robbery as a motive to link Collier to A.J.'s murder. This theory rested completely on A.J., F.M., and S.C. being the men who had robbed Collier. Although there was some evidence tending to support the inference that A.J. may have been involved in the robbery of Collier, we cannot conclude that the

[4] The state points to isolated comments within these broader categories to which Collier did not object, arguing for a plain-error analysis with respect to those comments. *See Wren*, 738 N.W.2d at 390 (stating standard of review for unobjected-to misconduct). But in light of the nature of the misconduct and the bases for Collier's objections, Collier's objections are adequate to warrant application of the harmless-error test. *Cf. Francis*, 729 N.W.2d at 590 (stating that prosecutorial misconduct in closing argument is to be considered "as a whole").

[5] J.N. had been smoking marijuana shortly before the shooting, fled the scene rather than assist the police in apprehending his friend's killer, first identified Collier months later while in jail, and had been convicted of giving false information to the police.

state's unsupported assertions used to fill the gaps in its motive theory and the state's inappropriate attempt to bolster J.N.'s credibility were harmless beyond a reasonable doubt.

Because we cannot conclude that the prosecutorial misconduct was harmless beyond a reasonable doubt, we reverse Collier's conviction and remand for a new trial. [6]

Reversed and remanded.

[6] Collier also asserts that the prosecutor committed misconduct by using animal imagery to appeal to the jury's emotions. *See State v. Mayhorn*, 720 N.W.2d 776, 787, 791 (Minn. 2006) (stating that it is misconduct for prosecutor to attempt to inflame passions and prejudices of jury). In light of our decision regarding the other complained-of misconduct, we need not address this claim.