STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0474

State of Minnesota,
Respondent,

vs.

Fedor Pakhnyuk,
Appellant.

Filed January 8, 2018
Affirmed
Bratvold, Judge
Dissenting, Johnson, Judge

Scott County District Court
File No. 70-CR-12-23227

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

S Y L L A B U S

A conviction for surreptitious interference with privacy under Minn. Stat. § 609.746, subd. 1(a) (2010), does not require the defendant to have the "intent to intrude upon or interfere with the privacy of a member of the household" when he enters the property of another.

O P I N I O N

BRATVOLD, Judge

On appeal from his conviction of interference with privacy of a minor by surreptitious intrusion, appellant Fedor Pakhnyuk challenges the sufficiency of the evidence. Because we determine that a conviction under Minn. Stat. § 609.746, subd. 1(a), does not require evidence that a person entered the property of another with the intent to "intrude upon or interfere with the privacy of a member of the household," we affirm.

FACTS

Pakhnyuk, who was 38 years old, was staying at his brother's home in Shakopee to assist with a construction job. Pakhnyuk's niece, who was 14 years old, also lived at the house. On Saturday, July 14, 2012, Pakhnyuk's niece had three friends over for a slumber party; all were about the same age. That night, Pakhnyuk gave his niece and her friends alcohol and made several crude, sexual remarks to them. Pakhnyuk also touched the inner thigh of one friend while they watched television. The friend, K.L., left the room, as did the rest of the girls. They remained in the niece's bedroom for the rest of the night.

Five days later, Pakhnyuk, his niece, and K.L. were still staying at the same home. Pakhnyuk was sleeping on the living room floor when his niece and K.L. walked through. The niece went to her bedroom and K.L. went to the kitchen. Pakhnyuk stood up, hugged K.L., and "grabbed [her] buttocks." K.L. ran upstairs and locked the door. Later that night, K.L. was undressing in the niece's bedroom when she saw Pakhnyuk sitting on the garage roof staring at her through the window. K.L. screamed. The niece roused her father, who confronted Pakhnyuk.

The state charged Pakhnyuk with three offenses: interference with the privacy of a minor under Minn. Stat. § 609.746, subd. 1(e)(2) (2010), which requires violation of Minn. Stat. § 609.746, subd. 1(a); furnishing alcohol to a minor under Minn. Stat. § 340A.503, subd. 2(1) (2010); and disorderly conduct under Minn. Stat. § 609.72, subd. 1(3) (2010).

During the jury trial, the district court used the pattern instruction for interference with privacy. *See* 10A *Minnesota Practice*, CRIMJIG 17.32 (2006). The jury was instructed that, to convict Pakhnyuk of interference with privacy of a minor, they must find the state proved the following elements: (1) he "entered upon the property of another"; (2) he "surreptitiously gazed, stared, or peeped in the window or other aperture of the house or dwelling place of another"; (3) he "acted with an intent to intrude upon or interfere with the privacy of a member of the household of another"; (4) his "acts took place on or about July 19, 2012, in Scott County"; and (5) Pakhnyuk knew or had reason to know that a minor was present. Pakhnyuk did not object to the district court's instructions.

The jury found Pakhnyuk guilty of all charges. The district court entered convictions, stayed execution of sentence for the interference with privacy offense, and imposed 90 days in jail for the alcohol offense. Pakhnyuk appeals from judgment but challenges only the interference with privacy conviction under Minn. Stat. § 609.746, subd. 1(e)(2).

ISSUE

Does a conviction under Minn. Stat. § 609.746, subd. 1(a), require evidence that a defendant entered another's property "with the intent to intrude upon or interfere with the privacy of a member of the household?"

ANALYSIS

Pakhnyuk's sole issue on appeal contends that the evidence is insufficient to support his conviction because, under the relevant statute, the state needed to prove that he entered his brother's property with the intent to interfere with the privacy of a member of his brother's household, but the state provided no evidence Pakhnyuk had such an intent. Since Pakhnyuk's sufficiency-of-the-evidence challenge involves determining whether his conduct met the statutory definition of an offense, we are presented with an issue of statutory interpretation, which we review de novo. *See State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013).

In resolving the issue before us, we first decide to address Pakhnyuk's statutory interpretation issue, even though he raised it for the first time on appeal, because it is necessary in order to decide his sufficiency-of-the evidence challenge. Next, we conclude that Minn. Stat. § 609.746, subd. 1(a), is ambiguous after applying canons of interpretation and analyzing the statutory language in light of grammatical rules. Then, by relying on the canons of statutory construction, we reject Pakhnyuk's position and hold that the relevant statute does not require evidence of intent at the time of entry onto the property of another. This conclusion follows from the plain language of the former statute, the minor alternations made by the legislature when it adopted the current version of the statute, and relevant caselaw suggesting that this construction of Minn. Stat. § 609.746, subd. 1(a), is consistent with the legislature's intent to protect individual privacy.

A. We may address a statutory interpretation issue that Pakhnyuk raised for the first time on appeal.

The state argues that Pakhnyuk forfeited this issue because he did not raise it at trial and because addressing the argument on appeal would be "fundamentally unfair" to the state. Pakhnyuk concedes that he did not explicitly raise this issue during trial, but he argues this court must interpret the relevant statute and determine the offense elements in order to consider his sufficiency-of-the-evidence challenge.

Generally, this court will not consider legal issues that the parties did not raise in the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But the supreme court has held that "it is often necessary to interpret a criminal statute when evaluating an insufficiency-of-the-evidence claim." *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017). Any "conviction based upon anything less than 'proof beyond a reasonable doubt of every fact necessary to constitute the crime' violates the Due Process Clause of the Fifth Amendment." *State v. Clow*, 600 N.W.2d 724, 726 (Minn. App. 1999), *review denied* (Minn. Oct. 21, 1999) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970)). We conclude that Pakhnyuk may raise a statutory interpretation issue for the first time on appeal because it is necessary to interpret Minn. Stat. § 609.746, subd. 1(e)(2), when determining his sufficiency-of-the-evidence challenge.

B. Minn. Stat. § 609.746, subd. 1(a), is ambiguous.

Violating Minn. Stat. § 609.746, subd. 1(e)(2), requires a violation of Minn. Stat. § 609.746, subd. 1, "against a minor under the age of 18, knowing or having reason to know that the minor is present." The state alleged that Pakhnyuk violated Minn. Stat.

§ 609.746, subd. 1(a), which describes surreptitious interference with the privacy of another, as follows:

> (a) A person is guilty of a gross misdemeanor who:
> (1) enters upon another's property;
> (2) surreptitiously gazes, stares, or peeps in the window or any other aperture of a house or place of dwelling of another; and
> (3) does so with intent to intrude upon or interfere with the privacy of a member of the household.

For ease of reference, we will refer to Minn. Stat. § 609.746, subd. 1(a), as "subdivision 1(a)." Subdivision 1(a) contains three elements, which we will refer to as the "entry" element (clause 1), the "gazing" element (clause 2), and the "intent" element (clause 3).

Our purpose in interpreting statutes "is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2016); *see also State v. Struzyk*, 869 N.W.2d 280, 284 (Minn. 2015). In doing so, we give the "statute's words and phrases their plain and ordinary meaning." *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009). To determine the plain meaning of statutory language, we may refer to canons of interpretation, such as common usage, dictionary definitions, and grammatical rules. Minn. Stat. § 645.08 (2016); *see also Struzyk*, 869 N.W.2d at 287 (applying rules of grammar to interpret plain language of statute). If the "words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16; *State v. Riggs*, 865 N.W.2d 679, 682 (Minn. 2015). If, however, a statute is ambiguous, we will consider canons of construction to ascertain the legislature's intent while construing the meaning of the statute. A statute is ambiguous if it is subject to more than one reasonable interpretation. *State v. Mauer*, 741

N.W.2d 107, 111 (Minn. 2007). We review issues of statutory interpretation de novo. *Peck*, 773 N.W.2d at 771 (Minn. 2009).

The parties disagree regarding to what "does so" refers in the intent element of subdivision 1(a). Pakhnyuk argues that "does so" refers to both the entry and gazing elements. In other words, according to Pakhnyuk, a conviction under subdivision 1(a) requires evidence that the defendant "enter[ed] upon another's property" with the "intent to intrude upon or interfere with the privacy of a member of the household," and that the defendant "surreptitiously gazed" in the window of another's house with the same intent. The state argues that "does so" refers only to the gazing element.

Briefly restated, the issue is not the meaning of subdivision 1(a)'s words, but the relationship of the words to one another. Accordingly, to properly interpret subdivision 1(a), we turn to the rules of grammar. Precedent establishes that we may rely on grammatical rules and other canons of interpretation before determining whether the statute is ambiguous and resorting to canons of construction.[1] Minn. Stat. § 645.08; *see, e.g.*, *Schmid*, 859 N.W.2d at 820 (using grammatical rules to interpret meaning of "take" in criminal statute prohibiting deer hunting without license and holding statute was not ambiguous). The parties, however, each rely on different grammatical rules to support their interpretation of subdivision 1(a).

[1] While courts must determine that a statute is ambiguous before applying canons of construction, we "may use the canons of interpretation in Minn. Stat. § 645.08 . . . to determine if a statute is unambiguous." *State v. Schmid*, 859 N.W.2d 816, 820 (Minn. 2015). Grammatical rules are included in the canons of interpretation. *See Riggs*, 865 N.W.2d at 682-83.

Pakhnyuk contends the "series-qualifier" rule applies to subdivision 1(a). Under this rule, "when several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *In re Estate of Pawlik*, 845 N.W.2d 249, 252 (Minn. App. 2014), *review denied* (Minn. June 25, 2014) (quotation omitted). The state argues in favor of applying the "last-antecedent" rule, under which a limiting phrase "ordinarily modifies only the noun or phrase that it immediately follows." *Larson v. State*, 790 N.W.2d 700, 705 (Minn. 2010).

We are not persuaded by Pakhnyuk's contention because subdivision 1(a)'s structure is different from that to which the series-qualifier rule typically applies. The series-qualifier rule applies "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series." *Pawlik*, 845 N.W.2d at 252 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012) [hereinafter *Reading Law*]). Parallel construction means that words or phrases are arranged so that "[*e*]*very element*" of the parallel series is a "functional match of the others . . . and serve[s] the same grammatical function in the sentence." *The Chicago Manual of Style* § 5.212 (16th ed. 2010) (emphasis added). The entry and gazing elements of subdivision 1(a) do not share enough grammatical similarity with one another to qualify as a "straightforward, parallel construction." The entry element begins with a verb, while the gazing element begins with an adverb that applies to a series of verbs. "Surreptitiously" has no functional equivalent in the entry element.

We also are not persuaded by the state's argument because the last-antecedent rule does not match the syntax of subdivision 1(a). Under this rule, a "pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent." *Ryan Contracting Co. v. O'Neil & Murphy, LLP*, 883 N.W.2d 236, 244 (Minn. 2016) (quoting *Reading Law*, *supra*, at 144); *see also* 2A Norman Singer & Shambie Singer, *Sutherland Statutory Construction* § 47:33 (7th ed. 2017) [hereinafter *Sutherland*] ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent."). "So" in "does so" is the referring language in subdivision 1(a) and is an adverb, not a pronoun, relative pronoun, or demonstrative adjective.[2] *See The New Shorter Oxford English Dictionary* 2927-28 (4th ed. 1993) (defining "so" as an adverb and giving the following example: "[p]ersons using the bridge do so at their own risk"); *Chicago Manual*, *supra*, §§ 5.27, .51, .98.

While neither party raises a third grammatical rule, we conclude that the "nearest-reasonable-referent" rule is best suited to understanding the meaning of subdivision 1(a).

[2] In *Ryan Contracting*, the supreme court used the last-antecedent rule and concluded that the phrase "in use" applied only to the last-antecedent noun. 883 N.W.2d at 244 (interpreting Minn. Stat. § 514.011, subd. 4). It is true that "in use" is not a pronoun, relative pronoun, or demonstrative adjective. But there are key differences between the language at issue in *Ryan Contracting* and the language at issue in Pakhnyuk's case. In *Ryan Contracting*, the statutory language at issue did not contain any punctuation between the modifier and the preceding antecedent. *Id.* In contrast, in subdivision 1(a), a semicolon separates the intent element from the gazing element. Further, in *Ryan Contracting*, the supreme court reasoned that some of the statute would be rendered superfluous if the court did not apply the last-antecedent rule. *Id.* But neither the last-antecedent nor the series-qualifier rule would render superfluous either subdivision 1(a) or any part of section 609.746. Accordingly, we are unable to take direction from *Ryan Contracting* to resolve the issue before us.

Under this grammatical rule, which closely resembles the last-antecedent rule and is often confused with it, "[w]hen the syntax [of a sentence] involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent." [3] *Reading Law*, *supra*, at 152. On first glance, this rule seems to avoid the syntactical hurdles that disrupted application of the last-antecedent rule.

But the semicolons separating each element of subdivision 1(a) disrupt the simple application of any of the three grammatical rules already mentioned. "Punctuation in a legal text will rarely change the meaning of a word, but it will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part." *Reading Law*, *supra*, at 161. Because semicolons separate the elements of the relevant statute, we are persuaded that grammatical rules do not definitively clarify subdivision 1(a). *See id.* at 144-53. "The series-qualifier rule may be applicable where the text of a statute is a flowing sentence that lacks any distinct separations." *Pawlik*, 845 N.W.2d at 252 (quotation omitted). Here, semicolons, numbers, and line breaks divide subdivision 1(a), and the series-qualifier rule does not apply. Similarly, the supreme court has suggested that the last-antecedent rule may not be applicable if a "semicolon or a line break" separates statutory elements. *City of Oronoco v. Fitzpatrick Real Estate, LLC*, 883 N.W.2d 592, 595

[3] Indeed, in *Larson v. State*, the Minnesota Supreme Court broadly defined the last-antecedent rule in a fashion that appears to encompass the nearest-reasonable-referent rule. 790 N.W.2d 700, 705 (Minn. 2010) (describing last-antecedent rule as instructing that a "limiting phrase . . . ordinarily modifies only the noun or phrase that it immediately follows").

(Minn. 2016). Given the similarity between the last-antecedent and the nearest-reasonable-referent rule, subdivision 1(a)'s semicolons similarly disrupt application of the latter rule.

Because it is not reasonable to prefer one of these grammatical rules over the other when interpreting subdivision 1(a), we conclude that the intent element of subdivision 1(a) is subject to multiple reasonable interpretations, and thus is ambiguous.[4] As a result, we consider other indications of the legislature's intent.

C. Based on the former law, the intent element of subdivision 1(a) applies only to the gazing element.

"When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters . . . the former law, if any." [5] Minn. Stat. § 645.16; *Riggs*, 865 N.W.2d at 683 n. 4. In resolving other issues of statutory interpretation, we have found previous versions of a statute to be instructive. *See, e.g.*, *State v. Holmes*, 787 N.W.2d 617, 622 (Minn. App. 2010) (using previous version of a statute in analysis of current version of statute).

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[4] While we determine that subdivision 1(a) is ambiguous, we also note that Pakhnyuk does not ask this court to apply the rule of lenity. Even if he had, this court must first consider the other canons of construction when interpreting an ambiguous statute, *State v. Thonesavanh*, __N.W.2d__, __, 2017 WL 3880768, at *7 (Minn. Sept. 6, 2017). We resort to the rule of lenity only if, having applied our other canons, we are still left with a "grievous ambiguity." *Id.* (quotation omitted). In this case, we conclude that subdivision 1(a) is not "grievous[ly] ambiguous" because other canons clarify the legislature's intent.

[5] When a law is not "explicit," courts may "ascertain[]" the legislature's intent by considering: (1) the occasion and necessity for the law; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained; (5) any former law; (6) the consequences of a particular interpretation; (7) legislative history; and (8) legislative and administrative interpretations of the statute. Minn. Stat. § 645.16; s*ee also State v. Engle*, 743 N.W.2d 592, 593 (Minn. 2008) (interpreting "reckless" discharge of firearms by reference to indicia of legislative intent).

Here, the former law was adopted by the legislature in 1979. 1979 Minn. Laws ch. 258, § 19, at 555. As originally adopted, section 609.746 flowed as a single sentence and contained the same three elements as in the current law:

> Any person who enters upon another's property and surreptitiously gazes, stares, or peeps in the window of a house or place of dwelling of another with intent to intrude upon or interfere with the privacy of a member of the household thereof is guilty of a misdemeanor.

Id. For succinct reference, we will call the 1979 version of section 609.746, "the former law."

Section 609.746 has undergone changes since its original enactment, but the legislature has not materially altered the elements of the crime. In 1994 the legislature adopted the current structure by moving the placement of "is guilty of a misdemeanor" to the beginning of the subdivision and separating three numbered elements, divided by semicolons. 1994 Minn. Laws ch. 636, art. 2, § 47, at 2216-17. The 1994, changes also added "does so" at the beginning of the intent element and "or any other aperture" to the gazing element. *Id.* In 2005, the legislature made violating subdivision 1(a) a gross misdemeanor. 2005 Minn. Laws ch. 136, art. 17, § 43, at 1150. Subdivision 1(a) has not been altered since 2005.

With this textual history in mind, we interpret the former law and rely on grammatical rules to guide our analysis. The Supreme Court's opinion in *Barnhart v. Thomas* discussed a sentence that is similar to the former law and, thus, the Court's analysis is instructive. 540 U.S. 20, 27, 124 S. Ct. 376, 381 (2003). In that case, the Supreme Court provided the following example: "You will be punished if you throw a party or engage in

any other activity that damages the house." *Id.* The Court applied the last-antecedent rule and concluded "that damages the house" modified only "any other activity" and did not modify "a party." *Id.* In other words, throwing a party that causes no damage still warrants punishment. *Id.*

The flowing sentence structure of the Supreme Court's example closely resembles the former law, and we are persuaded that a similar grammatical analysis applies. The series-qualifier rule and the last-antecedent rule do not apply to the former law for the same reasons these rules do not apply to the current law. Because punctuation did not separate the three elements in the former law, we conclude that the nearest-reasonable-referent rule applies. Under that rule, "with intent to" is a post-positive modifier, and the nearest referent is the gazing element.

Our interpretation of the former law persuades us to reject Pakhnyuk's interpretation of subdivision 1(a) for two reasons. First, we discern no legislative intent to alter the meaning of the former law because the legislature made only minor alterations in 1994 when it adopted the current version of subdivision 1(a). *Compare* 1994 Minn. Laws ch. 636, art. 2, § 47, at 2216-17, *with* 1979 Minn. Laws ch. 258, § 19, at 555. According to the supreme court, "[i]t is a generally accepted rule of statutory construction that a revision of existing statutes is presumed not to have changed their meaning, even if there [are] phraseological alterations, unless an intention to change clearly appears from the language of the revised statute."[6] *Champ v. Brown*, 197 Minn. 49, 55-56, 266 N.W. 94, 97 (1936);

[6] The dissent claims that the "effect" of our reliance on the former law is to convict Pakhnyuk of a criminal offense that is no longer in force and effect. The dissent's claim is

see generally Minn. Stat. § 645.37 (2016) ("When a law is repealed and its provisions are at the same time reenacted in the same or substantially the same terms by the repealing law, the earlier law shall be construed as continued in active operation."). For example, in *Connelly*, the supreme court concluded that the relevant statute was ambiguous and therefore referred to the former statute to discern legislative intent. 249 Minn. at 432-33, 82 N.W.2d at 492. In interpreting the former statute, the supreme court determined that the plain language was clear and, noting phraseology and punctuation differences with the current statute, held that the modest changes "reveal[ed] no clear legislative intent to change the law." *Id.* at 433, 82 N.W.2d at 493.

Here, the 1994 amendments to subdivision 1(a), which added numbers and punctuation to create the three separate clauses in the current statute, do not suggest that the legislature intended to change the elements of the offense. 1994 Minn. Laws ch. 636, art. 2, § 47, at 2216. This is so even though the legislature clearly knows how to adopt

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not persuasive for two reasons. First, the dissent fails to discuss the changes made by the legislature in 1994 when it adopted the current version of the statute. As discussed above, the legislature added numbers and punctuation, which we describe as "minor" or "modest" changes. Second, the dissent's claim appears to assume the 1994 changes reflect a material change in legislative intent. Yet the Supreme Court long-ago established that "[p]unctuation is a most fallible standard by which to interpret a writing." *Ewing's Lesee v. Burnet*, 36 U.S. 39, 54, 11 Pet. 28, 38 (1837). Moreover, the Minnesota Supreme Court has stated that "in a [statutory] revision a change in phraseology or punctuation is presumed to be intended to simplify the language of the prior act and not to change its meaning." *State v. Connelly*, 249 Minn. 429, 433, 82 N.W.2d 489, 492 (1957). In other words, our reference to the former law, which was amended in small ways, establishes not only the meaning of that statute, but also that the legislature did not intend to change the law when it adopted the current version in 1994. Because the goal of statutory interpretation is to give effect to legislative intent and the former law assists our understanding of legislative intent for the current statute, we are confident that it is appropriate to consider the former law in construing subdivision 1(a).

language applying an intent element to other multiple elements. In fact, the legislature did exactly that in subdivision 2 of section 609.746. When the legislature enacted subdivision 2 in 1987, it provided:

> A person who, with the intent to harass, abuse, or threaten another, repeatedly follows or pursues another, after being told not to do so by the person being followed or pursued, is guilty of a misdemeanor.

1987 Minn. Laws ch. 307, § 4, at 1839. By placing the intent element at the beginning of the subdivision and separating it from the other elements with commas, the legislature ably expressed that the "intent to harass" element applied to both (1) "repeatedly follows or pursues another" and (2) doing so "after being told not to . . . by the person being followed or pursued." *Id.* Additionally, subdivision 2 contains two elements that may occur over a period of time; this is similar to the entry and gazing elements that may occur over a period of time.

Second, by using the former law to construe subdivision 1(a), our holding gives effect to the legislature's intent. Previous caselaw has noted that, in criminalizing the intrusions described in section 609.746, the legislature intended to protect individual privacy. *State v. Sopko*, 770 N.W.2d 543, 546 (Minn. App. 2009) (holding the "object to be attained" in section 609.746, subd. 1(d), is to "prevent one's intrusion into another's privacy"). By requiring proof of intent to intrude when the accused "surreptitiously gazes, stares, or peeps" into a home or dwelling, and not when the accused "enters upon the property of another," our construction of subdivision 1(a) gives effect to the legislature's intent to protect individual privacy. If we were to hold otherwise, subdivision 1(a) would

not reach intrusions by those who lacked intent when they entered the property because, for example, they were staying with a relative, hired to perform work, or living in the same apartment complex.[7]

Based on the plain language of the former law, the legislature's modest changes when it adopted the current version of the relevant statute, and previous caselaw holding that the legislature intends that section 609.746 protect individual privacy, we conclude that the intent element of subdivision 1(a) modifies only the gazing element and does not modify the entry element. Thus, while a conviction under subdivision 1(a) requires proof of intent to intrude when a defendant "gazes, stares, or peeps" into a home, we hold that a conviction under this statute does not require that the state prove a defendant entered the property of another "with the intent to intrude upon or interfere with the privacy of a member of the household."

[7] While neither the supreme court nor our court previously has had occasion to decide the intent issue raised by Pakhnyuk, both courts have affirmed convictions after considering sufficiency of the evidence under section 609.746. These prior decisions illustrate intrusions in homes and apartments that were held to be prohibited by the intrusion statute. *See, e.g.*, *Munger v. State*, 749 N.W.2d 335, 339 (Minn. 2008) (upholding sufficiency of evidence for conviction of first-degree burglary at apartment where evidence established underlying intent to commit intrusion offense; appellant "reached into the residence to move the curtain" and "did so simultaneously to surreptitiously gaze" into the window "with intent to interfere in the privacy of the resident"); *State v. Hartwig*, 355 N.W.2d 333, 335 (Minn. App. 1984) (upholding sufficiency of evidence for conviction under former law where appellant's employer had been hired to clean an oil spill in family home; evidence established appellant "enter[ed] another's property and surreptitiously gaz[ed] around corners into the windows from protected spots"). We note that both convictions were upheld in the absence of any evidence of intent at the time of entry.

D E C I S I O N

Because violating subdivision 1(a) does not require evidence that Pakhnyuk entered his brother's property with the intent to interfere with the privacy of a member of the household, we affirm Pakhnyuk's conviction.

Affirmed.

JOHNSON, Judge (dissenting)

I respectfully dissent from the opinion of the court. I would conclude that section 609.746, subdivision 1(a), of the Minnesota Statutes requires the state to prove that Pakhnyuk intended to intrude upon or interfere with the privacy of a person inside his brother's house *both* when he entered his brother's property *and* when he gazed, stared, or peeped through a window of a bedroom of the house.

A.

"The first step in statutory interpretation is to determine whether the statute's language, on its face, is ambiguous." *State v. Thonesavanh*, ____ N.W.2d ____, ____, 2017 WL 3880768, at *2 (Minn. Sept. 6, 2017). "'A statute is ambiguous only if it is subject to more than one reasonable interpretation.'" *Id.* (quoting *500, LLC v. City of Minneapolis*, 837 N.W.2d 287, 290 (Minn. 2013)). If a statute is unambiguous, "then we must apply the statute's plain meaning." *State v. Nelson*, 842 N.W.2d 433, 436 (Minn. 2014) (quotation omitted). But if a statute is ambiguous, "then we may apply the canons of construction to resolve the ambiguity." *Thonesavanh*, ____ N.W.2d at ____, 2017 WL 3880768, at *2.

Pakhnyuk's argument focuses on the third clause of section 609.746, subdivision 1(a), which requires proof that a defendant acted "with intent to intrude upon or interfere with the privacy of a member of the household." *See* Minn. Stat. § 609.746, subd. 1(a)(3) (2016). The state contends that the third clause applies only to the action in the second clause ("gazes, stares, or peeps"). Pakhnyuk contends that the third clause applies to the

action in the first clause ("enters") and to the action in the second clause ("gazes, stares, or peeps").

To determine whether the statute is ambiguous, we should begin by closely examining the text of the statute. *See Thonesavanh*, ____ N.W.2d at ____, 2017 WL 3880768, at *2. The key phrase is "does so," and the key word is "so." The word "so" has a multitude of meanings, depending on how the word is used. *See, e.g.*, *The American Heritage Dictionary* 1709 (3d ed. 1996); *The Oxford Universal Dictionary* 1933 (3d ed. 1964); *Webster's New International Dictionary* 2384 (2d ed. 1946). When used as an adverb, the primary meaning of the word "so" is "[i]n the condition or manner expressed or indicated." *American Heritage Dictionary*, *supra*, at 1709 (3d ed. 1996); *see also Oxford Universal Dictionary*, *supra*, at 1933 (3d ed. 1964) ("[i]n the way or manner described, indicated, or suggested"). That definition, by itself, does not confirm either the state's interpretation or Pakhnyuk's interpretation. No definition of the word "so" compels the conclusion that one party's interpretation of the statute is reasonable while the other party's interpretation is unreasonable. Thus, both parties' interpretations of the statute are reasonable. Accordingly, the statute is ambiguous. *See Thonesavanh*, ____ N.W.2d at ____, 2017 WL 3880768, at *2.

B.

Because the statute is ambiguous, we may apply canons of statutory construction to determine the meaning of the statute.[1] *See id*. I agree with the majority opinion insofar as

[1]A court may apply ordinary rules of grammar *before* a determination whether a statute is ambiguous or unambiguous. *See, e.g.*, *State v. Struzyk*, 869 N.W.2d 280, 286-87

it states that the series-qualifier canon does not apply to the current version of the statute. *See supra* at 8. I believe, however, that the series-qualifier canon does not apply to the current version of the statute solely because of the structure of subdivision 1(a) and the line breaks and punctuation that separate the three clauses. *See In re Estate of Pawlik*, 845 N.W.2d 249, 252 (Minn. App. 2014), *review denied* (Minn. June 25, 2014). I also agree with the majority opinion insofar as it states that both the last-antecedent canon and the nearest-reasonable-referent canon do not apply to the current version of the statute. *See supra* at 9-11.

(Minn. 2015); *State v. Schmid*, 859 N.W.2d 816, 819-24 (Minn. 2015). A court may apply canons of construction *after* a determination that a statute is ambiguous. *See, e.g.*, *Nelson*, 842 N.W.2d at 436; *Thonesavanh*, ____ N.W.2d at ____, 2017 WL 3880768, at *2; *Sleiter v. American Family Mut. Ins. Co.*, 868 N.W.2d 21, 25-27 (Minn. 2015). The majority opinion refers to the series-qualifier principle, the last-antecedent principle, and the nearest-reasonable-referent principle as "rules" and applies them before determining that the statute is ambiguous. *See supra* at 5-11. The majority's approach is inconsistent with a secondary source on which it relies, which consistently refers to these principles as "canons." *See generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012). This court has referred to the series-qualifier principle as a "canon" and has applied it *after* determining that a statute is ambiguous. *See 650 North Main Ass'n v. Frauenschuh, Inc.*, 885 N.W.2d 478, 493, 499-500 (Minn. App. 2016); *In re Estate of Pawlik*, 845 N.W.2d 249, 251-52 (Minn. App. 2014), *review denied* (Minn. June 25, 2014). The supreme court has referred to the last-antecedent principle as both a "rule" and a "canon" and has applied it *before* determining that a statute is ambiguous, thereby indicating that the principle may operate as a rule of grammar. *See City of Oronoco v. Fitzpatrick Real Estate, LLC*, 883 N.W.2d 592, 596 (Minn. 2016); *Ryan Contracting Co. v. O'Neill & Murphy, LLP*, 883 N.W.2d 236, 244 (Minn. 2016); *Binkley v. Allina Health Sys.*, 877 N.W.2d 547, 551-52 (Minn. 2016); *In re Estate of Butler*, 803 N.W.2d 393, 397-98 (Minn. 2011); *Larson v. State*, 790 N.W.2d 700, 705 (Minn. 2010). As a practical matter, there should be a close correlation between rules of grammar and canons of construction: rules of grammar guide a writer in communicating an intended meaning, while canons of construction guide a reader in interpreting a text to discern a writer's intended meaning.

C.

I respectfully disagree with the majority opinion insofar as it interprets section 609.746, subdivision 1(a), by determining the meaning of a former version of the statute and then imputing that meaning to the current version of the statute. *See supra* at 11-16.

It is elementary that a person may not be convicted of a criminal offense set forth in a statute that no longer is in force and effect. *See, e.g.*, *State v. Kilmer*, 741 N.W.2d 607, 610-11 (Minn. App. 2007). Yet that is the effect of the majority opinion's reasoning. Granted, courts sometimes compare a former version of a statute with the current version of the statute, but only if doing so sheds light on the meaning of the current version, which may occur if an amendment to the statute reveals a certain legislative intent. For example, in *Auto Owners Ins. Co. v. Perry*, 749 N.W.2d 324 (Minn. 2008), the supreme court compared the current version of a statute to the former version and inferred that, "By eliminating the phrase '[i]n all other cases' . . . , the legislature likely intended to limit the definition of" a key word in the statute. *Id.* at 328 (alteration in original). Similarly, in *State v. Holmes*, 787 N.W.2d 617 (Minn. App. 2010), this court compared the current version of a statute to the former version and inferred that, by changing the phrase "on account of such improvement" to "for the improvement," the legislature intended the statute to have a different meaning. *Id.* at 622-23. But in this case, the majority opinion does not refer to the former version of the statute to identify a difference between versions and thereby discern the meaning of the current version. Rather, the majority opinion interprets the former version and then simply transfers its interpretation of the former version to the current version, effectively allowing the former version to determine

Pakhnyuk's guilt. I am not aware of any authority for that method of statutory interpretation.[2]

Nonetheless, if I were to attempt to determine the meaning of the former version of the statute, I would not apply the nearest-reasonable-referent canon. *See supra* at 12-13. I would not do so because the nearest-reasonable-referent canon applies only if "the syntax involves *something other than* a parallel series of nouns or verbs." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012) (emphasis added). The nearest-reasonable-referent canon does not apply to the former version of the statute because the former version contained a parallel series of verbs. Specifically, the former statute had a parallel series of two verbs or groups of verbs: first, the single word "enters" and, second, the three words "gazes, stares, or peeps," which are essentially synonymous.[3] The three words that constituted the second part of the parallel verb structure were phrased in the disjunctive so that any of them may have operated in the same

[2]I would not rely on either *State v. Connelly*, 249 Minn. 429, 433, 82 N.W.2d 489, 492 (1957), or *Champ v. Brown*, 197 Minn. 49, 266 N.W. 94 (1936). *See supra* at 13-14 & n.6. Both opinions concern the unique situation in 1905 in which a three-person commission prepared a revision of all of Minnesota's statutes. *See Connelly*, 249 Minn. at 433, 82 N.W.2d at 492; *Champ*, 197 Minn. at 56-57, 266 N.W. at 97-98; *see also Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 40-42 (Minn. App. 2010) (discussing history of 1905 revision). In any event, the *Champ* court based its interpretation of a statute on the change of the word "shall" to "may," which indicated that the resulting statute was permissive instead of mandatory. *Champ*, 197 Minn. at 56-57, 266 N.W. at 97-98.

[3] In the former version of the statute, the words "enters" and "gazes, stares, and peeps" did not operate as verbs. Rather, the operative verb was the word "is," which was joined with the predicate compliment "guilty of a gross misdemeanor." The words "enters" and "gazes, stares, and peeps" appeared in a noun clause that used the relative pronoun "who" to introduce a restrictive subordinate clause, which described the person who is the subject of the sentence. *See* William A. Sabin, *The Gregg Reference Manual* 19-20, 472, 479 (7th ed. 1993).

manner as a single word. It is immaterial that the adverb "surreptitiously" preceded the three verbs. A simplified version of the former statute would read as follows: "A person who enters and gazes with intent to interfere with privacy is guilty of a gross misdemeanor." In that sentence, it is easy to see that the words "enters" and "gazes" are in parallel form.[4] Accordingly, it is inappropriate to apply the nearest-reasonable-referent canon to the former version of the statute.

If I were to attempt to determine the meaning of the former version of the statute, I would apply the series-qualifier canon. The series-qualifier canon applies if, first, "there is a straightforward, parallel construction that involves all nouns or verbs in a series" and, second, "the text of a statute is a flowing sentence that lacks any distinct separations." *See Pawlik*, 845 N.W.2d at 252 (quotations omitted). Both of those prerequisites are satisfied in this case. The series-qualifier canon makes sense in this situation because it comports with well-accepted rules of grammar and common usage. An example provides an illustration: "Jane sings and dances with enthusiasm." A reader naturally would understand

[4]The majority opinion states that the former statute is not parallel because an adverb precedes the three "gazing" verbs. *See supra* at 8. I respectfully disagree. The examples provided in *The Chicago Manual of Style* indicate that a sentence may be parallel in structure even if the sentence contains clauses or phrases that are not identical in structure. *The Chicago Manual of Style* ¶¶ 5.212-.215, at 259-61 (16th ed. 2010). Other sources show that the insertion of an adjective or an adverb does not cause a sentence to be not parallel. *See, e.g.*, John C. Hodges & Mary E. Whitten, *Harbrace College Handbook* 259 (8th ed. 1977) ("Opportunity for *purposeful* activity, opportunity for self-realization, opportunity for work and rest and love and play—this is what men think of as liberty today.") (emphasis added); *Gregg Reference Manual*, *supra*, at 247-48 ("The desk copier is easy to operate, efficient, and *relatively* inexpensive.") (emphasis altered). One of these examples also shows that a sentence may be parallel in structure even if one element of a series consists of multiple words of the same part of speech. *Harbrace College Handbook*, *supra*, at 259 ("work and rest and love and play").

that Jane both sings with enthusiasm and dances with enthusiasm. The same is true even if the subject of a sentence engages in different actions at different times: "John works and plays with gusto." Again, a reader naturally would understand that John both works with gusto and plays with gusto. The same is true of the following sentence: "He entered and gazed with intent to interfere with another person's privacy." A reader naturally would understand that the subject of the sentence *both* entered with intent to interfere with another person's privacy *and* gazed with intent to interfere with another person's privacy. If a writer intended these meanings, no rule of grammar or punctuation would require the writer to compose the sentences differently. But if a writer intended contrary meanings, he or she would be obligated to compose the sentences differently, such as the following: "Jane sings with dread, but she dances with enthusiasm." "John works with calm but plays with gusto." "He entered, and then he gazed with intent to interfere with another person's privacy."

Thus, if I were to attempt to determine the meaning of the former version of the statute, I would construe the former statute to have meant that the state must prove that a defendant intended to intrude upon or interfere with the privacy of a person inside a home *both* when the defendant entered another's property *and* when the defendant gazed, stared, or peeped into a home on the property.[5]

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[5]The majority opinion states that, in *State v. Munger*, 749 N.W.2d 335 (Minn. 2008), and *State v. Hartwig*, 355 N.W.2d 333 (Minn. App. 1984), convictions under the statute "were upheld in the absence of any evidence of intent at the time of entry." *See supra* at 16 n.7. I respectfully disagree. As an initial matter, the appellant in *Munger* was convicted of first-degree burglary, not interference with privacy. *See Munger*, 749 N.W.2d at 336. Most importantly, the appellants in both cases did not make the same argument that Pakhnyuk makes in this appeal. *See id.* at 339; *Hartwig*, 355 N.W.2d at 335. Accordingly, the courts in both cases did not consider and resolve the question whether a person must

D.

As stated above, I would not interpret section 609.746, subdivision 1(a), by attempting to determine the meaning of the former version of the statute. Rather, I would confine my analysis to the current version of the statute, and I would reason that no canon of statutory construction is available to determine its meaning. Accordingly, I believe that the statute is so grievously ambiguous that the meaning of the statute must be determined by the rule of lenity. *See Nelson*, 842 N.W.2d at 443-44. "The rule of lenity requires us to resolve the ambiguity in [a statute] in favor of the criminal defendant" so as to "'vindicate[] the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain.'" *Id.* at 444 (quoting *United States v. Santos*, 553 U.S. 507, 514, 128 S. Ct. 2020, 2025 (2008)). Consequently, I would interpret section 609.746, subdivision 1(a), to require the state to prove that a defendant intended to intrude upon or interfere with the privacy of a person inside a home *both* when the defendant

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have the requisite intent both when entering another person's property and when gazing through a window of a house on the property. *See Munger*, 749 N.W.2d at 339; *Hartwig*, 355 N.W.2d at 335. Thus, the *Munger* and *Hartwig* opinions shed no light whatsoever on the issue presented in this appeal. *See Skelly Oil Co. v. Commissioner of Taxation*, 269 Minn. 351, 371, 131 N.W.2d 632, 645 (1964) (stating that opinions must be read in light of "the specific controversy then before this court"); *Chapman v. Dorsey*, 230 Minn. 279, 288, 41 N.W.2d 438, 443 (1950) (stating that opinions are not precedential on issues "never raised or called to the attention of the court"). Furthermore, the *Hartwig* opinion indicates that the appellant did in fact enter another person's property with the requisite intent. Hartwig testified that he entered the property with an innocuous intent, but the district court, sitting as factfinder, found his testimony to be "totally incredible." *Hartwig*, 355 N.W.2d at 334. The district court found that Hartwig's "intent was to intrude upon the privacy of the members of that household," and that statement is not limited to the time when Hartwig gazed through a window of the house on the property. *See id.* at 335.

entered another's property *and* when the defendant gazed, stared, or peeped into a home on the property.

In light of the state's concession that it did not introduce any evidence that Pakhnyuk intended to intrude upon or interfere with anyone's privacy when he entered his brother's property, I would conclude that the evidence is insufficient to sustain the conviction and, therefore, would reverse.