

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 26, 2013

Diane M. Fremgen
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. 2012AP2605-CR

Cir. Ct. No. 2010CF349

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICOLE A. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Nicole Smith appeals her criminal conviction for causing a child between the ages of thirteen and eighteen to view sexual activity

contrary to WIS. STAT. § 948.055 (2011-12),¹ and an order denying her motion for a new trial.² She challenges the sufficiency of the evidence and remarks made by the prosecutor in closing argument. We affirm for the reasons discussed below.

BACKGROUND

¶2 The primary evidence in this case is a video that shows Smith penetrating the anus of her boyfriend with a dildo and kissing his buttocks, while he lay face down on a bed, handcuffed and with his pants pulled down. During the incident, Smith’s boyfriend repeatedly groaned in pain, asked Smith to stop, said it was not what he meant when he referred to Smith and her daughter together, and promised that he would never ask Smith for anal sex again. Testimony at trial established that Smith’s sixteen-year-old daughter recorded the video on her cell phone while sitting astride Smith’s boyfriend’s upper back.

¶3 Smith testified that the incident began when she and her daughter were watching television and decided to go “mess around with” Smith’s boyfriend. Smith’s daughter testified that it was her idea to record the incident. All three participants testified that the incident had been meant as a joke and that they all thought it was funny, like a Jackass video—although Smith’s boyfriend had previously told police that he was not a willing participant. Smith denied that there was anything “sexual” about the video or that she had the intent to arouse or gratify herself or her boyfriend or to degrade or humiliate her daughter.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² The judgment included an additional count of bail jumping that is not challenged on appeal.

¶4 During closing argument, the prosecutor made statements that “it is completely degrading to involve a child in this manner of adult sexual activity”; that the video showed the “sexual degradation” of Smith’s daughter; that “any 16-year-old would be humiliated” by witnessing Smith’s actions; that Smith’s daughter testified that she had not been humiliated only “because she loves her mother and she wants this to be over;” and that it didn’t really matter what Smith said about the video being a joke, it mattered only what the jurors saw and heard Smith do on the video. The jury returned a guilty verdict, and Smith appeals.

STANDARD OF REVIEW

¶5 “In reviewing challenges to the sufficiency of evidence, we give great deference to the trier-of-fact and do not substitute our judgment unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no reasonable fact-finder could have found guilt beyond a reasonable doubt.” *State v. Routon*, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530.

DISCUSSION

¶6 In accordance with WIS JI—CRIMINAL 2125, the circuit court instructed the jury that the State needed to present sufficient evidence to establish beyond a reasonable doubt that: (1) Smith caused her daughter to view sexually explicit conduct, which would include actual or simulated anal penetration by an object; (2) Smith intended that her daughter view the sexually explicit conduct; (3) the daughter had not reached the age of eighteen; and (4) Smith “acted with the purpose of sexually arousing or gratifying [herself] or humiliating or degrading [her daughter].” Smith does not dispute that the first three elements were satisfied.

She challenges only the sufficiency of the evidence to prove that she acted with the prohibited purpose identified in the fourth element.

¶7 When a charged crime contains an element of specific intent, the prohibited purpose must be an “object toward which [the defendant] strives.” *State v. Jackson*, 2012 WI App 76, ¶10, 343 Wis. 2d 602, 819 N.W.2d 288 (quoted source omitted). It is not necessary that the criminal purpose be the defendant’s only purpose for the conduct. *State v. Hamdan*, 2003 WI 113, ¶78 n.36, 264 Wis. 2d 433, 665 N.W.2d 785. Additionally, an intent to become sexually aroused or gratified or to humiliate or degrade another may be inferred from the defendant’s conduct. *State v. Drusch*, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987).

¶8 Here, the fact that Smith may have had mixed purposes to teach her boyfriend a lesson or to create a prank video does not preclude her from also having intended to derive sexual gratification from the incident. The jury could reasonably infer that at least one object of Smith’s conduct in the video was to gain some degree of sexual gratification based upon the inherently sexual nature of inserting a dildo into the anus of her restrained boyfriend and kissing his buttocks. It would also be reasonable to infer based upon Smith’s mugging for the camera throughout the incident that she was deriving additional pleasure or sexual gratification from having her sexual conduct witnessed by her minor daughter. In short, the jury was entitled to give greater weight to its own interpretation of the video than to the self-serving testimony of the participants as to what was intended by the conduct shown. We are therefore satisfied that the evidence was sufficient to support the verdict.

¶9 As to the prosecutor's comments, we do not agree with Smith that they appealed to the sympathy of the jury, diverted the jury from deciding the case based upon the evidence, offered the prosecutor's personal opinion as to the credibility of a witness, or misstated the evidence or the law. The comments about the conduct in the video being degrading were one fair view of the evidence, and the nature of Smith's conduct in involving her daughter in the incident was relevant as a basis from which to infer Smith's intent. The suggestion that Smith's daughter denied being humiliated only because she loved her mother merely highlighted standard impeachment evidence. And, as we have just explained in the preceding paragraph, the jury *was* entitled to interpret for itself what it saw and heard on the video, rather than accepting the testimony of Smith, Smith's daughter, and Smith's boyfriend that the whole thing was only a joke.

By the Court.—Judgment and order affirmed.

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

