

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP1319-CR

Cir. Ct. No. 2002CF34

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SUSAN M. WAGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County:
GLENN H. HARTLEY, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Susan Wagers appeals a judgment convicting her of three counts of first-degree sexual assault, false imprisonment, substantial battery, battery, possession of THC and possession of drug paraphernalia, all as a party to a crime. She argues: (1) there is insufficient evidence to support the

conviction of substantial battery because the victim's tooth was not punched out or fractured; (2) there is insufficient evidence to support the conviction of false imprisonment; and (3) there is insufficient evidence to support the three counts of first-degree sexual assault because the victim's testimony was not credible and there was no evidence Wagers acted with intent to become sexually aroused or gratified. We affirm.

¶2 Wagers first contends there is insufficient evidence to support her conviction of substantial battery. WISCONSIN STAT. § 939.22(38) (2003-04)¹ provides that the loss or fracture of a tooth is “substantial bodily harm” supporting a conviction of substantial battery. Wagers contends she did not cause the victim to lose or fracture a tooth. Wagers punched the victim, knocking out a permanent cap on the victim's tooth. Based on our reading of the statute, we see no reason to differentiate a dental fixture permanently affixed to a tooth and designed to replace the tooth from the tooth itself. Therefore, we reject this argument.

¶3 Wagers next argues there is insufficient evidence to support the conviction of false imprisonment. We review a claim of insufficient evidence to support a jury verdict under an extremely deferential test. *See State v. Allbaugh*, 148 Wis. 2d 807, 808-09, 436 N.W.2d 898 (Ct. App. 1989). We “may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value that no reasonable jury could have found guilt beyond a reasonable doubt.” *State v. Block*, 222 Wis. 2d 586, 596,

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

587 N.W.2d 914 (Ct. App. 1998). It is the jury's duty, not this court's, to sift and winnow the evidence and determine credibility of the witnesses. *Id.*

¶4 The victim's testimony is sufficient to support the conviction of false imprisonment. She testified Wagers beat her, injuring her and knocking out her cap, and that Wagers helped to bind her arms and legs in duct tape. The testimony of witness Clayton Gadsby also supports the conviction. He testified he was told Wagers was standing watch over the victim, who had been bound and left in the apartment. This conduct alone supports the conviction as party to a crime. *See* WIS. STAT. § 939.05.

¶5 Finally, Wagers argues there was insufficient evidence to convict her of sexual assault. First, she argues the victim's testimony about the assault was incredible. However, the credibility of the witnesses is for the jury to decide, *State v. Hahn*, 221 Wis. 2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998), and the jury chose to believe the victim's version of events. Second, Wagers contends no evidence was presented that she became sexually aroused or gratified, one of the elements of the crime. Due to the intimate nature of Wagers' contact with the victim, the jury could have reasonably inferred this element was present.

By the Court.—Judgment affirmed.

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

