**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 16, 2010**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2009AP2664-CR** **Cir. Ct. No. 2008CF3177**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BASIL J. KRUEGER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Basil J. Krueger appeals a judgment of conviction, entered following a jury trial, for operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood (fifth offense), contrary to

WIS. STAT. § 346.63(1)(am) (2007-08).[1] Krueger argues that he should be granted a new trial because he was denied his constitutional right to confront witnesses and because the trial court erred when it allowed an officer to testify about what it means to self-medicate. Because Krueger made a strategic decision not to move for a mistrial, his first argument fails. We further conclude that the trial court properly admitted the testimony Krueger challenges on appeal. Accordingly, we affirm.

## I. BACKGROUND.

¶2 Krueger was charged with operating a motor vehicle while under the influence of an intoxicant and/or a restricted controlled substance (fifth offense) and operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood (fifth offense), arising out of an incident that occurred on June 8, 2007. Police officers testified that on that date, they witnessed a vehicle operated by Krueger pull out of a parking lot and accelerate at a high rate of speed. The officers followed Krueger, who immediately pulled to the right and stopped. The police officer who spoke with Krueger concluded that Krueger might be intoxicated and conducted standard field sobriety tests. After Krueger performed poorly on the field sobriety tests, he was placed under arrest for suspicion of operating a motor vehicle while under the influence of intoxicants. When the officers searched Krueger's vehicle, they found open containers of beer and a bag containing prescription medications. Following his arrest, a sample of Krueger's

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

blood was drawn, which trial testimony revealed tested positive for cocaine and methadone, but not alcohol.

¶3 A jury found Krueger guilty of operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood, but acquitted him of operating a motor vehicle while under the influence of an intoxicant and/or a controlled substance. The trial court sentenced Krueger to two years of initial confinement and two years of extended supervision. Additional facts relevant to the issues Krueger argues on appeal are provided below.

## II. ANALYSIS.

*A. Failure to move for a mistrial.*

¶4 Krueger seeks a new trial on the basis that he was denied his constitutional right to confront witnesses when the trial court allowed testimony to be taken in his absence. Krueger was present during the beginning of the trial, and all other portions of the trial, with the exception of Michelle Koss's testimony and part of Officer Milotzky's testimony on direct examination. Koss was the nurse who drew Krueger's blood following the incident. Officer Milotzky was one of the officers who stopped and arrested Krueger.

¶5 The second day of Krueger's trial was scheduled to start at 9:00 a.m. When Krueger failed to appear, the trial court continued the trial pursuant to WIS. STAT. § 971.04(3).[2] Krueger's attorney objected to continuing in Krueger's

[2] WISCONSIN STAT. § 971.04(3) provides in relevant part:

(continued)

absence. In response, the court stated that if Krueger came in and had a good reason for being late, the court would revisit the issue and would entertain a motion for a mistrial.

¶6 When Krueger arrived at 10:50 a.m., the court gave his attorney an opportunity to talk to him and offer an explanation for his nonappearance. Krueger's attorney relayed that Krueger was unable to drive himself because he did not have a valid driver's license. Consequently, Krueger made arrangements to have a friend drive him to court; however, the friend never picked him up. Krueger informed the court that he called his attorney's office to explain the situation but no one answered and he did not leave a message. Krueger's girlfriend ultimately drove him to the trial. Krueger did not contact the court because he did not have the number.

¶7 After Krueger's absence was explained to the court, his attorney again objected to the trial court's decision to allow the trial to proceed in Krueger's absence. Hearing this, the court specifically inquired whether the defense was "making any motion?" Krueger conferred with his attorney, and after doing so, Krueger's attorney advised the court that the defense did not have any motions.

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> If the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of the court, the trial or return of verdict of the jury in the case shall not thereby be postponed or delayed, but the trial or submission of said case to the jury for verdict and the return of verdict thereon, if required, shall proceed in all respects as though the defendant were present in court at all times.

¶8 "It is a well established maxim that '[a]n accused cannot follow one course of strategy at the time of trial and if that turns out to be unsatisfactory complain he should be discharged or have a new trial.'" ***State v. Jones***, 179 Wis. 2d 215, 225, 507 N.W.2d 351 (Ct. App. 1993) (citation omitted; bracketing in ***Jones***). Where there is an error "'*of so serious a nature that it may warrant a mistrial*,'" it is not enough for a litigant to assert error and leave it at that; instead, it is imperative that the litigant demand a mistrial. ***Pophal v. Siverhus***, 168 Wis. 2d 533, 543, 484 N.W.2d 555 (Ct. App. 1992) (citation omitted; emphasis in ***Pophal***). "'[F]ail[ing] to demand a mistrial is tantamount to an acknowledgement that the error is harmless, or at least it is not prejudicial to the degree that the aggrieved party is not willing to proceed on the assumption, or hope, there will be a favorable verdict despite the error.'" ***Id.*** (citation omitted).

¶9 We conclude that Krueger waived the argument that he deserves a new trial because he was denied his constitutional right to confront witnesses. After discussing it with his attorney, he made a strategic decision not to pursue a mistrial motion. This decision was made despite the fact that the court had indicated to Krueger's attorney that it would entertain a mistrial motion if Krueger had a good reason for his absence. We agree with the State that "[h]aving deliberately foregone his right to seek a new trial when the opportunity was presented to him, Krueger cannot complain that he should be given a new trial now after the result of the trial he chose to continue to its conclusion turned out to be unsatisfactory to him."

¶10 In his reply brief, Krueger argues that his failure to ask for a mistrial constitutes plain error. The plain-error rule allows appellate courts to review errors that were otherwise waived by a party's failure to object or preserve the error for review. ***State v. Mayo***, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d

115; *see also* WIS. STAT. § 901.03(4). Having reviewed the circumstances surrounding Krueger's strategic decision not to ask for a mistrial, we conclude that application of the plain-error rule is not warranted. *See* ***State v. Tomlinson***, 2001 WI App 212, ¶36, 247 Wis. 2d 682, 635 N.W.2d 201 ("[Defendant] cannot create his own error by deliberate choice of strategy and then ask to receive the benefit from that error on appeal.").

*B. Officer Milotzky's testimony.*

¶11 Krueger next argues that Officer Milotzky's testimony about what it means to self-medicate was improper opinion testimony by a lay witness and that the trial court's ruling allowing this testimony was in error. We conclude that Officer Milotzky was qualified to testify on this issue as an expert witness under WIS. STAT. § 907.02; accordingly, the court did not err when it allowed his testimony.

¶12 After Krueger's late arrival at court, the State continued its direct examination of Officer Milotzky. Officer Milotzky testified that he previously had been assigned to the drug unit for the Wauwatosa Police Department. The State then questioned Officer Milotzky regarding the meaning of the term self-medicating, to which Krueger's attorney placed a continuing objection as to relevance on the record. The court overruled the objection and Officer Milotzky testified that individuals can self-medicate by using prescription drugs or illegal drugs, such as cocaine, to treat their own symptoms or ailments. Officer Milotzky based this testimony on his training and experience with the Wauwatosa Police Department in investigating drug crimes.

¶13 WISCONSIN STAT. § 907.02 "sets a fairly low threshold for the admissibility of opinion evidence that is beyond the presumed ken of ordinary

jurors." ***Anderson v. Combustion Eng'g, Inc.***, 2002 WI App 143, ¶4, 256 Wis. 2d 389, 647 N.W.2d 460; *see* § 907.02 ("If … specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."). One with any form of specialized knowledge, however obtained, may testify as an expert in Wisconsin. *See* ***State v. Hollingsworth***, 160 Wis. 2d 883, 896, 467 N.W.2d 555 (Ct. App. 1991). Formal education is not a requisite. ***Id.*** Experience alone, as opposed to technical and academic training, may qualify one as an expert. ***Id.***

¶14 Given Officer Milotzky's experience working in the drug unit for the Wauwatosa Police Department, we conclude that he was qualified to testify about what it means to self-medicate. Accordingly, the trial court properly admitted the challenged testimony.

*By the Court*.—Judgment affirmed.

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