COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1983-CR **Cir. Ct. No. 2010CF1780**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIKA LISETTE GUTIERREZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Brennan, P.J., Kessler, and Brash, JJ.

¶1 BRENNAN, P.J. Erika Lisette Gutierrez appeals from a judgment of conviction, following a bifurcated criminal trial, for four counts of intentional physical abuse of a child with high probability of great bodily harm. She also

appeals an order denying her postconviction motion for 1) withdrawal of her plea in the guilt phase and 2) a new trial on the question of mental responsibility.

¶2 Gutierrez argues that she is entitled to withdraw her plea for three reasons. First, because the trial court omitted required words from its warning—it warned that her plea could result in "deportation, *exclusion* or denial of naturalization" when the required statutory language is "deportation, the *exclusion from admission to this country* or the denial of naturalization." WIS. STAT. 971.08(1)(c) (2015-16) (emphasis added).[1] She argues that because the trial court failed to fully advise her of the deportation statute and because she will likely be deported as a result of her plea, she is entitled to plea withdrawal under ***State v. Negrete***, 2012 WI 92, ¶23, 343 Wis. 2d 1, 819 N.W.2d 749.

¶3 Secondly, Gutierrez argues that her plea was not free, voluntary, and knowing because she was incorrectly advised by her trial counsel that if she pled and waived her right to a jury for the mental responsibility phase, the court would not view a hospital videotape of her repeatedly stopping her baby son from breathing. Gutierrez argues that this viewing, which counsel advised her would not happen, was an unwarned collateral consequence of her guilty plea that renders the plea involuntary under ***Brown***, ***Riekkoff***, and ***Woods***.[2] Third, she also

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] ***State v. Brown***, 2004 WI App 179, ¶¶8, 10, 276 Wis. 2d 559, 687 N.W.2d 543 (plea rendered involuntary by affirmative misstatements of prosecutor and trial court's acquiescence); ***State v. Riekkoff***, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983) (plea rendered involuntary by affirmative misstatements of trial counsel, with trial court's and prosecutor's acquiescence, of his appellate review rights); and ***State v. Woods***, 173 Wis. 2d 129, 141, 496 N.W.2d 144 (Ct. App. 1992) (plea rendered involuntary by affirmative misstatements by trial counsel, prosecutor and the trial court regarding potential sentence).

argues that this promise constituted ineffective assistance of counsel and that she would not have entered a plea had she known the court would view the videotape. As an alternative to her plea withdrawal arguments, she argues that she is entitled to a new trial in the interest of justice on the issue of mental responsibility because the verdict was against the greater weight of the evidence presented at trial. We disagree and affirm.

BACKGROUND

¶4 On April 3, 2010, Gutierrez was with her two-month-old son, who was in the hospital being monitored for reported seizures, when a nurse responded to a possible seizure episode and stayed in the room with them for an hour. Within minutes after the nurse left the room, the alarm sounded, and she returned to find the baby purple, without a pulse, and not breathing. Immediately oxygen was administered, and the child was revived. The baby was moved to a room equipped with a video electroencephalogram (EEG) machine, which simultaneously records video images of the child and the child's brain activity. The following day, a nurse concerned about the baby's intermittent distress—which never occurred when nurses were present—started reviewing the video images recorded during times when the mother and baby were in the room on April 3 and April 4. On the video, which was time stamped, Gutierrez can be observed on eight occasions covering the baby's nose and mouth while the baby visibly flails and attempts to breathe. The incidents last between twenty and forty seconds. Gutierrez can be observed removing her hand and attempting to soothe the baby when a nurse or the baby's father enters the room. She can also be observed repeatedly unplugging the devices monitoring the baby's oxygen saturation levels.

¶5 Following an investigation, Gutierrez was charged with eight counts of intentional physical abuse of a child by conduct that created a high probability of great bodily harm, contrary to WIS. STAT. §§ 948.03(2)(c), 939.50(3)(f) (2009-10).

¶6 Gutierrez initially entered pleas of not guilty and not guilty by reason of mental disease or defect. The case was accordingly bifurcated.

Guilt phase.

¶7 On July 26, 2010, Gutierrez entered guilty pleas to four of the counts, and as part of an agreement with the State, the remaining counts were dismissed as read-ins. However, she retained her plea of not guilty by reason of mental disease or defect.

¶8 During the plea colloquy, the trial court asked, "You also understand if you're not a citizen of the United States, your plea could result in deportation, exclusion or denial of naturalization?" Gutierrez answered, through an interpreter, "Yes." The trial court later asked, as part of the colloquy, "Nobody made any promises or threats to you to plead to the offenses?" Gutierrez answered, through the interpreter, "No."

¶9 Following the colloquy, the trial court made a finding of guilt as to each of the four counts. The State addressed the trial court as follows:

> I know immigration has been a big concern for Ms. Gutierrez. And I believe there is case law that says not only should the court look for any possible consequences of a criminal conviction but defense counsel also has the obligation to discuss those consequences with the defendant.
>
> Since I know that there is a concern in this case, I would just ask that defense counsel make a record as to not

> necessarily the substance of their conversation but that she did have those conversations.

¶10 Defense counsel responded, "I did discuss with Ms. Gutierrez the possible consequences from immigration that could result from the plea."

Mental responsibility phase.

¶11 Gutierrez waived her right to a jury on the mental responsibility phase of the trial, and the State had no objection. A trial to the court took place over the course of five days, ending on January 10, 2011.

¶12 Dr. John Pankiewicz examined Gutierrez and submitted a report concluding that at the time of the incident she suffered from a mental illness and lacked the capacity to conform her conduct to the requirements of the law. Pankiewicz testified as an expert witness for the defense. The defense also presented testimony from the pastor of the church Gutierrez attended, who testified regarding two conversations he had had with Gutierrez while she was pregnant in which she told him she was not well and was hearing voices.

¶13 The State's first witness was Dr. Robert Rawski, who also examined Gutierrez and submitted a report, concluding that Gutierrez was experiencing a "major depressive disorder" and that she nevertheless had the "capacity to appreciate the wrongfulness of her actions or to conform her conduct to the requirements of the law."

¶14 Over defense objection, the State also called Dr. Angela Rabbitt and moved to admit the report she had prepared. Rabbitt is a pediatrician who was familiar with the hospital video EEG recording Gutierrez's actions. Rabbitt had reviewed it as a member of the hospital's Child Advocacy Center, which

investigates when hospital staff suspects child abuse. After laying the foundation for the video, the State moved to admit the video as an exhibit. As relevant to this appeal, trial counsel also objected to the court's viewing of the video on the grounds that any relevance the video had would be to the guilt phase, and not the responsibility phase, and also that even if it was relevant, it was unduly prejudicial. The trial court overruled the objection and viewed the video.

¶15 The trial court found that at the time the crime was committed, Gutierrez had a mental disease or defect. It further found that she had "failed to satisfy her burden to prove the affirmative defense of diminished criminal responsibility[.]" The trial court stated that it found Rawski's testimony "most credible," particularly the part concerning Gutierrez's ability to control her actions when medical staff or her husband entered the room. The trial court found that this precluded a finding that she lacked the capacity to conform her conduct to the requirements of the law. Accordingly, the trial court found her guilty.

¶16 Judgment was entered on the four counts, and Gutierrez was sentenced to three years of prison and two years of extended supervision on each count, to run consecutive.

Postconviction motion.

¶17 Gutierrez filed a postconviction motion and brief seeking to withdraw her plea for the same reasons advanced here, or, in the alternative, to obtain a new trial on the mental responsibility phase. Postconviction counsel included Gutierrez's trial counsel's affidavit to her reply brief that stated as follows:

> When Ms. Gutierrez was deciding whether to enter a guilty plea during phase one of this case, I informed her that the

> video of her allegedly putting her hand over her son's mouth would never be shown to the court as it would be irrelevant to determining criminal responsibility;
>
> I advised Ms. Gutierrez that by pleading guilty during phase one, the video would never be seen by the fact-finder; and
>
> The Assistant District Attorney told me that she would only play the video if Ms. Gutierrez did not waive the jury for phase two of the trial.

¶18 The trial court denied the motion. This appeal follows.

DISCUSSION

¶19 Gutierrez argues that she is entitled to withdraw her plea for three reasons: 1) the trial court failed to fully warn her as required by the deportation statute, 2) her constitutional right to a free, knowing and voluntary plea was violated when she was not warned that the court would view the video, which she views as a collateral consequence of her guilty plea, and 3) she received ineffective assistance of counsel when trial counsel incorrectly "promised that the fact-finder would not view the video if she entered a guilty plea" in the guilt phase and waived her right to a jury trial, and this induced her to do so. In the alternative, she argues that she is entitled to a new trial in the interest of justice under WIS. STAT. § 752.35 because it is likely that "justice has miscarried," and "there is a substantial probability that a new trial would produce a different result." For the reasons stated below, we disagree.

1. Gutierrez is not entitled to withdraw her plea.

a. The trial court properly warned her of the consequences of her plea pursuant to WIS. STAT. § 971.08.

¶20 In a plea colloquy, a trial court is required by statute to advise the defendant specifically regarding potential consequences for those who are not U.S. citizens:

> [The court shall] [a]ddress the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

WIS. STAT. § 971.08(1)(c). If a trial court fails to advise a defendant as required, *and* if a defendant shows that "the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization," the court "shall … permit the defendant to withdraw the plea[.]" WIS. STAT. § 971.08(2). Where the trial court "*substantially complie[s]* with the mandate of § 971.08[,]" however, a defendant is not entitled to withdraw her plea. ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173 (emphasis added). A warning substantially complies with the mandate when "the statute's purpose—to notify a non-citizen defendant of the immigration consequences of a criminal conviction—was undoubtedly effectuated, and the linguistic differences were so slight that they did not alter the meaning of the warning in any way[.]" ***Id.*** Whether the trial court's warning complied with the statute is a question of law we review *de novo*. *See* ***State v. Dwyer***, 181 Wis. 2d 826, 836, 512 N.W.2d 233 (Ct. App. 1994).

¶21 Here, the court warned Gutierrez, in relevant part, "your plea could result in deportation, exclusion or denial of naturalization[.]" The trial court omitted the five words following *exclusion*: "from admission to this country." Gutierrez argues that with this omission, the meaning of the warning was altered and as a result the warning failed to inform her that that she would be "excluded from coming back into the country where her family now lives." We disagree.

¶22 As ***Mursal*** holds, there are cases where a warning that is not a verbatim recitation of the statute will nevertheless be sufficient to satisfy the statute's requirements. ***Mursal***, 351 Wis. 2d 180, ¶20. The warning Gutierrez received starts by saying it applies to anyone "who is not a citizen of the United States" and includes the words "deportation" and "denial of naturalization." In this context, the word "exclusion" in the warning is clearly referring to exclusion *from the United States*. Further, even when those words are omitted, the meaning is not changed. "Exclusion" in this context does not have a different meaning than "exclusion from admission to this country." We conclude that even with these words omitted, the statute's purpose was effectuated, and the omitted words "did not alter the meaning of the warning in any way." *See* ***Mursal***, 351 Wis. 2d 180, ¶20. We therefore conclude that the trial court complied with the statutory mandate. Because Gutierrez has failed to show that the first part of the test is satisfied, we need not reach the second part of the test for plea withdrawal under WIS. STAT. § 971.08(2) (plea withdrawal required where court fails to advise *and* plea is likely to have specified immigration consequences).

b. Gutierrez has not established a constitutional violation of her right to a voluntary, knowing and intelligent plea because viewing a videotape is not a consequence of a plea under *Brown, Riekkoff,* and *Woods*.

¶23 "A plea that is not entered voluntarily, knowingly and intelligently violates due process." ***State v. Merten***, 2003 WI App 171, ¶5, 266 Wis. 2d 588, 668 N.W.2d 750. "A defendant who is not apprised of the *direct* consequences of a plea may be entitled to withdraw the plea as involuntarily and unknowingly made." ***Id.***, ¶7 (emphasis added). Direct consequences are those that have "a definite, immediate, and largely automatic effect on the range of the defendant's punishment." ***State v. Byrge***, 2000 WI 101, ¶60, 237 Wis. 2d 197, 614 N.W.2d 477. "[A] defendant does not have a due process right to be informed of the collateral consequences of his plea." ***Merten***, 266 Wis. 2d 588, ¶7. "Collateral consequences are indirect and do not flow from the conviction." ***Byrge***, 237 Wis. 2d 197, ¶61. "[N]o manifest injustice occurs when a defendant is not informed of a collateral consequence." ***Merten***, 266 Wis. 2d 588, ¶7. Consequences that have been held to be collateral include deportation, restitution, subsequent filing of a sexually violent person petition, habitual offender penalties, the consequences of revocation of probation, and transfer to an out-of-state prison facility. ***State v. Parker***, 2001 WI App 111, ¶9, 244 Wis. 2d 145, 629 N.W.2d 77.

¶24 However, the distinction between direct and collateral consequences is irrelevant when, with the acquiescence of the trial court, the prosecutor and trial counsel *affirmatively misinform* a defendant regarding consequences of his plea. *See* ***State v. Brown***, 2004 WI App 179, ¶¶8, 10, 276 Wis. 2d 559, 687 N.W.2d 543 (plea rendered involuntary by affirmative misstatements of prosecutor and trial court's acquiescence). When that happens, the plea is as a matter of law not knowingly and voluntarily entered, and the defendant is entitled to withdraw it.

Id., ¶¶13-14. *See also* ***State v. Riekkoff***, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983) (plea rendered involuntary where defendant was misinformed by trial counsel, with the acquiescence of trial court and prosecutor, of his appellate review rights), *and* ***State v. Woods***, 173 Wis. 2d 129, 141, 496 N.W.2d 144 (Ct. App. 1992) (plea rendered involuntary by affirmative misstatements of consequences from the attorneys and the trial court regarding potential sentence).

¶25 Gutierrez argues that under ***Brown***, ***Riekkoff***, and ***Woods***, her plea was involuntary because she was affirmatively misinformed by trial counsel that the trial court would not view the hospital video during the second phase of the trial if she pled guilty during the first phase. Trial counsel, in her postconviction affidavit, said that the prosecutor told her this, but there is no mention in the trial record of the prosecutor saying anything about the video promise. She argues that she would not have pled guilty but for the misinformation and that the viewing of the video was a consequence of her guilty plea. As noted above, the record contains trial counsel's affidavit saying the same thing.

¶26 Gutierrez's argument fails for two reasons.

¶27 First, it is based on the faulty premise that the viewing of the video by the trial court, which happened after her plea, is a *consequence* of her plea. The fact that something follows something else does not make the first thing a cause of the second. Cases have categorized consequences as direct and consequential, but we do not find any that defines the word "consequence." *Consequence* is defined as "[s]omething that logically or naturally follows from an action or condition" and "[t]he relation of a result to its cause." American Heritage Dictionary 401 (3d ed. 1992). In each of the cases she cites, the defendant experienced a consequence—a result *caused* by his guilty plea and something that logically and legally followed

from it. *See* ***Brown***, 276 Wis. 2d 559, ¶10 (effect of no-contest plea was that defendant was subject to sex offender registration); ***Riekkoff***, 112 Wis. 2d at 127 (effect of guilty plea was loss of right to appellate review of certain issues notwithstanding defendant's and State's stipulation to the contrary); and ***Woods***, 173 Wis. 2d at 140 (effect of plea was a legally impossible sentence to which both counsel and the trial court had agreed). Each case is based on not just a logical or common consequence, but one that the law *requires*.

¶28 In this case, by contrast, the viewing of the video was not an action required by law in response to Gutierrez's plea. The plea itself was to the first phase—guilt. The court did not view the video as part of the plea in that first phase. Had Gutierrez stipulated to mental responsibility, instead of merely waiving a jury, the video may not have been offered or viewed. But in no way was the viewing of the video something that legally was required to follow from the plea to the guilt phase, and in that respect the cases relied on by Gutierrez offer no support for her argument at all.

¶29 Additionally, if Gutierrez had not entered the plea, she would have faced a jury trial in phase one on all eight charges (not the reduced four) that would unquestionably have included the video of her committing the crimes. Viewing the video cannot be a consequence of the plea if viewing it would certainly have occurred whether the plea happened or not. Because her guilty plea did not cause the consequence she complains about, the ***Brown***, ***Riekkoff***, and ***Woods*** framework is inapplicable, and she is not entitled to relief under the rationale of those cases.

¶30 Second, in each of those cases, the appellate court pointed out that the trial court had either "acquiesced" in the affirmative misrepresentation by both

counsel, *see* ***Brown***, 276 Wis. 2d 559, ¶8, and ***Riekkoff***, 112 Wis. 2d at 129, or had joined counsel in affirmatively misinforming the defendant regarding the consequences, *see* ***Woods***, 173 Wis. 2d at 140. There is no indication in the record that the trial court here was aware of or acquiesced in any representation to Gutierrez that her guilty plea in phase one would prevent the trial court from viewing the video in phase two. For these reasons, Gutierrez has not shown that she is entitled to withdraw her plea under ***Brown***, ***Riekkoff***, and ***Woods***.

c. Gutierrez has not shown that trial counsel's representation to her regarding the showing of the video constituted ineffective assistance of counsel.

¶31 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because a defendant must show both deficient performance and prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Id.*** at 697.

¶32 To prove deficient performance, the defendant must point to specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is "a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "'Effective representation is not to be equated, as some accused believe, with a not-guilty verdict. But the representation must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his [or her] services.'" ***State v. Felton***, 110 Wis. 2d 485, 500-01, 329 N.W.2d 161 (1983) (citation omitted).

¶33 To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were serious enough to deprive him or her of a fair trial and a reliable outcome, ***Johnson***, 153 Wis. 2d at 127, and "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," ***Strickland***, 466 U.S. at 694. A "reasonable probability of a different outcome" exists if "there is a reasonable probability that a jury … would have a reasonable doubt as to the defendant's guilt." ***State v. McCallum***, 208 Wis. 2d 463, 474, 561 N.W.2d 707 (1997). We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***Johnson***, 153 Wis. 2d at 127. We will not reverse the trial court's factual findings unless they are clearly erroneous. ***Id.*** However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128.

¶34 Gutierrez argues that trial counsel's representation to her that the video would not be shown to the court was deficient performance because trial counsel gave inaccurate legal information that was not part of a deliberate strategy. Gutierrez argues that this prejudiced her because absent this representation, Gutierrez would have proceeded to trial rather than enter a plea. Gutierrez argues that "[i]t's not the court's role to judge whether that was a good decision or not." The question is not whether that was a good decision but whether there is a reasonable probability of a different outcome, *see* ***Strickland***, 466 U.S. at 694, and whether there is a reasonable probability that a jury would have a reasonable doubt as to the defendant's guilt, *see* ***McCallum***, 208 Wis. 2d at 474. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694. For the following reasons, we conclude that there is not.

¶35 Gutierrez was charged with eight felony counts of child abuse. Pursuant to her guilty plea, four charges were dismissed and read in, which cut her sentence exposure by fifty years. Part of the evidence for all eight counts was a video EEG that showed both images and the baby's vital signs during the episodes in which Gutierrez prevented him from breathing. Trial counsel's affidavit is the source of the other facts relevant to this argument: that trial counsel informed Gutierrez that the video would "never be seen" if she pled guilty in the first phase and that the prosecutor told trial counsel that if there was a jury waiver for the second phase, the State would not introduce the video into evidence.

¶36 Like the postconviction court, we address only the question of whether Gutierrez suffered any prejudice from the allegedly deficient performance, and we conclude that she did not. *See* ***Strickland***, 466 U.S. at 697 (reviewing courts need not consider one prong if the defendant has failed to establish the other). That question is dispositive of the analysis for ineffective assistance of counsel. In light of the overwhelming evidence for the counts, Gutierrez cannot show that there is "a reasonable probability" that, but for counsel misinforming her about the use of the video, "the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694. "The ***Strickland v. Washington*** test for prejudice, which we apply, emphasizes that the error is prejudicial if it undermines confidence in the outcome." ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985). Applying that test to this case, we would find prejudice only if our confidence in the outcome of the case is undermined by a reasonable probability that but for counsel's erroneous advice, Gutierrez would have gone to trial and a jury would have returned a verdict of not guilty by reason of mental disease or defect. In light of the overwhelming

evidence in this case, such an outcome is so unlikely that it does not undermine our confidence in the outcome at all.

¶37 To the extent that she is arguing that the result of the proceeding could have been different—that she would have gone to trial and a jury *could have* acquitted her of the eight charges—that is not the legal standard. Given the evidence here, there is not a *reasonable probability* that a jury considering this evidence at trial would have acquitted in the guilt phase. Accordingly, Gutierrez has not established that she is entitled to withdraw her plea on this basis.

2. Gutierrez is not entitled to a new trial in the interest of justice.

¶38 Gutierrez argues that she met her burden of showing "to a reasonable certainty by the greater weight of the credible evidence," *see* WIS. STAT. § 971.15(3), that she lacked the substantial capacity to either appreciate the wrongfulness of her conduct or conform her conduct to the requirements of the law. *See* WIS JI—CRIMINAL 605. For this reason, she argues, she is entitled to a new trial in the interest of justice on the issue of mental responsibility, pursuant to WIS. STAT. § 752.35, which permits discretionary reversal "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]" ***Id.***

¶39 Our supreme court has held that the "exceptional cases" that are appropriate for discretionary reversal are cases where the jury was wrongly prevented from hearing important testimony or considered improper evidence that "clouded a crucial issue," and cases where "an erroneous instruction prevented the real controversy in a case from being tried." ***State v. Doss***, 2008 WI 93, ¶86, 312 Wis. 2d 570, 754 N.W.2d 150 (citation omitted). This is not that "exceptional case," and Gutierrez does not even attempt to argue that what happened is

analogous to a case where the jury heard improper evidence or was given an erroneous instruction that prevented the real controversy from being tried. She simply makes a conclusory statement that justice miscarried because the only "rational" explanation for Gutierrez's actions is diminished mental capacity.

¶40 The trial court found the evidence failed to support lack of mental responsibility based particularly in part on Gutierrez's ability to control her actions when hospital staff entered the room. The court also concluded that Rawski, the State's expert, was more credible in his opinion that she was mentally responsible than Dr. Pankiewicz was in his opinion to the contrary. Credibility is a determination for the trial court which we affirm unless clearly erroneous. *See* ***Lemke v. Lemke***, 2012 WI App 96, ¶48, 343 Wis. 2d 748, 820 N.W.2d 470. *See also* ***Schultz v. State***, 87 Wis. 2d 167, 173, 274 N.W.2d 614 (1979) (credibility of witnesses and whether the defendant met his burden of proving lack of capacity by reason of mental disease or defect are for the trier of fact to determine).

¶41 In her argument that justice miscarried here, Gutierrez argues that Rawski, the State's expert, wrongly concluded that Gutierrez falsely reported hearing voices. Rawski testified that he did not believe her claims of hearing voices because he noted that she did not raise those claims until six weeks after the incident. On appeal Gutierrez argues that other evidence from the trial supports her claim of hearing voices. Gutierrez's pastor testified that Gutierrez told him twice that she heard voices during her pregnancy. However, the problem with Gutierrez's argument is that this is all evidence that the trial court was aware of at trial, and yet the court nonetheless decided that Rawski was more credible. Gutierrez makes no claim of new or missing evidence at trial that would lead to a different result if included on retrial. Therefore, Gutierriez fails to establish any basis for a new trial in the interest of justice.

¶42 Additionally Gutierrez makes several other purely speculative arguments such as the possibility that Gutierrez, based on her Mexican heritage, may not have felt comfortable telling others she heard voices or that perhaps there were translation differences between her interviews with the two doctors. There is no record support for either. Ultimately her argument is that there is "no other rational or alternative explanation for Gutierrez's behavior except for that she was psychotic and unable to control her actions when she placed her hand over [her child's] mouth." But this purely conclusory statement of counsel fails to establish any basis for overturning a trial court's reasoned credibility determination.

¶43 The controversy here—the issue of Gutierrez's mental responsibility—was fully tried, and this is not an "exceptional case[.]" ***Doss***, 312 Wis. 2d 570, ¶86 (citation omitted). There was ample evidence admitted at the trial's second phase suggesting that Gutierrez had the capacity to appreciate the wrongfulness of her actions and conform her conduct to the requirements of the law, including the number of times she stopped the actions when others entered the room.

¶44 For these reasons, we affirm the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.