STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0560

State of Minnesota,
Respondent,

vs.

Nicholas Lee Hill,
Appellant.

Filed July 16, 2024
Reversed
Johnson, Judge
Dissenting, Reyes, Judge

Hennepin County District Court
File No. 27-CR-20-11630

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Reyes, Judge.

SYLLABUS

If the state introduces a defendant's confession into evidence at trial, Minnesota Statutes section 634.03 (2018) requires the state to corroborate the confession by presenting evidence independent of the confession that reasonably tends to prove that the specific crime charged in the complaint actually occurred. To satisfy that requirement, the state's independent evidence must corroborate the elements of the crime that constitute the *corpus*

delicti of the crime. If the defendant is charged with an attempt crime, the *corpus delicti* of the crime consists of two components: first, an intent to commit an underlying crime and, second, a substantial step toward the commission of the underlying crime.

OPINION

JOHNSON, Judge

Nicholas Lee Hill attacked a woman by pushing her to the floor, leaning over her, and choking her. When he was interrogated by police officers, he said that he "thought about raping" the woman but "didn't follow through." The state charged Hill with attempted first-degree criminal sexual conduct. At trial, the woman testified that Hill did not touch any intimate parts of her body, did not try to undress her, did not undress himself, and did not make any comments of a sexual nature. The district court found Hill guilty. We conclude that the state did not present any evidence independent of Hill's confession that reasonably tends to prove that the crime of attempted first-degree criminal sexual conduct actually occurred, as required by Minnesota Statutes section 634.03, because the state did not present any evidence—other than Hill's confession—of an intent to engage in non-consensual sexual conduct. Therefore, we reverse the conviction.

FACTS

At approximately noon on May 11, 2020, Hill went to a subsidized senior-living apartment building in Minneapolis. He had been to the apartment building on three or four prior occasions and had requested a housing application each time. The building's service coordinator, M.K., opened the secured front door to allow other persons to enter to deliver meals for residents. While the door was open, Hill entered the building, approached M.K.

in the lobby, and requested another application. The building's housing manager, C.L., intervened by telling M.K. that she would respond to Hill's request.

C.L. told Hill to wait in the lobby while she went to get an application. Less than a minute later, C.L. returned and saw Hill walking into the interior of the building. C.L. told Hill to come back to the lobby and gave him an application to complete. C.L. later returned to give Hill additional information. Hill asked to see one of the apartments, and C.L. agreed to show him one.

While C.L. was showing Hill an apartment, Hill pushed her into a large closet, causing her to fall to the floor. Hill leaned over C.L., put his hands around her neck, and began choking her. C.L. screamed and pounded on the closet walls. M.K. heard C.L.'s screams from the office, called 911, and kicked the locked apartment door in an attempt to open it. C.L. scratched Hill's face and told him, "You need to stop." Hill's face "went blank," and he stopped choking her. Hill stood up and allowed C.L. to stand up. Hill removed a knife from his clothing and handed it to C.L. C.L. told M.K. to step away from the door so that Hill could leave. Hill walked out of the apartment, repeatedly saying, "I'm sorry." He then left the building.

The next day, police officers arrested Hill and interrogated him. Hill told the officers that "for some reason my dick got really hard." Hill said that he "thought about raping . . . whoever the woman was that was in there" but that he "didn't follow through." Hill said, "I thought I was supposed to do it, but the way she was acting didn't seem correct, so I stopped and walked out."

The state charged Hill with attempted first-degree criminal sexual conduct while armed with a dangerous weapon and attempted first-degree criminal sexual conduct while using force or coercion to cause personal injury. *See* Minn. Stat. § 609.17, subd. 1 (2018); Minn. Stat. § 609.342, subd. 1(d), 1(e)(i) (Supp. 2019).

The case was tried to the district court on four days in September 2022. Hill asserted the defenses of not guilty and not guilty by reason of mental illness. C.L. testified at trial to the events described above. On cross-examination, she testified that, during the assault, Hill did not touch any "intimate parts" of her body, did not try to undress her, did not undress himself, and did not make any comments of a sexual nature.

In a written order filed after trial, the district court found Hill guilty of the second charged offense—attempted first-degree criminal sexual conduct while using force or coercion to cause personal injury—but not guilty of the first charged offense. The district court relied on Hill's post-arrest confession to support its finding that Hill intended to engage in sexual penetration and took a substantial step toward commission of the crime of first-degree criminal sexual conduct. In the same order, the district court found that Hill did not prove his defense of not guilty by reason of mental illness. The district court sentenced Hill to 180 months of imprisonment.

Hill appeals. With the assistance of appellate counsel, he makes three arguments for reversal: (1) the state did not present evidence independent of his confession that reasonably tends to prove that the charged offense actually occurred; (2) the district court erred by not bifurcating the trial and separately considering whether he had proved his mental-illness defense and by relying on facts not introduced into evidence at trial; and

(3) the district court erred by denying his motion to suppress his confession by considering evidence that was not admitted for purposes of his suppression motion. In a *pro se* supplemental brief, Hill makes 14 additional arguments. In light of our resolution of the first argument presented by appellate counsel, we need not consider the other arguments.

ISSUE

Did the state present evidence independent of Hill's confession that reasonably tends to prove that the specific crime charged in the complaint—attempted first-degree criminal sexual conduct—actually occurred, as required by Minnesota Statutes section 634.03?

ANALYSIS

Hill's first argument is based on a statute that provides, in relevant part, "A confession of the defendant shall not be sufficient to warrant conviction without evidence that the offense charged has been committed . . . ." Minn. Stat. § 634.03 (2018). This statute, which has remained "largely unchanged" since its enactment by the territorial legislature in 1851, codifies the common-law *corpus delicti* rule. *State v. Holl*, 966 N.W.2d 803, 807, 809 (Minn. 2021).

The term *corpus delicti* is Latin for "the body of the crime." *Id.* at 809. The supreme court has summarized the common-law *corpus delicti* rule by stating that it "generally requires the State to 'introduce evidence independent of an extrajudicial confession to prove that the confessed crime actually occurred.'" *Id.* at 809 (quoting *Allen v. Commonwealth*, 752 S.E.2d 856, 859 (Va. 2014)). The supreme court has interpreted "the plain language" of section 634.03 to "require[] the State to present evidence independent

of a confession that reasonably tends to prove that the specific crime charged in the complaint actually occurred in order to sustain the defendant's conviction." *Id.* at 814.[1]

In this case, the specific crime with which Hill was charged and of which he was convicted is an attempt crime. An attempt crime is "an inchoate crime that must be connected to an uncompleted substantive crime that was attempted." *State v. Noggle*, 881 N.W.2d 545, 549 (Minn. 2016). In this case, the underlying uncompleted substantive crime is first-degree criminal sexual conduct using force or coercion causing personal injury. The elements of that crime are "(1) the intentional act of sexual penetration, (2) without the consent of the complainant, (3) causing personal injury to the complainant, and (4) through the use of force or coercion." *State v. Epps*, 949 N.W.2d 474, 482 (Minn. App. 2020), *aff'd*, 964 N.W.2d 419 (Minn. 2021).

More importantly for purposes of this appeal, a person is guilty of an attempt to commit a crime if the person, "with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1. "The essential elements of the crime of attempt are: (1) an intent to commit a crime, and (2) a substantial step taken toward the crime's commission." *State v. Olkon*, 299 N.W.2d 89, 104 (Minn. 1980). Thus, to establish Hill's guilt at trial of

[1]The supreme court acknowledged in *Holl* that some of its prior opinions had implicitly allowed the state to corroborate a defendant's confession by introducing evidence that tends to show the trustworthiness of the confession. 966 N.W.2d at 810-11. But the *Holl* court clarified that the trustworthiness concept is "absent from the plain language of" section 634.03 and that "[t]o incorporate a trustworthiness standard into the statutory language of Minn. Stat. § 634.03 would require us to add words into the statute that do not exist." *Id.* at 811-12.

attempted first-degree criminal sexual conduct using force or coercion causing personal injury, the state was required to prove two things: first, that Hill intended to commit the underlying crime of first-degree criminal sexual conduct using force or coercion causing personal injury to C.L. and, second, that he took a substantial step toward the commission of that crime. *See Tichich v. State*, 4 N.W.3d 114, 123 (Minn. 2024).[2]

Hill argues that the state did not present any evidence, other than his confession, to prove that the "specific crime" of attempted first-degree criminal sexual conduct actually occurred. Hill contends that the state did not introduce evidence independent of his confession that reasonably tends to prove that he intended to engage in non-consensual sexual conduct toward C.L.[3]

In response, the state initially argues that, to comply with section 634.03, it need not present evidence independent of Hill's confession with respect to every element of the

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[2]The dissenting opinion conflates the elements of attempt with the elements of criminal sexual conduct. *See infra* D5. An attempt crime is separate from the underlying crime that was attempted but not completed, and "a defendant's conviction solely for an attempt . . . is not a 'violation' of the statute defining the offense attempted." *Noggle*, 881 N.W.2d at 549.

[3]The dissenting opinion refers to the district court's denial of Hill's pre-trial motion to dismiss and implies that the district court made a post-trial ruling concerning section 634.03. *See infra* D1, D3-D4. To be clear, Hill seeks reversal only on the ground that the state did not present evidence *at trial* that is independent of Hill's confession and reasonably tends to prove that the specific crime charged in the complaint actually occurred. Hill is *not* appealing from the district court's denial of his pre-trial motion to dismiss. Such an appeal would be foreclosed by *State v. Dixon*, 981 N.W.2d 387 (Minn. 2022), in which the supreme court held that, notwithstanding *Holl*, "a finding of probable cause can be based on an uncorroborated confession of a defendant, which would be insufficient to sustain a conviction at trial without evidence independent of the confession that reasonably tends to prove that the specific crime charged in the complaint actually occurred." *Id.* at 394. Hill did not argue in his post-trial motion that the state did not corroborate his confession.

charged crime. The state also argues that it complied with section 634.03 by presenting evidence independent of Hill's confession that reasonably tends to prove that the charged crime actually occurred.

A.

We first address the state's argument that, to comply with section 634.03, it need not corroborate Hill's confession with respect to every element of the offense. That argument is based on a sentence in the following excerpt from the *Holl* opinion, which we have highlighted with italics:

> We now hold that the plain language of Minn. Stat. § 634.03 requires the State to present evidence independent of a confession that reasonably tends to prove that the specific crime charged in the complaint actually occurred in order to sustain the defendant's conviction. *Notably, Minn. Stat. § 634.03 does not require that each element of the offense charged be individually corroborated.* And circumstantial evidence can still be construed as sufficient independent evidence for corroboration.

966 N.W.2d at 814 (emphasis added) (quotation and citations omitted).

The *Holl* opinion does not elaborate on the italicized sentence by describing which elements of a charged offense must be corroborated or which elements need not be corroborated. Prior supreme court opinions, however, demonstrate that the state must corroborate the elements of a crime that constitute the *corpus delicti* of the crime.

The concept is well explained in a respected treatise that the supreme court has cited in discussing the *corpus delicti* rule and section 634.03:

> To establish guilt in a criminal case, the prosecution must ordinarily show that (a) the injury or harm constituting the crime occurred; (b) the injury or harm was caused in a criminal

> manner; and (c) the defendant was the person who inflicted the injury or harm.[4] Wigmore maintains that the "orthodox" and "more natural meaning" of corpus delicti includes only the first of these—"the fact of the specific loss or injury sustained"—and does not include proof that the injury was occasioned by anyone's criminal agency. Some courts have agreed.
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> Most courts, however, define corpus delicti as involving both (a) and (b). Under this definition, the corroborating evidence must tend to show that the harm or injury existed and was the result of criminal activity. The prosecution need not, however, present independent evidence that the defendant was the guilty party.

1 Charles T. McCormick, *McCormick on Evidence* § 146, at 194 (Robert P. Mosteller ed., 8th ed. Supp. 2022) (citations omitted); *see also Holl*, 966 N.W.2d at 807 n.6, 810 (citing 1 *McCormick on Evidence* § 145 (Robert P. Mosteller ed., 8th ed. 2020)); *State v. Lalli*, 338 N.W.2d 419, 420 (Minn. 1983) (citing *McCormick on Evidence* § 158 (2d ed. 1972)).

The supreme court's prior opinions reflect the latter view described by *McCormick*, that the *corpus delicti* of a crime generally consists of two components: first, a particular injury or harm that the criminal law seeks to prevent or punish and, second, the criminal nature of the cause of the injury or harm. For example, in *State v. Laliyer*, 4 Minn. 368, 4 Gil. 277 (1860), in which the appellant was convicted of murder, the supreme court stated that the *corpus delicti* statute required evidence tending to prove that "the particular

[4]Professor Wigmore used somewhat different language by describing the first concept as "the *occurrence* of the specific kind of injury or loss (as, in homicide, a person deceased; in arson, a house burnt; in larceny, property missing)," and the second as "somebody's criminality (in contrast, e.g., to accident) as the source of the loss." 7 John Henry Wigmore, *Evidence* § 2072, at 524 (Chadbourn ed., 1978). Similarly, Judge Learned Hand described the first concept as "the injury against whose occurrence the law is directed." *Daeche v. United States*, 250 F. 566, 571 (2d Cir. 1918).

murder, or other crime has been committed by some one," which, in that case, required that "evidence be produced, outside of the Defendant's confessions, sufficient to induce belief, not only that [the victim] is dead, but that her death was caused by the criminal agency of another." *Id.* at 377, 4 Gil. at 284-85. Similarly, in *State v. Grear*, 13 N.W. 140 (Minn. 1882), in which the appellant was convicted of assault, the supreme court stated, "Evidence that the offence charged has been committed by *some* person is all that is required" by the *corpus delicti* statute. *Id.* at 140. Likewise, in *State v. Plagman*, 121 N.W.2d 621 (Minn. 1963), in which the appellant was convicted of arson, the supreme court stated, "That there was a fire willfully set by someone is the corpus delicti of the crime charged." *Id.* at 623.

In light of this caselaw, we interpret *Holl* to require the state to present evidence independent of the defendant's confession that reasonably tends to prove those elements of the specific crime charged in the complaint that constitute the *corpus delicti* of the crime.

B.

As previously stated, the specific crime of which Hill was convicted is an attempt crime. Some courts have recognized that the *corpus delicti* rule does not apply in the usual way to attempt crimes because an attempt typically does not result in a tangible injury or harm. *See State v. Bishop*, 431 S.W.3d 22, 51 (Tenn. 2014); *State v. Chatelain*, 220 P.3d 41, 45 (Or. 2009); *State v. Mauchley*, 67 P.3d 477, 484-85 & n.4 (Utah 2003); *State v. Parker*, 337 S.E.2d 487, 493 (N.C. 1985). The *McCormick* treatise suggests that the *corpus delicti* of an inchoate crime may be defined by "the gravamen of the offense." *McCormick on Evidence*, *supra*, § 146, at 195. The word "gravamen" is understood to mean "the point of a complaint or grievance" or "the material part" of a criminal charge. *See* Bryan A.

Garner, *Garner's Dictionary of Legal Usage* 396 (3d ed. 2011). The *corpus delicti* of an attempt crime must encompass both elements—an intent to commit an underlying crime and a substantial step toward the commission of the underlying crime—because both are material and essential to the existence of an attempt crime. There can be no attempt crime if there is only an intent to commit a crime but no act in furtherance of that intent. *See, e.g.*, *State v. McGrath*, 574 N.W.2d 99, 101 (Minn. App. 1998) ("no crime can be committed by bad thoughts alone") (quotation omitted), *rev. denied* (Minn. Apr. 14, 1998). And there can be no attempt crime if there is only an act, without any intent to commit a crime. *See, e.g.*, *State v. Zupetz*, 322 N.W.2d 730, 734 (Minn. 1982).

In many situations, independent evidence of the requisite intent and the requisite substantial step would not only establish the *corpus delicti* of an attempt crime but also reveal the identity of the person who committed or allegedly committed the crime: the defendant. One court has recognized that, in some situations, the state "will be unable to produce evidence showing that the charged crime was committed by *someone* unless it also produces evidence showing that the charged crime was committed *by the defendant*." *State v. Flowers*, 991 P.2d 1206, 1208 (Wash. App. 2000) (applying *corpus delicti* rule to offense of attempt to elude police officer). Similarly, the Minnesota Supreme Court has acknowledged that the evidence that proves the *corpus delicti* of an intangible crime might identify the defendant. In *In re Welfare of M.D.S.*, 345 N.W.2d 723 (Minn. 1984), the appellant was convicted of an aiding-and-abetting crime. *Id.* at 725. She argued on appeal that the state did not present sufficient independent evidence to corroborate her confession. *Id.* at 735. The supreme court resolved the appeal by citing a federal aiding-and-abetting

case and summarizing it by stating, "Because there was no tangible injury which could be isolated as the *corpus delicti* of the crime, the accused had to be identified in order to show a crime had been committed." *Id.* at 735 (citing *Smoot v. United States*, 312 F.2d 881 (D.C. Cir. 1962)).[5]

In light of this caselaw, we interpret section 634.03 and *Holl* to require that, if the specific crime charged in the complaint is an attempt crime, the state must present evidence independent of the confession that reasonably tends to prove, first, an intent to commit an underlying crime and, second, a substantial step toward the commission of the underlying crime. In the circumstances of this case, the state's independent evidence relevant to the two elements of attempt necessarily refers to Hill. Accordingly, to corroborate Hill's confession, the state was required to present independent evidence that reasonably tends to prove, first, that he intended to commit the underlying crime of attempted first-degree criminal sexual conduct by engaging in non-consensual sexual conduct toward C.L. and, second, that he took a substantial step toward the commission of that underlying crime.[6]

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[5]We rely on *M.D.S.* only for the principle that, if a crime does not give rise to a tangible injury or harm, the *corpus delicti* of the crime may implicate the defendant's identity. We do not rely on that part of *M.D.S.* in which the supreme court reasoned that the appellant's confession could be corroborated with evidence that the confession is trustworthy. 345 N.W.2d at 735-36. The supreme court made clear in *Holl* that the trustworthiness standard does not apply. 966 N.W.2d at 811-12.

[6]The dissenting opinion appears to reason that the state corroborated Hill's confession by introducing independent evidence that reasonably tends to prove only that Hill took a substantial step toward the commission of the underlying crime. *See infra* D1, D6-D7. But the *corpus delicti* of an attempt crime has two components, so the state does not satisfy its obligation under section 634.03 unless it presents independent evidence that reasonably tends to prove both the first component and the second component.

C.

Before determining whether the state has satisfied its obligation under section 634.03, we will identify and describe the applicable evidentiary standard.

First, the nature of the corroborating evidence necessary for purposes of section 634.03 is distinct from that which is necessary for purposes of section 634.04, which provides, "A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense . . . ." Minn. Stat. § 634.04 (2022).[7] The supreme court has thoroughly explained the differences between section 634.03 and section 634.04. *See Holl*, 966 N.W.2d at 816 n.14; *State v. Azzone*, 135 N.W.2d 488, 493 (Minn. 1965).

Second, the state may corroborate a defendant's confession with circumstantial evidence. This is clear from *Holl*, which stated, in connection with the "reasonably tends to prove" standard, that "circumstantial evidence can still be construed as sufficient independent evidence for corroboration." 966 N.W.2d at 814.

Third, the quantum of independent evidence necessary to corroborate a defendant's confession is less than what is necessary to prove a defendant's guilt. In stating the "reasonably tends to prove" standard, the *Holl* opinion cites *State v. Nordstrom*, 178 N.W.

[7]In applying section 634.04, the supreme court has said that "corroborating evidence need only be sufficient to restore confidence in the truthfulness of the accomplice's testimony." *State v. Gilleylen*, 993 N.W.2d 266, 281 (Minn. 2023) (quotation omitted). The supreme court also has said, in applying section 634.04, "Corroborative evidence need not, standing alone, be sufficient to support a conviction, but it must affirm the truth of the accomplice's testimony and point to the guilt of the defendant in some substantial degree." *Id.* (quotation omitted).

164 (Minn. 1920). *Holl*, 966 N.W.2d at 814. In *Nordstrom*, the supreme court stated that "it is not considered necessary that the evidence independent of the confession should establish the corpus delicti beyond a reasonable doubt." 178 N.W. at 165.

The meaning of the phrase, "evidence independent of a confession that reasonably tends to prove that the specific crime charged in the complaint actually occurred," *see Holl*, 966 N.W.2d at 814, is illustrated by the supreme court's application of that standard to the state's independent evidence in *Holl*. The appellant in that case was convicted of multiple counts of criminal sexual conduct based on three alleged incidents involving his minor stepdaughter. *Id.* at 805-06. The appellant had confessed to all three incidents, but the victim testified about only two of the incidents. *Id.* at 806-07. On appeal, the appellant argued that "the evidence was insufficient to support his conviction on count I because the State failed to present independent evidence to corroborate his confession to" the incident about which the victim did not testify, in which the appellant, according to his confession, forced the victim to touch his penis with her hand while they were scouting for deer in the woods. *Id.* at 807.

The state's primary argument in *Holl* was that the appellant's confession was corroborated by the victim's testimony that the appellant had repeatedly sexually assaulted her. *Id.* at 815. The supreme court rejected that argument, stating that it was "not persuaded that [the victim's] general testimony about numerous sexual assaults is sufficient to corroborate Holl's confession to the deer-scouting incident" because the victim "vividly described numerous sexual assaults" but never "testif[ied] to anything resembling the

specific and graphic facts Holl described when he confessed to the deer-scouting incident." *Id.*

The state's secondary argument was that the appellant's confession was corroborated by the victim's testimony "about sexual abuse during duck season . . . because both situations involve hunting, and it is possible that the victim simply confused the details." *Id.* at 816. The supreme court rejected that argument as well, noting that the victim specifically testified that, during duck season, the appellant had used his fingers to penetrate her vagina while they were sitting in a truck. *Id.* The supreme court reasoned that "Holl's confession and [the victim's] testimony differ in three major ways: the type of hunting, the specific location of the sexual assault, and the type of sexual assault"; that it was "unable to reconcile these key factual differences"; and that, as a result, the victim's "testimony to an assault while duck hunting is insufficient to corroborate Holl's confession to the deer-scouting incident." *Id.*

D.

We now consider whether the state has presented evidence independent of Hill's confession that reasonably tends to prove that he intended to commit the crime of first-degree criminal sexual conduct by engaging in non-consensual sexual conduct toward C.L. We apply a *de novo* standard of review. *See id.* at 814.

The state contends that it introduced independent evidence that Hill intended to commit a sexual assault. The state refers to evidence concerning the manner in which Hill entered the building, evidence that Hill isolated C.L. in an apartment, evidence that Hill pushed C.L. to the ground, and evidence that Hill choked C.L.

The evidence identified by the state was provided by C.L. She testified that Hill pushed her to the floor, leaned over her, put his hands around her neck, and choked her. C.L. described Hill's appearance while choking her as "very aggressive and angry, like a person would look that's trying to hurt another person." C.L. testified that Hill did not touch any "intimate parts" of her body, did not try to undress her, did not undress himself, and did not make any comments that were "sexual in nature."

C.L.'s testimony certainly would be sufficient to prove that Hill attempted to commit assault and, in fact, committed assault. *See State v. Fleck*, 810 N.W.2d 303, 308-10 (Minn. 2012). But *Holl* makes clear that the state's independent evidence must reasonably tend to prove that "*the specific crime charged in the complaint* actually occurred." 966 N.W.2d at 814 (emphasis added). The specific crime with which Hill was charged and of which he was convicted is attempted first-degree criminal sexual conduct. C.L.'s testimony does not describe any conduct by Hill, or any words spoken by him, that indicate an intent to engage in non-consensual sexual conduct.

We acknowledge that, in a case like this case, a person in C.L.'s position might fear a sexual assault or might perceive that a sexual assault was imminent. But that apparently was not so in this case. The prosecutor may have sought to elicit such evidence by asking C.L., "what were you thinking when the defendant was on top of you choking you in the closet?" But C.L. answered by stating, "That I needed to figure out a way to get out of the situation."

The independent evidence on which the state relies in this case is weaker than the independent evidence that was rejected in *Holl*. There, the victim testified that the

appellant had sexually assaulted her on multiple occasions, including one occasion that was somewhat similar to the deer-scouting incident, to which the appellant had confessed. 966 N.W.2d at 814-16. But the supreme court closely scrutinized the state's independent evidence and concluded that it did not reasonably tend to prove the allegations in the complaint concerning the deer-scouting incident. *Id.* As a result, the state had no independent evidence that the crime allegedly committed during the deer-scouting incident actually occurred. *Id.* In this case too, the state did not present any independent evidence affirmatively showing that Hill intended to engage in non-consensual sexual conduct toward C.L., which is necessary to establish the *corpus delicti* of the charged crime. The state asks this court to draw an inference that is too speculative in light of the independent evidence in the record.

The weakness of the state's independent evidence also is demonstrated by prior supreme court opinions affirming convictions of attempted criminal sexual conduct based on circumstantial evidence of an intent to engage in non-consensual sexual conduct. For example, in *State v. Wallace*, 558 N.W.2d 469 (Minn. 1997), the facts were similar to the facts of this case in that the appellant "lured [the victim] into his empty apartment, locked the door, directed her into his bedroom . . . , forced her onto a bed, held her down, threatened her with a knife to her neck, told her to shut up, [and] used bed sheets to bind her wrists and gag her." *Id.* at 473. But, importantly, the appellant "unbuckled and began to remove the belt on his pants," and the victim later testified that "she believed appellant was going to rape her." *Id.* Such evidence is absent in this case. Evidence of a sexual nature also was introduced in *State v. Welch*, 675 N.W.2d 615 (Minn. 2004), in which the

appellant made statements to the victim with a "discernable sexual overtone" and *Spreigl* evidence showed that the appellant had used similar means to commit sexual assaults on three prior occasions. *Id.* at 617, 619-20. Again, no such evidence was introduced in this case. We acknowledge that the supreme court applied a beyond-a-reasonable-doubt standard in *Wallace* and *Welch*, but the opinions nonetheless indicate the type of evidence that is necessary to establish the existence of an intent to engage in non-consensual sexual conduct.[8]

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[8]The dissenting opinion cites *State v. Johnson*, 67 N.W.2d 639 (Minn. 1954), in which the appellant was convicted of assault with intent to commit rape. *Id.* at 640. *See infra* D8. In that case, the appellant entered a woman's bedroom at 4:30 a.m., "jumped on her, grabbed her by the shoulders, put his arm across her throat, and held her tight," but eventually fled, without having engaged in sexual penetration, after the woman struggled and screamed. *Id.* at 640-41. On appeal, the appellant challenged the sufficiency of the evidence with respect to his intent to commit rape. *Id.* at 641. The supreme court affirmed based on evidence that, during the incident, the appellant "had removed his trousers and was naked except for his shirt," which was confirmed by physical evidence that he "forgot his trousers and left them in the bedroom with his car keys and billfold in the pockets." *Id.* Again, as in *Wallace* and *Welch*, there is no such evidence in this case.

The dissenting opinion also cites *State v. Wilkie*, 946 N.W.2d 348 (Minn. 2020), and *State v. Peterson*, 262 N.W.2d 706 (Minn. 1978), for the proposition that a defendant may commit the crime of attempted criminal sexual conduct even if the attempt was interrupted before sexual conduct occurred. *See infra* D7-D8. But in each of those cases, there was no dispute on appeal that the appellant intended to commit the underlying crime of criminal sexual conduct; in each case, the issue on appeal was whether the appellant took a substantial step toward the commission of the underlying crime. *Wilkie*, 946 N.W.2d at 351-54; *Peterson*, 262 N.W.2d at 707. If we were to conclude that Hill had the requisite intent to commit the underlying crime, we would conclude that he took a substantial step toward the commission of the underlying crime.

In addition, the dissenting opinion cites *State v. Herberg*, 324 N.W.2d 346 (Minn. 1982), for the proposition that "choking is often accompanied by sexual acts." *See infra* D8 n.4. The appellant in *Herberg* was charged with multiple offenses based on a series of abusive acts against a 14-year-old girl, including sexual penetration and choking, though not simultaneously. *Id.* at 347-48. The appellant pleaded guilty and raised only sentencing issues on appeal. *Id.* The *Herberg* opinion cannot reasonably be interpreted to say that choking, by itself, is sufficient evidence of attempted criminal sexual conduct if evidence

Thus, the state did not present evidence independent of Hill's confession that reasonably tends to prove that he intended to commit the underlying crime of first-degree criminal sexual conduct. In light of that conclusion, we need not consider whether the state presented independent evidence that reasonably tends to prove that Hill took a substantial step toward the commission of the underlying crime.

DECISION

The state did not corroborate Hill's confession by presenting evidence independent of his confession that reasonably tends to prove that the specific crime with which he was charged and of which he was convicted actually occurred, as required by Minnesota Statutes section 634.03.

Reversed.

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of a sexual intent is otherwise absent. Similarly, that proposition cannot reasonably be extracted from the nonprecedential opinion in *Wilkins v. State*, No. A22-0684, 2023 WL 19240 (Minn. App. Jan. 3, 2023), *rev. denied* (Minn. Mar. 28, 2023), in which the appellant choked his victim during penetration, pleaded guilty to first-degree criminal sexual conduct causing reasonable fear of imminent bodily harm, and raised only sentencing issues on appeal. *Id.* at *1-5. *See infra* D8 n.4.

REYES, Judge (dissenting)

In this case, the record independent of appellant's confession leads to the reasonable inference that he actively targeted a potential victim by repeatedly visiting her workplace, luring her into an enclosed area under false pretenses, and forcing her to the ground before assaulting and choking her. Because this evidence, at a minimum, "reasonably tends to prove" that appellant took a substantial step towards attempting first-degree criminal sexual conduct, I discern no error by the district court in denying appellant's pretrial motion to dismiss and determining that sufficient evidence supports his conviction. I therefore respectfully dissent.

Respondent State of Minnesota charged appellant Nicholas Lee Hill with attempted first-degree criminal sexual conduct while armed with a dangerous weapon (count I) and attempted first-degree criminal sexual conduct while using force or coercion to cause personal injury (count II). *See* Minn. Stat. § 609.17, subd. 1 (2018) (governing attempt crimes); *see also* Minn. Stat. § 609.342, subd. 1(d), 1(e)(i) (Supp. 2019). Prior to trial, appellant moved to dismiss the charges, arguing that the state failed to present evidence independent of his confession to meet the requirements of Minn. Stat. § 634.03 (2018), which codifies the common-law rule of corpus delicti.[1] The district court denied the motion.

[1] The corpus-delicti rule, which is Latin for "the body of the crime," appears to be based, in part, on a 1661 English decision called *Perry's Case*, in which John Perry confessed after interrogation to the murder of his master, William Harrison. *See State v. Holl*, 966 N.W.2d 803, 809 (Minn. 2021) (citations omitted). At trial, the Crown relied on his confession without any other evidence of the crime, and Harrison's body had not been found. *Id.* Perry was convicted and executed. *Id.* Years later, Harrison reappeared alive

The case proceeded to a court trial, at which multiple witnesses, including victim C.L. and eyewitness M.K., testified. Both identified appellant as the assailant. The state presented evidence that, on May 11, 2020, appellant entered a secured subsidized senior-living and persons-with-disabilities apartment building in Minneapolis when M.K., the building's service coordinator, had opened the door for another person. Appellant asked for a housing application, even though he had previously visited that building and asked for a housing application each time. C.L., the building's housing manager, told him to wait in the lobby. When she returned with an application, appellant asked to see an apartment, and C.L. agreed to show him one.

Once inside the apartment, appellant locked the door and pushed C.L. into a closet, where she fell to the ground and onto her back. Appellant knelt over C.L., put his hands around her neck, and began choking her. She screamed, pounded on the closet walls, and scratched appellant's face. M.K. heard the screams and pounding, called 911, and tried but failed to enter the apartment. C.L. told appellant, "You need to stop," which he did. Appellant stood up, allowed C.L. to stand up, and then handed her a knife he had in his clothing. He left the building, repeatedly stating, "I'm sorry." Minneapolis police officers who spoke to C.L. after the assault observed red marks on her neck, and she suffered a sore side, a sore throat, and a stiff neck from the assault.

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and said that he had been kidnapped and sold into slavery. This led to the corpus-delicti rule to prevent erroneous convictions based solely on a confession without some form of independent evidence. *Id.*

When asked by the prosecutor, "[W]hat were you thinking when the defendant was on top of you choking you in the closet?" C.L. answered, "That I needed to figure out a way to get out of the situation." On cross-examination, C.L. testified that appellant did not touch any intimate parts of her body, did not try to undress her, did not undress himself, and did not make any comments of a sexual nature during the assault.

The state also introduced evidence of appellant's post-arrest confession at which appellant told the officers that he went to the apartment building "thinking that there was something [he] was supposed to do there" and "for some reason [his] dick got really hard." Appellant admitted that before the crime he "thought about raping . . . whoever the woman was that was in there with [him]" and that he ultimately committed the assault "'[c]ause [he] was thinking about sex." Appellant stated that he "didn't follow through" because C.L. made a sound and acted differently from the other two or three people he had raped before. To him, "rape" meant "like aggressive sex." "I thought I was supposed to do it, but the way she was acting didn't seem correct, so I stopped and walked out."

Following trial, the district court issued a written order finding appellant not guilty of count I and guilty of count II and later sentenced him to 180 months in prison.

I. The state presented sufficient evidence independent of appellant's confession to meet the requirements of Minnesota Statutes section 634.03.

Appellant argues that the district court erred by determining that the state presented sufficient evidence independent of his confession "that reasonably tends to prove" that he attempted to commit first-degree criminal sexual conduct while using force or coercion to

cause personal injury under section 634.03.[2] I conclude that the district court correctly applied the statute.

Appellate courts review the application of section 634.03 de novo. *Holl*, 966 N.W.2d at 814. Under section 634.03, "[a] confession of the defendant shall not be sufficient to warrant conviction without evidence that the offense charged has been committed." Minn. Stat. § 634.03. The Minnesota Supreme Court has held that "the plain language of Minn. Stat. § 634.03 requires the [s]tate to present evidence independent of a confession that reasonably tends to prove that the specific crime charged in the complaint actually occurred in order to sustain the defendant's conviction." *Holl*, 966 N.W.2d at 814 (citations omitted). The supreme court further noted that the statute "does not require that each element of the offense charged be individually corroborated," and that "circumstantial evidence can still be construed as sufficient independent evidence for corroboration." *Id.* (citation and quotation omitted).

A. The evidence beyond appellant's confession "reasonably tends to prove" three of the four elements of attempted first-degree criminal sexual conduct, which meets the section 634.03 requirements.

In order to meet the section 634.03 requirements, the state did not have to prove the charge beyond a reasonable doubt. Rather, the state only needed "to present evidence independent of [appellant's] confession that *reasonably tends to prove* that the specific crime . . . actually occurred." *Id.* (Emphasis added.) The state only needs to show that

[2] Appellant's counsel raises two additional arguments and appellant raises 14 arguments in a supplemental brief. I agree with the majority that we need not address those issues because the first issue is dispositive.

someone committed the crime and does not even need to present evidence that *the defendant* committed the crime to satisfy section 634.03, even though identity is an essential element of a crime. 1 Charles T. McCormick, *McCormick on Evidence* § 146, at 194 (8th ed. Supp. 2022) (citations omitted); *see also Holl*, 966 N.W.2d at 808, n.6.

Moreover, the state does not need to corroborate every element of the charged crime. *Holl*, 966 N.W.2d at 814. Here, the specific crime is attempted first-degree criminal sexual conduct while using force or coercion to cause personal injury, which requires the state to prove that (1) appellant attempted to engage in sexual penetration of C.L.; (2) the attempted sexual penetration occurred without consent; (3) he used force or coercion; and (4) he caused personal injury to C.L. *State v. Epps*, 949 N.W.2d 474, 482 (Minn. App. 2020), *aff'd*, 964 N.W.2d 419 (Minn. 2021).

It is undisputed that appellant's conduct met three of the four elements of the crime because he did not have C.L.'s consent, used force, and caused personal injury to C.L. *See id.* Although appellant asserts that the first element has not been met, the supreme court has specifically stated that every element of the charged offense *need not* be corroborated to comply with section 634.03. *Holl*, 966 N.W.2d at 814. On that basis alone, appellant's claim fails.

B. The state presented sufficient evidence independent of appellant's confession that reasonably tends to show that he had the intent to engage in sexual penetration of C.L. and therefore attempted to commit first-degree criminal sexual conduct.

Appellant argues that the state failed to provide evidence independent of his confession showing that he had the requisite intent to be convicted of attempted first-degree

criminal sexual conduct because C.L. did not testify that he used sexual language or engaged in any overt sexual conduct during the assault.[3] But the charged crime is an attempt crime, and the state may prove intent with circumstantial evidence. *State v. Colgrove*, 996 N.W.2d 145, 152 (Minn. 2023). Even though the state was not required to corroborate every element of first-degree criminal sexual conduct to meet section 634.03's requirements, the state's circumstantial evidence nevertheless shows that appellant had the intent to engage in sexual penetration of C.L.

"Attempt" is an incomplete crime. *See State v. Noggle*, 881 N.W.2d 545, 549 (Minn. 2016). An attempt crime involves "an act which is a substantial step toward, and more than preparation for, the commission of the crime." *See* Minn. Stat. § 609.17, subd. 1; *see also State v. Wilkie*, 946 N.W.2d 348, 353 (Minn. 2020) (supreme court affirming conviction of attempted third-degree criminal sexual conduct when appellant took substantial step toward crime by arranging to meet decoy-victim and moved beyond preparation by walking up to victim's house and knocking on the door).

Here, evidence independent from appellant's confession clearly supports the inference that he took a substantial step beyond preparation toward the crime. The record shows that appellant had previously gone multiple times to the building where C.L. worked to ask for an application, indicating planning. *See State v. Ford*, 322 N.W.2d 611, 613

[3] Appellant asserts in his reply brief that "the basic nature of the charged offense of attempted first-degree criminal sexual conduct is a specific intent to engage in forcible sexual penetration." To the extent that he argues that this is the only element of criminal sexual conduct, his argument misstates the law. The charged crime has four elements. *Epps*, 949 N.W.2d at 482. Appellant's argument cites only the first element.

(Minn. 1982) (noting that defendant's "casing" of a potential crime scene constituted overt act in furtherance of conspiracy to commit aggravated robbery). He then returned on May 11 and asked C.L. to show him one of the apartments alone, locked the door behind them, pushed C.L. into a closet and caused her to fall to the ground and onto her back, knelt next to her, and choked her before she told him to stop. These actions go well beyond preparation and comprise a substantial step toward attempted first-degree criminal sexual conduct while using force or coercion to cause personal injury. *See* Minn. Stat. § 609.17, subd. 1; *Wilkie*, 946 N.W.2d at 353. In turn, this evidence, independent of appellant's confession, "reasonably tends to prove that the specific crime charged . . . actually occurred." *Holl*, 966 N.W.2d at 814.

The state also presented sufficient evidence to meet the first element regarding his intent to engage in sexual penetration of C.L. Intent is generally proved by circumstantial evidence. *Colgrove*, 996 N.W.2d at 152 (noting that "[i]ntent is an inference drawn by the [factfinder] from the totality of circumstances" (quotation omitted)). The supreme court has reiterated that "circumstantial evidence can still be construed as sufficient independent evidence for corroboration." *Holl*, 966 N.W.2d at 814. Further, the state only needed to provide evidence that "reasonably tends to prove" appellant's intent. *Id.* And, unlike in the cases relied on by appellant, the state only needed to provide evidence reasonably tending to prove that appellant *attempted* to engage in first-degree criminal sexual conduct, the first element of which is that he had the intent to engage in forcible sexual penetration of C.L. Caselaw is clear that a person can be found guilty *beyond a reasonable doubt* of attempted criminal sexual conduct even if the attempt is cut short and no sexual act

occurred. *See Wilkie*, 946 N.W.2d at 352-53 (appellant's attempted criminal sexual conduct stopped when police arrested him before he had any contact with decoy-victim); s*ee also State v. Peterson*, 262 N.W.2d 706, 707 (Minn. 1978) (appellant's attempted third-degree criminal sexual conduct stopped when police appeared before he could grab victim); *State v. Johnson*, 67 N.W.2d 639, 642 (Minn. 1954) (noting that in the context of sexual-assault crimes "an attempt begins with the initial attack" and need not involve a battery nor sexual penetration).[4] Appellant's lack of an overt sexual act therefore does not preclude a determination that the state's evidence reasonably tends to prove his guilt.

Here, as noted above, the state presented sufficient circumstantial evidence from C.L. and M.K.'s testimony, along with reasonable inferences from their testimony, that appellant had the specific intent to engage in forcible sexual penetration of C.L. *See State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) ("[C]ircumstantial evidence always requires an inferential step to prove a fact that is not required with direct evidence."). The fact that he was interrupted before he could complete the offense does not defeat a claim of an *attempt* to engage in criminal sexual conduct. *See Wilkie*, 946 N.W.2d at 352-53. Moreover, appellant's conduct does not need to "objectively reveal the nature of the

[4] Further, choking is often accompanied by sexual acts. *See State v. Herberg*, 324 N.W.2d 346, 347-48 (Minn. 1982) (noting that appellant choked victim during course of assault that was sexual in nature); *Wilkins v. State*, No. A22-0684, 2023 WL 19240, at *1 (Minn. App. Jan. 3, 2023) (noting that appellant choked victim during sexual assault), *rev. denied* (Minn. Mar. 28, 2023). *Wilkins* is nonprecedential and we cite it only for its persuasive value. Minn. R. Civ. App. P. 136.01, subd. 1(c).

intended crime" and does not need to "identify the nature of the uncompleted offense." *Id.*[5]

Lastly, appellant's reliance on *Holl* to show a lack of evidence independent of a confession is misguided. In *Holl*, the state relied solely on the defendant's confession to criminal sexual conduct that occurred during a deer-scouting incident. 966 N.W.2d at 806. However, the victim failed to provide *any* testimony regarding that deer-scouting incident. *Id.* at 806-07. The supreme court concluded that this lack of independent evidence was fatal to the conviction stemming from that incident. *Id.* at 817. Unlike in *Holl*, the victim C.L. and her colleague M.K. both provided testimony of appellant's actions independent of his confession.

In conclusion, it is undisputed that appellant's conduct satisfies three of the four elements of attempted first-degree criminal sexual conduct. This alone is sufficient to sustain his conviction under Minn. Stat. § 634.03. *Holl*, 966 N.W.2d at 814. Accepting appellant's argument that the state also needs to reasonably show the first element is

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[5] The majority reasons that the state needed to prove appellant's intent to commit both the underlying crime as well as the inchoate crime of attempt. This misstates the law. It is illogical to 'intend to attempt,' which is why Minnesota jury instructions only require the state to prove a defendant's intent with respect to the substantive crime. *See State v. Cruz-Ramirez*, 771 N.W.2d 497, 508 (Minn. 2009) (noting that jury instruction requiring proof that "the Defendant intended to commit the crime of *attempted* murder" erroneously stated Minnesota attempt law, but that mistake was not material because district court previously gave proper instruction defining attempt as "*an intent to commit the crime* and a substantial step toward commission of the crime" (emphasis added)); *see also* 9 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 46:3 (4th ed. 2012) ("The [jury] instructions should not say that it is an element of the attempted crime that the defendant intended to commit the *attempted* crime, but simply that he or she intended to commit the crime itself.").

contrary to binding supreme court caselaw stating that not every element needs to be corroborated. *Id.*

Moreover, even under appellant's novel rule requiring the state to corroborate appellant's intent as well, the circumstantial evidence independent of his confession shows that he intended to engage in criminal sexual conduct of C.L. Appellant did not have to overtly express his intentions during the assault because his conduct demonstrated that he was executing his plan to sexually assault C.L. He cased C.L.'s workplace by visiting it several times before the incident occurred. He asked C.L. to show him an apartment under false pretenses. Then, when he had her alone in the apartment, he forced her into a closet, locked the door behind him, pushed her flat on the ground, and began choking her. C.L. was also acutely aware of appellant's intentions. That is why she pounded on the walls, scratched him, and told him to stop, and why she later testified to thinking "That [she] needed to figure out a way to get out of the situation." Not only do these circumstances "reasonably tend[] to prove" appellant's guilt, but they point unerringly to the only conclusion that a woman in C.L.'s situation would reach: that appellant intended on engaging in criminal sexual conduct of C.L. I would therefore affirm appellant's conviction.