IN THE
TENTH COURT OF APPEALS

No. 10-18-00333-CR

GUY DON MINZE,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 413th District Court
Johnson County, Texas
Trial Court No. DC-F201700234

MEMORANDUM OPINION

Guy Don Minze was charged with two counts of Criminal Solicitation of a Minor (Counts One and Two), one count of Bail Jumping (Count Three), and one count of Possession of a Controlled Substance (Count Four). After a jury trial, Minze was convicted of each offense and sentenced to life in prison in Counts One and Two, 25 years in prison in Count Three, and 10 years in prison in Count Four. Because the trial court had subject matter jurisdiction and did not err in denying Minze's motion to

quash, and because Minze's sufficiency of the evidence issues were not adequately briefed, the trial court's judgments are affirmed.

BACKGROUND

In a sting operation, Minze solicited, by telephone, two undercover police officers for oral sex. When he arrived for the arranged meeting at a local hotel, he was arrested. During the arrest, Minze's cap fell off and methamphetamine fell out of the cap. Minze made bail, and although he appeared in court once, he failed to appear at a subsequent court hearing and was located two months later on the other side of the State.

SUBJECT MATTER JURISDICTION

In his first issue, Minze contends the trial court did not have subject matter jurisdiction of Counts One and Two of the indictment, rendering his conviction on those two counts void. To support this contention, Minze argues that what was charged in the indictment under Counts One and Two was not an offense appearing in the Texas Penal Code, and thus, he cannot be legally convicted. Although not clear, it appears Minze contends, as the title of the two counts indicate, he was charged with "Indecency with a Child by Sexual Contact-Criminal Solicitation of a Minor" and that specifically-titled offense does not appear in the Texas Penal Code.

The question of the subject matter jurisdiction of the convicting court may be raised at any time. *Gallagher v. State*, 690 S.W.2d 587, 588 (Tex. Crim. App. 1985).

Moreover, a defendant may challenge for the first time on appeal an instrument that fails to charge the commission of an offense or does not charge a particular person with the crime. *See Teal v. State*, 230 S.W.3d 172, 178-180 (Tex. Crim. App. 2007); *see also Kuol v. State*, 482 S.W.3d 623, 627 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).

For a trial court to have jurisdiction, there must be a charging instrument. *See Martin v. State*, 346 S.W.3d 229, 230-31 (Tex. App.—Houston [14th Dist.] 2011, no pet.). A charging instrument must allege that (1) a person (2) committed an offense. *See Teal*, 230 S.W.3d at 179; *see also* TEX. CONST. art. V, § 12(b) (defining "indictment" and "information" as written instruments presented to the court "charging a person with the commission of an offense"). The proper test to determine if a charging instrument alleges "an offense" is whether the allegations in it are clear enough that one can identify the offense alleged. *Teal*, 230 S.W.3d at 180 (Tex. Crim. App. 2007). In other words, "Can the trial court (and appellate courts who give deference to the trial court's assessment) and the defendant identify what penal code provision is alleged and is that penal code provision one that vests jurisdiction in the trial court?" *Id*. If so, then the indictment is sufficient to confer subject matter jurisdiction. *Id*. We look to the charging instrument as a whole, not just to its specific formal requisites. *Kirkpatrick v. State*, 279 S.W.3d 324, 328 (Tex. Crim. App. 2009).

A person commits the offense of criminal solicitation of a minor if the person, with intent to commit an enumerated offense, requests, commands, or attempts to

induce a minor to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute an enumerated offense. *See* TEX. PENAL CODE § 15.031(a), (b). The crime Minze was accused of soliciting was indecency with a child by contact. TEX. PENAL CODE § 21.11(a)(1).

In this case, the body of the indictment alleged, in Count One, that on or about September 2, 2015, Minze:

> … did then and there: With the intent that the offense of indecency with a child by sexual contact be committed, request, command, or attempt to induce a minor or an individual whom the Defendant believed to be younger than 17 years of age, namely, Cora Gray, to engage in specific conduct, to wit: the touching of the anus, breast, or any part of the genitals of a child younger than 17 years of age with the intent to arouse or gratify the sexual desire of any person, that under the circumstances surrounding the conduct of the said Defendant as the said Defendant believed them to be would constitute the offense of indecency with a child by sexual contact.

The wording of the allegation in Count Two was exactly the same as in Count One with the exception of the complainant being Kimberly Bustos.

When reviewing the indictment as a whole and comparing it to the Penal Code provision, it is clear to this Court that Minze was charged with the offense of criminal solicitation of a minor, and the crime he was accused of soliciting was indecency with a child by contact. *See* TEX. PENAL CODE §§ 15.031(b); 21.11(a)(1). Thus, in deference to the trial court, we determine the allegations in Counts One and Two are clear enough that both the trial court and Minze could identify the offenses alleged and that penal code provision, section 15.031(a), (b), is one that vests jurisdiction in the trial court.

Consequently, the trial court acquired subject matter jurisdiction of Counts One and Two.

Minze's first issue is overruled.

MOTION TO QUASH

In his fourth issue, Minze complains that the trial court erred in denying Minze's pre-trial Motion to Quash. In that motion, Minze complained that Counts One and Two of the indictment: 1) charged two different offenses which deprived him of the certainty of what offense to defend against; 2) failed to charge an offense in ordinary and concise language; 3) contained a defect in form because the counts were vague as to specific intent and thus failed to clearly state an offense; and 4) failed to confer jurisdiction by failing to charge the commission of an offense due to the omission of an alleged conduct element. On appeal, however, Minze complains that two distinct offenses were charged in the one paragraph in each of Counts One and Two, which is prohibited by law, and that Counts One and Two failed to provide notice of the alleged element of conduct. These are not the same complaints raised by Minze in his motion to quash.[1]

[1] Although the notice argument on appeal may appear, at first blush, to be the same as Minze's fourth argument in his motion to quash, notice and the failure to allege an element of the offense are not the same. *See Smith v. State*, 309 S.W.3d 10, 16, 18 (Tex. Crim. App. 2010) (court of appeals mischaracterized defendant's complaint as a "notice problem" when defendant complained the charging instrument failed to describe an element of the offense).

Accordingly, Minze's arguments on appeal do not comport with the arguments made at trial in his Motion to Quash, and this issue is not preserved for our review. *See Lovill v. State*, 319 S.W.3d 687, 691-92 (Tex. Crim. App. 2009); *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009).

Minze's fourth issue is overruled.

SUFFICIENCY OF THE EVIDENCE

In three issues, Minze complains the evidence is insufficient to support his convictions for Criminal Solicitation of a Child (Counts One and Two, issues two and three) and Possession of a Controlled Substance (Count Four, issue five).

Standard of Review

The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

> When addressing a challenge to the sufficiency of the evidence, we consider whether, after viewing all of the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017). This standard requires the appellate court to defer "to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. We may not re-weigh the evidence or substitute our judgment for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The court conducting a sufficiency review must not engage in a "divide and conquer" strategy but must consider the cumulative force of all the evidence. *Villa*, 514 S.W.3d at 232. Although juries may not speculate about the meaning of facts or evidence, juries are permitted to draw any reasonable inferences from the facts so long as each inference is

> supported by the evidence presented at trial. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016) (citing *Jackson*, 443 U.S. at 319); *see also Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). We presume that the factfinder resolved any conflicting inferences from the evidence in favor of the verdict, and we defer to that resolution. *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). This is because the jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). Direct evidence and circumstantial evidence are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015); *Hooper*, 214 S.W.3d at 13.
>
> We measure whether the evidence presented at trial was sufficient to support a conviction by comparing it to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct jury charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.*; *see also Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013). The "law as authorized by the indictment" includes the statutory elements of the offense and those elements as modified by the indictment. *Daugherty*, 387 S.W.3d at 665.

Zuniga v. State, 551 S.W.3d 729, 732-33 (Tex. Crim. App. 2018).

Criminal Solicitation of a Child

In his second and third issues, Minze contends that the evidence is insufficient to support his convictions in Counts One and Two of the Indictment. Specifically, he asserts the State failed to prove Minze engaged in sexual contact with the alleged child because, his argument continues, he was charged with, if any offense at all, and found

guilty of, Indecency with a Child.[2]

Minze was not charged with, nor was he convicted of, Indecency with a Child. He was charged with and convicted of criminal solicitation of a minor under Texas Penal Code section 15.031(b). The crime he was accused of soliciting was indecency with a child by contact. TEX. PENAL CODE § 21.11(a)(1). No completed act of sexual contact is required to be proved. *See e.g. Ganung v. State*, 502 S.W.3d 825, 828-829 (Tex. App.—Beaumont 2016, no pet.) (the prohibited conduct in online solicitation of a minor is the act of soliciting, not the completion of the act the defendant is accused of soliciting); *Ex parte Zavala*, 421 S.W.3d 227, 231-32 (Tex. App.—San Antonio 2013, pet. ref'd) (same).

Nowhere in this issue does Minze attack an element of the offense the State was required to prove. In presenting error to this Court, an appellant's brief must contain "argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). The failure to properly brief an issue presents nothing for us to review, and we are not required to make an appellant's arguments for him. *See Lucio v. State*, 351 S.W.3d 878, 896 (Tex. Crim. App. 2011); *Busby v. State*, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008); *Neville v. State*, —S.W.3d —, No. 10-18-00250-CR, 2020 Tex.

[2] Minze asserts that the judgments for Counts One and Two indicate he was found guilty of Indecency with a Child. Although the judgments suffer from the same title-of-the-offense defects as does the indictment, it is clear that Minze was charged in the indictment with criminal solicitation of a minor and the jury found Minze guilty as charged in Counts One and Two of the indictment. There is nothing fundamentally wrong with the judgments, and because we have not been asked to change the wording of the judgments, we will not.

App. LEXIS 5546 (Tex. App.—Waco July 20, 2020, no pet. h.) (publish). Accordingly, these issues are inadequately briefed and present nothing for review because Minze failed to point to any element the State was required to prove as being insufficiently supported by the evidence.

Minze's second and third issues are overruled.

Possession of a Controlled Substance

In his fifth issue, Minze contends the evidence was insufficient to support his conviction for possession of a controlled substance because no lab test was introduced into evidence, only testimony from the arresting officer that the substance which fell out of Minze's hat upon his arrest for criminal solicitation field-tested positive for methamphetamine. Minze cites to no case authority to support this proposition.

When presenting error to this Court, an appellant's brief must contain "argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). The failure to properly brief an issue presents nothing for us to review, and we are not required to make an appellant's arguments for him. *Lucio v. State*, 351 S.W.3d 878, 896 (Tex. Crim. App. 2011); *Busby v. State*, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008); *Neville v. State*, —S.W.3d—, No. 10-18-00250-CR, 2020 Tex. App. LEXIS 5546 (Tex. App.—Waco July 20, 2020, no pet. h.) (publish). Because Minze failed to provide authority to support his argument, this issue is improperly briefed and presents nothing for review.

Minze's fifth issue is overruled.

PROSECUTORIAL VINDICTIVENESS

In his sixth issue, Minze contends the trial court should have dismissed the entire criminal proceeding because of prosecutorial vindictiveness. Minze did not bring this claim to the trial court's attention and thus, has not preserved this complaint for review. *See Neal v. State*, 150 S.W.3d 169, 175 (Tex. Crim. App. 2004) (defendant forfeited prosecutorial vindictiveness claim by failing to comply with TEX. R. APP. P. 33.1(a)).

Accordingly, Minze's sixth issue is overruled.

CONCLUSION

Having overruled each issue on appeal, we affirm the trial court's judgments.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed August 31, 2020
Do not publish
[CRPM]