

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0606**

State of Minnesota,
Appellant,

vs.

Donald Mark Gray,
Respondent.

**Filed September 18, 2023
Reversed and remanded
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-21-12549

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

Mary F. Moriarty, Hennepin County Attorney, Minneapolis, Minnesota (for appellant)

David J. Risk, Halberg Criminal Defense, Bloomington, Minnesota (for respondent)

Considered and decided by Slieter, Presiding Judge; Smith, Tracy M., Judge; and
Frisch, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

The state appeals the district court's pretrial dismissal of two counts of second-degree criminal sexual conduct for lack of probable cause. Because we conclude that the amended complaint establishes probable cause, we reverse and remand.

FACTS

On July 6, 2021, appellant State of Minnesota charged respondent Donald Mark Gray with two counts of second-degree criminal sexual conduct based on an alleged incident of sexual abuse of his granddaughter that occurred in Edina. *See* Minn. Stat. § 609.343, subd. 1(a) (complainant under 13 and actor more than 36 months older), (g) (significant relationship and complainant under 16) (2014). In February 2022, the state amended the complaint to include two additional counts of second-degree criminal sexual conduct—counts III and IV—based on an alleged incident that occurred in the United Kingdom. *See id.*

The probable-cause section of the amended complaint contains the following allegations. In April 2021, Gray reported to Hennepin County Child Protection that he had sexually abused his granddaughter A.G.—once in 2015 on a family trip to the United Kingdom and once 6 to 12 months later in Minnesota. Gray reported that, during the second incident, which occurred while Gray was staying in A.G.’s family’s residence in Edina, Gray touched A.G.’s chest, “skin to skin.” In addition, A.G. disclosed to her parents and during a forensic interview that Gray touched her chest and her vagina, “skin to skin,” during a family trip to the U.K. in 2015. A.G. did not describe an incident in Edina. On May 12, 2021, Gray admitted both incidents to a police investigator. He told the investigator that the Edina incident occurred in fall 2015 while he was staying with his family.

Gray moved to suppress his May 12 statements to the investigator, moved to dismiss counts I and II for lack of probable cause, and moved to dismiss counts III and IV for lack

of jurisdiction. As relevant to this appeal, Gray argued that there was not probable cause for counts I and II because “the State has failed to establish the *corpus delicti* of the offenses by evidence independent of Mr. Gray’s confession,” which he argued was required by Minnesota Statutes section 634.03 (2022).¹

The district court granted Gray’s motion to dismiss counts I and II for lack of probable cause.² The district court concluded that, under Minnesota Statutes section 634.03, a confession “must be supported by other facts sufficient on their own to meet the probable cause standard.” The district court rejected the state’s argument that confessions can corroborate one another and determined that the state did not establish probable cause for counts I and II “[b]ecause the state failed to present evidence that could independently corroborate the Defendant’s confession.”

The state appealed. Gray moved to dismiss the appeal, arguing that the order was not appealable under Minnesota Rule of Criminal Procedure 28.04. *See* Minn. R. Crim. P. 28.04, subd. 1(1) (providing that “a pretrial order cannot be appealed if the court dismissed a complaint for lack of probable cause premised solely on a factual determination”). In a special-term order, this court determined that the probable-cause dismissal of counts I and II was based solely on a factual determination and thus was not appealable under rule 28.04. We dismissed the state’s appeal related to counts I and II.

¹ Because this statute has not been amended during these proceedings, we cite the most recent version of the statute.

² The district court also granted Gray’s motion to dismiss counts III and IV for lack of jurisdiction and declined to address Gray’s motion to suppress as moot. The state dismissed its appeal of the dismissal of counts III and IV and thus those counts are not at issue.

The state filed a petition for further review, which the supreme court granted. The supreme court held that the order was appealable because the probable-cause dismissal was based, in part, on the district court's interpretation of Minnesota Statutes section 634.03, which was a legal determination. *State v. Gray*, 987 N.W.2d 563 (Minn. 2023). The supreme court reversed and remanded for this court to consider the merits of the state's appeal under *State v. Dixon*, 981 N.W.2d 387 (Minn. 2022).

DECISION

The state appeals the portion of the district court's pretrial order dismissing counts I and II for lack of probable cause. In a state pretrial appeal, the state "must show clearly and unequivocally (1) that the district court's ruling was erroneous and (2) that the ruling will have a 'critical impact' on the State's ability to prosecute the case." *State v. Serbus*, 957 N.W.2d 84, 87 (Minn. 2021). The state has established critical impact here because the counts were dismissed. *See id.* Thus, the only issue is whether the district court erred by ruling that the complaint lacked probable cause.

"When a district court dismisses a criminal complaint for lack of probable cause based on a legal determination, [appellate courts] review that decision de novo." *Dixon*, 981 N.W.2d at 392. If "the defendant does not produce witnesses subject to cross-examination or offer any evidence directed at the credibility of the facts appearing in the record," the district court "should deny a motion to dismiss the charge for lack of probable cause if it is 'satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a [judgment] of acquittal if proved at trial.'" *Id.* at 392-93 (alteration in original) (quoting *State v. Florence*, 239 N.W.2d 892, 903

(Minn. 1976)). The district court properly denies a motion to acquit if “the state’s evidence, when viewed in the light most favorable to the state, [is] sufficient to sustain a conviction.” *State v. Slaughter*, 691 N.W.2d 70, 75 (Minn. 2005).

The state argues that Gray’s confessions are sufficient for probable cause under *State v. Dixon*, 981 N.W.2d 387 (Minn. 2022), and that the district court erred by requiring the state to provide other evidence under Minnesota Statutes section 634.03 to establish probable cause. In *Dixon*, the supreme court considered whether Minnesota Statutes section 634.03 applies to a probable-cause determination. 981 N.W.2d at 393-94. That statute provides that “[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. But, “under Minnesota law, ‘a finding of probable cause could be based on testimony which would not support a conviction.’” *Id.* at 393 (quoting *Florence*, 239 N.W.2d at 897). Thus, the *Dixon* court held that “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.

As an initial matter, we address Gray’s contention that the state forfeited its *Dixon* argument. Gray asserts that the state failed to argue “that an uncorroborated confession, alone, was sufficient to support probable cause” and therefore cannot rely on *Dixon* now. Generally, “[a] party may not ‘obtain review by raising the same general issue litigated below but under a different theory.’” *State v. McMurray*, 860 N.W.2d 686, 689 n.2 (Minn. 2015 (quoting *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988))). Gray is correct that the

state did not argue that section 634.03 does not apply at the probable-cause stage or that a single uncorroborated confession is sufficient for probable cause. But we are not convinced that forfeiture applies. The state argued in district court that the confessions identified in the amended complaint—Gray’s report to child protection and his May 12 statements to the investigator—establish probable cause, regardless of its other evidence. *Dixon* was decided after the supreme court heard oral argument in this case, and thus neither the parties nor the district court had the benefit of that case during the district court proceedings. Moreover, the supreme court explicitly directed this court to consider the merits of the state’s appeal in light of *Dixon*. We therefore do not consider the state’s *Dixon* argument barred.

We turn to whether the district court erred by dismissing counts I and II for lack of probable cause. Specifically, we consider whether there is sufficient evidence that Gray had “sexual contact” with A.G. and that the sexual contact occurred in Hennepin County.³ “Sexual contact” includes “intentional touching” of the complainant’s “primary genital area, groin, inner thigh, buttocks, or breast.” Minn. Stat. § 609.341, subds. 5, 11 (2014).

The amended complaint alleges that (1) in his report to child protection, Gray stated that he touched A.G.’s chest, “skin to skin”, while at A.G.’s home in Edina and (2) in his statement to the investigator, Gray “admitted to both instances of sexual abuse” and said the “offense in Edina occurred in the ‘fall of 2015’ while he was staying with his family.”

³ It is undisputed that other elements of counts I and II—that A.G. was younger than 13 and Gray was more than 36 months older and that Gray, as A.G.’s grandfather, had a significant relationship with her—were satisfied. *See* Minn. Stat. § 609.343, subd. 1(a), (g).

Both Gray's report to child protection and his statements to the investigator are direct evidence of guilt, *see Dixon*, 981 N.W.2d at 394, establishing that he engaged in "sexual contact" with A.G. in Hennepin County. Under *Dixon*, the state was not required to provide additional evidence to survive Gray's motion to dismiss, even if Gray's confessions could not sustain a conviction under section 634.03. As a result, the amended complaint establishes probable cause,⁴ and the district court erred when it granted Gray's motion to dismiss counts I and II.⁵

Reversed and remanded.

⁴ The parties dispute the scope of the record on appeal. Because the amended complaint is part of the record, and we conclude that the amended complaint alone establishes probable cause, we do not address those arguments.

⁵ Because we conclude that the district court erred by dismissing counts I and II under *Dixon*, we do not reach the state's alternative argument that one confession can be evidence independent of another confession to sustain a conviction under Minnesota Statutes section 634.03.