


IN THE SUPREME COURT OF THE STATE OF NEVADA

JEMAR D. MATTHEWS A/K/A JEMAR  
DEMON MATTHEWS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50052

**FILED**

**JUN 30 2009**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder, first-degree murder with the use of a deadly weapon, three counts of attempted murder with the use of a deadly weapon, possession of a short-barreled rifle, conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, and two counts of assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

In this case, appellant Jemar Matthews and three other young men walked up to a group of people standing outside a friend's house and opened fire, killing one victim with a shot to the head and injuring another. In attempting to flee the area, the shooters robbed a vehicle at gunpoint and a police chase ensued, resulting in Matthews' capture.

On appeal, Matthews raises multiple challenges to his conviction. For the following reasons, we conclude that Matthews' arguments fail, and therefore, affirm the district court's judgment of conviction. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

### Prosecutorial misconduct

Matthews contends that the prosecutor committed misconduct by directing the jury to infer his guilt in two respects: (1) by urging the jurors to stare and scrutinize his attire, and (2) by questioning his strenuous opposition to a key piece of evidence.<sup>1</sup>

#### Comment directing the jurors to scrutinize Matthews' attire

At trial, a group of youths dressed in oversized white T-shirts and baggy shorts attended the proceedings and were involved in a disturbance in the halls outside the courtroom. Then, during closing argument, in an attempt to associate Matthews with the troublemaking youths, the prosecutor directed the jurors to stare at Matthews and his co-defendants, and take note of their attire.<sup>2</sup>

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<sup>1</sup>Matthews also contends that the prosecutor improperly referred to his prior criminal history by using his SCOPE report (a document compiled when individuals obtain sheriff cards, work cards, or are arrested, for instance) to prove his height. However, after reviewing this argument, we conclude it is without merit.

<sup>2</sup>While Matthews did not provide a transcript of the objectionable statements, the State conceded that the prosecutor stated the following:

At the beginning of trial all you hear about is how they're presumed innocent, believe they're innocent—innocent, innocent, innocent—you have (sic) haven't heard anything, you don't know anything, they're innocent. Now you know everything. How innocent do they look to you? Take a look over there. How innocent do they look? There's nothing improper about it. Take a look at them. Stare at them.

*continued on next page . . .*

Asking the jury to infer a defendant's guilt based solely on his or her appearance and demeanor at trial is improper. Cf. Nau v. Sellman, 104 Nev. 248, 251, 757 P.2d 358, 360 (1988) (stating that an expert witness' comment that the defendant "acted like a guilty guy" during the preliminary hearing was improper); see, e.g., United States v. Schuler, 813 F.2d 978, 981-82 (9th Cir. 1987) (concluding that a prosecutorial comment on a defendant's nontestifying behavior impinges on his constitutional right to a fair trial and his right not to testify); United States v. Wright, 489 F.2d 1181, 1185-86 (D.C. Cir. 1973) (stating that the prosecutor improperly directed the jury, in its deliberations, to consider the defendant's demeanor during trial). Here, since the prosecutor clearly urged the jury to take note of Matthews' attire and thus infer his guilt by equating him with the troublemaking youths, we conclude that the comment was improper.

Comment regarding Matthews' strenuous opposition to a key piece of evidence

Throughout trial, Matthews strenuously opposed evidence of gunshot residue that was found on a red glove that was linked to him and the commission of the crimes. Focusing on Matthews' opposition to that evidence during its closing argument, the prosecutor commented to the

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*... continued*

Look at these two defendants. What, you think they walk around the street wearing those white shirts and ties? Come on.

jurors that, “[i]f we have the wrong guys and it’s not them, why do they care so much about gunshot residue being found on the gloves?”

A defendant has the right to challenge the evidence against him, see Hernandez v. State, 124 Nev. \_\_\_, \_\_\_, 194 P.3d 1235, 1243 (2008), and this court has repeatedly stated that it is improper for a prosecutor to disparage legitimate defense tactics. See, e.g., Butler v. State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004).

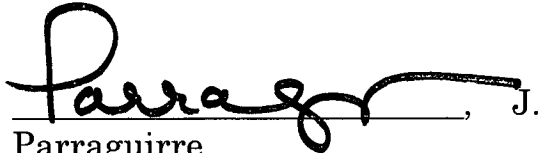
Here, the prosecutor’s statement directed the jury to infer Matthews’ guilt as a result of his strenuous opposition to the red glove and the gunshot residue discovered thereon. Since the prosecutor’s statement disparaged Matthews’ defense and denigrated his right to challenge a key piece of evidence against him, we conclude that the comment was improper.

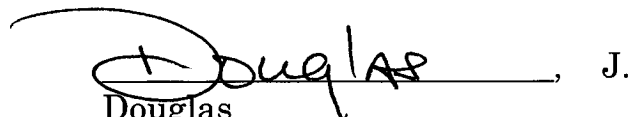
The misconduct was harmless

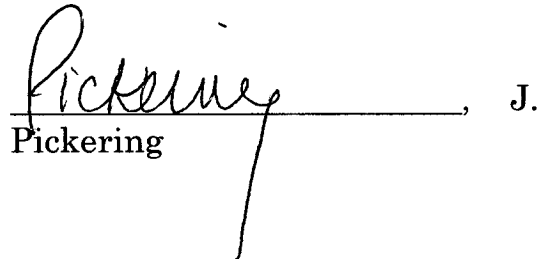
Although the two comments mentioned above were improper, since there was significant evidence indicating that Matthews participated in the shooting, robbery, and police chase (a pursuing officer identified Matthews as the driver in possession of the rifle, the bullet that killed the victim came from the same type of rifle in Matthews’ possession, the red glove found near where the police apprehended Matthews tested positive for gunshot residue, and Matthews closely matched the description of the shooting and robbery suspects), we conclude that the prosecutor’s misconduct was harmless. See Smith v. State, 120 Nev. 944, 947-48, 102 P.3d 569, 572 (2004). Therefore, reversal on these grounds is unwarranted.

For the reasons set forth above, we conclude that Matthews' arguments on appeal do not warrant reversing his convictions.<sup>3</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
Parraguirre J.

  
Douglas J.

  
Pickering J.

cc: Hon. David B. Barker, District Judge  
Bailus Cook & Kelesis  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>3</sup>Matthews also argues that (1) there was insufficient evidence to sustain any of his seven convictions; (2) since there was no evidence of premeditation and deliberation, his first degree conviction cannot stand; (3) his robbery convictions are redundant; (4) the district court erred by permitting expert testimony regarding gunshot residue; (5) a State's witness offered impermissible opinion testimony; and (6) the district court's refusal to grant him a peremptory challenge warrants reversal. However, after reviewing the record, we conclude that these arguments are without merit.