COURT OF APPEALS
DECISION
DATED AND RELEASED

July 2, 1996

Nos.95-2195-CR
95-2196-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY LILLY,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Jeffrey Lilly appeals from judgments of conviction as a repeat offender of two counts of second-degree reckless endangerment with a weapon, obstruction of an officer, criminal damage to property while armed and conspiracy to commit perjury before a court. He also appeals from an order denying his motion for postconviction relief. He argues that he was denied a fair trial by reference to his request for counsel, that evidence of his gang affiliation was improperly admitted and that the jury instructions failed to require a finding of a nexus between the predicate crimes and the possession of

a dangerous weapon. We conclude that no error occurred at trial, and we affirm the judgments and the order.

Lilly was charged with reckless endangerment for ramming the back of a car with another vehicle. As Lilly attempted to spit into the victim's car, he swerved into the passenger side of the victim's car. There was a passenger in the car. The victim identified the hit-and-run perpetrator as someone known to him as "Binky." Later that evening, police officers stopped the vehicle Lilly was driving as it matched the description and license plate number given by the victim. Lilly was asked to identify himself. He gave a false name, false birth date and indicated that he was from Daytona, Florida. When police were unable to draw information using the name Lilly had given, he was asked if he had been mistaken in representing his identity. Lilly again falsely identified himself. Over two hours later, the police were able to confirm Lilly's identity.[1]

Lilly argues that during his cross-examination, the prosecution improperly made reference to Lilly's request for counsel when he was interviewed by police. He claims that this violates his right against self-incrimination. We will assume as in ***State v. Price***, 111 Wis.2d 366, 376, 330 N.W.2d 779, 785 (Ct. App. 1983) (assuming that it is impermissible to refer to a defendant's request for counsel for the same reasons as it is impermissible to refer to a defendant's silence), that it is a denial of due process to refer at trial to a defendant's request for counsel. However, we conclude that the claimed error did not occur at the behest of the prosecution. *See* ***Lindgren v. Lane***, 925 F.2d 198, 202 (7th Cir.), *cert. denied*, 502 U.S. 831 (1991) (***Doyle v. Ohio***, 426 U.S. 610 (1976), does not impose a prima facie bar against any mention whatsoever to the defendant's request for counsel; it only guards against the prosecutor's exploitation of that right).

A detailed examination of the context in which the allegedly offending testimony arose demonstrates that Lilly volunteered the information that he had invoked his right to counsel. At trial, police officer Gregory testified

[1] The conspiracy to commit perjury charge arises out of Lilly's efforts to persuade a trial witness to testify falsely with regard to the hit-and-run incident. Lilly entered a guilty plea to this charge at sentencing. The conviction is not challenged on appeal.

that several days after his arrest, Lilly told the officer that he was a member of the gang Gangster Disciple. Lilly informed the officer that he was an area "overseer" for the gang.

Questions were raised about whether Lilly had directed certain companions to invent particular circumstances justifying the incident. On direct examination, Lilly testified that he had told one of his friends "my story ... what I had told the police."

On cross-examination, Lilly testified that he had told officer Santelli that the victim's car had bumped into his vehicle. He confirmed that he had refused to give police officer Dzbinski a statement. As cross-examination continued, Lilly testified that he knew that one of his companions was a member of the Gangster Disciples. The following exchange then took place:

QAnd you were also a member of the Gangster Disciples?

ANo.

Q You are not?

ANo.

Q Were you at that time?

A No.

QWere you the advisor and overseer of the Gangster Disciples?

A No.

....

QWell, do you recall giving a statement to Police Officer John Gregory?

ANo. When they spoke with me, I told them I wanted my lawyer and they left. Just that simple. I wanted to have my lawyer up there present because I didn't understand where it was coming from.

....

QThe question I asked you, do you deny telling Police Officer John Gregory that you were blessed into the Gangster Disciples' nation by Tony McIntyre? Do you deny telling that?

A Yes, I deny it.

QAnd tell me, was Officer Rueben Silguero present in the room when this conversation occurred?

AThere were two people in the room. Like I said, I didn't even know their names. Okay. I go into the room and they start asking me about gang affiliation and that so I tell them, I said, what's the purpose here? And we are not your friends. We are this and that.... And I said, I want my lawyer down here....

QYou told them you wanted a lawyer, but you're not a member of the Gangster Disciples?

A No, I am not.

QYou know, it seems to me, Mr. Lilly, that most people if they are approached by a couple of police officers and say, are you a member of the Gangster Disciples, most people would say, no, I am not, if they are not.

[DEFENSE COUNSEL] Objection, your Honor. Counsel--counsel is impeaching this witness by invocation of a constitutional right. I believe a curative instruction is

> appropriate, if nothing else, and this should be stricken.

Given officer Gregory's earlier testimony and Lilly's denial that he was a gang member, the prosecutor was free to ask Lilly if he recalled telling officer Gregory about his gang affiliation. It was Lilly himself who volunteered the information that he had not made any statement to Gregory because he wanted his lawyer present. He offered the information a second time. There is nothing to support even the slightest suggestion that the prosecutor's line of questioning sought to elicit the information. The prosecutor only mentioned Lilly's invocation of the right to counsel in fair response to Lilly's answers. We will not review invited error. *See* ***Shawn B.N. v. State***, 173 Wis.2d 343, 372, 497 N.W.2d 141, 152 (Ct. App. 1992).

Outside of the presence of the jury, Lilly made a motion for a mistrial. The decision of whether to grant a motion for a mistrial lies within the sound discretion of the trial court. ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). Although the prosecutor's last question came close to suggesting an implication of guilt from Lilly's request for counsel, the prosecutor withdrew the question. The trial court so advised the jury and gave a curative instruction regarding the reference to the invocation of a constitutional right. The trial court explained a suspect's right to remain silent when asked about things that might pertain to criminal activity and the right to be represented by an attorney when questioned. Wisconsin courts have enforced the general rule that prejudice to a defendant is presumptively erased when admonitory instructions are properly given by a trial court. ***State v. Williamson***, 84 Wis.2d 370, 391, 267 N.W.2d 337, 347 (1978). The trial court's instruction eliminated the possibility that the jury drew a negative inference from Lilly's testimony that he asked for a lawyer. We affirm the trial court's denial of the motion for a mistrial.[2]

[2] Lilly makes a one-line argument that under § 904.03, STATS., the probative value of the evidence outweighed its prejudicial effect. An objection was not made on this basis at trial and it is deemed waived. Further, the prejudice was minimal given the prosecutor's withdrawal of his question and the trial court's instruction to the jury.

Lilly next claims that it was error to admit evidence of his gang affiliation. He argues that such evidence was irrelevant, that its probative value was outweighed by its prejudicial effect and that it was extrinsic evidence on a collateral issue prohibited by § 906.08(2), STATS. Evidentiary rulings are addressed to the trial court's discretion. ***State v. Plymesser***, 172 Wis.2d 583, 591, 493 N.W.2d 367, 371 (1992). We will uphold the trial court's decision absent an erroneous exercise of its discretion. ***Id.*** at 585 n.1, 493 N.W.2d at 369.

The trial court ruled that gang affiliation was relevant on the issue of Lilly's motive. The theory of defense was that Lilly did not drive into the victim's car and had no grudge or animosity toward the victims. There was evidence that an occupant in Lilly's vehicle had been struck by one of the victims during an encounter a week earlier. The occupant was a known gang member. Thus, Lilly's own gang membership indicates a willingness to comply with the requests of other gang members for revenge and a motive for smashing into the victim's car. The evidence of gang affiliation was not merely extrinsic evidence which sought to impeach Lilly on a collateral issue. It had independent relevancy.

We turn to balancing probative value and prejudice.

> Nearly all evidence operates to the prejudice of the party against whom it is offered. The test is whether the resulting prejudice of relevant evidence is *fair or unfair*. In most instances, as the probative value of relevant evidence increases, so will the *fairness* of its prejudicial effect. Thus, the standard for unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by "improper means."

State v. Johnson, 184 Wis.2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994) (citations omitted).

Here, the evidence of gang affiliation was highly probative of motive and intent. Before admitting evidence of Lilly's gang affiliation, the trial court gave the jury an admonitory instruction explaining that gang membership was admitted only for the purpose of proving motive. The instruction was sufficient to reduce the potential of unfair prejudice attendant with admission of the evidence of gang affiliation. *See* ***State v. Mink***, 146 Wis.2d 1, 17, 429 N.W.2d 99, 105 (Ct. App. 1988). Thus, the probative value was not outweighed by unfair prejudice. Admission of the evidence was a proper exercise of the trial court's discretion.

The final claim is that the jury was not instructed that the State must prove that Lilly possessed a dangerous weapon, in this case the car, to facilitate the commission of the crimes. *See* ***State v. Peete***, 185 Wis.2d 4, 9, 517 N.W.2d 149, 150 (1994). Lilly concedes that there was no objection to instructions. We cannot review the unobjected-to instructional error. ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988). Nor are we persuaded that review is appropriate through use of our discretionary reversal authority under § 752.35, STATS.[3]

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[3] We note that the jury was instructed that to convict Lilly it had to find that he committed the crime while using a dangerous weapon. This was not merely a possession of a dangerous weapon case. "If a defendant commits a crime while using or threatening to use a dangerous weapon, a nexus is established." ***State v. Peete***, 185 Wis.2d 4, 18, 517 N.W.2d 149, 154 (1994).