

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC98546
	)	
	)	
MATTHEW J.L. MCCORD,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT, DIVISION 2
THE HONORABLE DAVID C. JONES, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Matthew J.L. McCord, was convicted of the class E felonies of failure to register as a sex offender (Count I), sections 589.400 and 589.425,¹ and residing within 1000 feet of a school or child care facility as a sex offender (Count II), section 566.147, and the class D felony of failing to register as a sex offender (Count III), sections 589.400 and 589.425, after a bench trial in the circuit court of Greene County, Missouri. L.F. 31:1; Tr. 161-62.² The Honorable David C. Jones sentenced Matthew to concurrent terms of four years' imprisonment on each count. L.F. 36:1-4.

Matthew directly appealed this conviction in the Missouri Court of Appeals, Southern District, pursuant to Article V, Section 3 of the Missouri Constitution and section 477.060. The appeals court issued its opinion affirming Matthew's convictions on April 15, 2020. This Court subsequently sustained Matthew's application for transfer to the Court under Rule 83.04; thus, jurisdiction lies with the Court.

¹ All statutory citations are to Mo. Rev. Stat. 2016, unless otherwise indicated.

² The Record on Appeal consists of a Legal File ("L.F."), Transcript ("Tr."), and Sentencing Transcript ("Sent. Tr."). The Legal File material is cited herein in [document number]:[page number] format.

STATEMENT OF FACTS

Appellant, Matthew J.L. McCord, a registered sex offender, was convicted under section 566.147 because his residence was 839 feet from a Springfield middle school if measured from property line to property line. Tr. 85, 96. However, Matthew resided more than one thousand feet from that school if measured from building to building. Tr. 99.

Matthew was charged by amended felony information with, *inter alia*, the class E felony of residing within 1000 feet of a school or child care facility (Count II), section 566.147. L.F. 30:1. Count II specifically alleged “that on or between January 15, 2017 and April 21, 2017, [Matthew] resided at 3241 W. Glenwood, Springfield, Missouri, a location less than 1000 feet from a school or child care facility, Carver Middle School.” L.F. 30:1.

Count II evidence

Matthew previously pleaded guilty to statutory rape in the second degree, section 566.034. Ex. 1. He was required to register as a sex offender in Greene County. Tr. 75. Matthew must register every ninety days and within three business days of any type of change to the contact information in his registration paperwork. Tr. 76.

Teresa Utterback testified that Matthew lived at her residence at 3241 W. Glenwood Street in Springfield from January, 2017 to April, 2017. Tr. 17-18, 41, 53.

Greene County sex offender registrar Lisa Simmons testified that this residence was 839 feet from 3241 W. Glenwood to Carver Middle School. Tr. 85, 96.

Simmons made this determination using her propriety computer system, which calculated that distance by measuring from property line to property line of each location. Tr. 96; Ex. 4; Ex. A. Simmons testified her determination that this measurement should go from property line to property line was not based on section

566.147 or a regulation or case law, but her subjective interpretation of the loitering statute, section 566.148, which forbids sex offenders from loitering within 500 feet of any daycare facility or its “real property.” Tr. 96-98.

Simmons also testified that if her measurement from 3241 W. Glenwood were “extended to the actual school, it would be outside the thousand feet.” Tr. 99.

In entering a guilty verdict on Count II, the trial court found:

And I specifically find – base that on the property lines. In reviewing the law, I believe that the legislature clearly intends to protect children not only inside the building but also on the school grounds, which is why they arrive at that 1,000 feet.

Tr. 162.

Other evidence

Matthew first registered as a sex offender in Greene County in 2009. Tr. 80, 85. He registered every ninety days. Tr. 76, 85. Matthew registered in January 2016, and he was required to register again in April 2016. Tr. 77.

Simmons gives registrants the entire month to register, rather than a specific day. Tr. 77-78. Matthew had until the last business day of April, 2016 in which to register. Tr. 78.

Matthew did not register until May 24, 2016. Tr. 78. He told Simmons and law enforcement he had been out of state for a couple months. Tr. 51, 79.

Simmons typically gives registrants a three or four week grace period to register after their monthly registration deadline. Tr. 87-88. When Matthew registered in May 2016, his registration was two days shy of four weeks late. Tr. 87.

On January 20, 2017, Matthew registered his address as 3108 W. Countryside Court. Tr. 80-81. This was the address of Matthew’s mother and her boyfriend. Tr. 119.

Simmons requires sex offenders to register a “frequented address.” Tr. 81-82. A “frequented address” is where “they’re going to be spending the night at, if they go over there quite frequently, such as, you know, a significant other, family member, you know, a good friend.” Tr. 82.

Matthew’s now-wife, Karie McCord, rented a room from Utterback at 3241 W. Glenwood. Tr. 18-19, 109. Karie lived at this address before and after she and Matthew married on December 1, 2016. Tr. 109.

On April 20, 2017, Simmons asked law enforcement to verify an anonymous call that Matthew might be residing at 3241 W. Glenwood. Tr. 39, 52. When they arrived at that address after 5:00 p.m., it was still daylight. Tr. 40, 53. Utterback told law enforcement Matthew had lived there since January 2017. Tr. 17-18, 24, 41, 53. Officers contacted Matthew in the house and arrested him. Tr. 41-42, 54.

The trial court found Matthew guilty of all counts as charged. L.F. 31:1; Tr. 161-63. The Honorable David C. Jones sentenced Matthew to concurrent terms of four years’ imprisonment on each count. L.F. 36:1-4. This appeal follows. L.F. 33:1-3.

POINT RELIED ON

The trial court erred in overruling Matthew’s motion for judgment of acquittal and finding him guilty of, and entering sentence and judgment on, Count II, in derogation of his right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that, where the plain and ordinary meaning of “within one thousand feet of” a public school in section 566.147 is inherently ambiguous as to whether a person’s residence must be 1,000 feet from the property line of the school or the school building proper, and, as such, the rule of lenity operates to give Matthew the most favorable construction of section 566.147. Given that it is undisputed 3241 W. Glenwood Street was more than 1,000 feet from Carver Middle School measured building-to-building, there was insufficient evidence by which the trial court could have found Matthew guilty of violating that section beyond a reasonable doubt.

State v. Knox, 604 S.W.3d 316 (Mo. banc 2020);

State v. Liberty, 370 S.W.3d 537 (Mo. banc 2012);

Cox v. Dir. of Revenue, 98 S.W.3d 548 (Mo. banc 2003);

State ex rel. McCree v. Dalton, 573 S.W.3d 44 (Mo. banc 2019);

U.S. Const. amend. XIV;

Mo. Const. art. I, § 10; and

Mo. Rev. Stat. § 566.147.

ARGUMENT

The trial court erred in overruling Matthew’s motion for judgment of acquittal and finding him guilty of, and entering sentence and judgment on, Count II, in derogation of his right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that, where the plain and ordinary meaning of “within one thousand feet of” a public school in section 566.147 is inherently ambiguous as to whether a person’s residence must be 1,000 feet from the property line of the school or the school building proper, and, as such, the rule of lenity operates to give Matthew the most favorable construction of section 566.147. Given that it is undisputed 3241 W. Glenwood Street was more than 1,000 feet from Carver Middle School measured building-to-building, there was insufficient evidence by which the trial court could have found Matthew guilty of violating that section beyond a reasonable doubt.

Preservation and Standard of Review

Matthew filed a motion for judgment of acquittal at the close of respondent’s evidence, which the trial court denied. Tr. 105. This issue is preserved for review. See Rule 29.11(e).

“A challenge to the sufficiency of the evidence supporting a criminal conviction is rooted in the Due Process Clause of the Fourteenth Amendment to the United States Constitution.” *State v. Lawson*, 232 S.W.3d 702, 704 (Mo. App. W.D. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 313-17 (1979)). This is because no person may be deprived of liberty, “except upon evidence that is sufficient fairly to support a conclusion that every element of the claim has been established beyond a reasonable doubt.” *Id.* (quoting *Jackson*, 443 U.S. at 313-14). This impresses “upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused” and thereby symbolizes the significance that our society attaches to liberty. *Jackson*, 443 U.S. at 315. There must be more than a “mere modicum” of

evidence, because “it could not seriously be argued that such a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.” *Id.* at 320.

In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). The State may rely upon direct and circumstantial evidence to meet its burden of proof. *State v. Howell*, 143 S.W.3d 747, 752 (Mo. App. W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative, or forced inferences. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375. “[T]he relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010).

Matthew’s Point Relied On also presents this Court with a question of what respondent need prove to convict him of violating section 566.147. “The question of what the State must prove to support a conviction [under section 566.147] is one of statutory interpretation and, therefore, is determined *de novo*.” *State v. Knox*, 604 S.W.3d 316, 320 (Mo. banc 2020) (citing *Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 930 (Mo. banc 2008)).

Relevant Facts

Count II of the amended felony information charged Matthew with the class E felony of residing within 1,000 feet of a school or child care facility as a sex offender under section 566.147. L.F. 30:1. This count specifically alleged that “on

or between January 15, 2017 and April 21, 2017, [Matthew] resided at 3241 W. Glenwood, Springfield, Missouri, a location less than 1000 feet from a school or child care facility, Carver Middle School.” L.F. 30:1 (emphasis supplied).

Matthew previously pleaded guilty to statutory rape in the second degree, section 566.034. Ex. 1. He was required to register as a sex offender in Greene County. Tr. 75

Teresa Utterback testified that Matthew lived at her residence at 3241 W. Glenwood Street in Springfield from January, 2017 to April, 2017. Tr. 17-18, 41, 53.

Greene County sex offender registrar Lisa Simmons testified that this residence was 839 feet from 3241 W. Glenwood to Carver Middle School. Tr. 85, 96. Simmons made this determination using her propriety computer system, which calculated that distance by measuring from property line to property line of each location. Tr. 96; Ex. 4; Ex. A. Simmons testified her determination that this measurement should go from property line to property line was not based on section 566.147 or a regulation or case law, but her subjective interpretation of the loitering statute, section 566.148, which forbids sex offenders from loitering within 500 feet of any daycare facility or its “real property.” Tr. 96-98.

Simmons also testified that if her measurement from 3241 W. Glenwood were “extended to the actual school, it would be outside the thousand feet.” Tr. 99.

In entering a guilty verdict on Count II, the trial court found:

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Tr. 162.

Analysis

In Missouri, any person who, since July 1, 1979, has been found guilty of a Chapter 566 violation “shall not reside within one thousand feet of any public school as defined in section 160.011[.]” Section 566.147.1(2). “‘Public school’ includes all elementary and high schools operated at public expense.” Section 160.011(7) (2009).

A. Section 566.147 is ambiguous as to the meaning of “within one thousand feet of” a public school.

“The Due Process Clause requires that state criminal statutes demonstrate a basic level of clarity and definiteness.” *State v. Faruqi*, 344 S.W.3d 193, 199 (Mo. banc 2011). “No one may be may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes [and a]ll are entitled to be informed as to what the State commands or forbids.” *Id.* (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

“The primary rule of statutory interpretation is to give effect to the legislative intent as reflected in the plain language of the statute.” *Knox*, 604 S.W.3d at 320 (quoting *State v. Salazar*, 236 S.W.3d 644, 646 (Mo. banc 2007)). “This Court interprets statutes in a way that is not hypertechnical but instead is reasonable and logical and gives meaning to the statute and the legislature’s intent as reflected in the plain language of the statute at issue.” *IBM Corp. v. Dir. of Revenue*, 491 S.W.3d 535, 538 (Mo. banc 2016) (citation omitted) *overruled on other grounds by* section 144.030.2(5) (2018 Cum. Supp.). “When interpreting a statute, its clear and unambiguous language must be given effect, and words cannot be added by implication.” *State ex rel. McCree v. Dalton*, 573 S.W.3d 44, 47 (Mo. banc 2019) (cleaned up).³

³ This brief uses (cleaned up) to indicate that internal quotation marks, brackets, ellipses, footnote signals, alterations, citations, and other non-substantive prior alterations have been omitted from quotations. See, e.g., *United States v. Coleman*,

“If statutory language is subject to more than one reasonable interpretation, then the statute is ambiguous.” *State v. Liberty*, 370 S.W.3d 537, 548 (Mo. banc 2012) (quoting *State v. Graham*, 204 S.W.3d 655, 656 (Mo. banc 2006). “A statute is considered ambiguous only when [the Court] cannot ascertain the legislative intent from the language of the statute by giving the language its plain and ordinary meaning.” *State v. Haynes*, 564 S.W.3d 780, 784 (Mo. App. E.D. 2018) (citation omitted). “An ambiguity means duplicity, indistinctness or uncertainty of meaning of an expression[.]” *J.B. Vending Co., Inc. v. Dir. of Revenue*, 54 S.W.3d 183, 188 (Mo. banc 2001) (cleaned up).

“But before finally deciding that a statute is ambiguous, a court is permitted to apply rules of statutory construction, for the rule of lenity in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read.” *Liberty*, 370 S.W.3d at 549 (cleaned up) (quoting *Bell v. United States*, 349 U.S. 81, 83 (1955)). “The principle of common sense which now governs in the construction of words requires that courts shall understand them as other people would.” *Liberty*, 370 S.W.3d at 549 n.16 (quoting *Kirk v. Ebenhoch*, 191 S.W.2d

961 F.3d 1024, 1027 (8th Cir. 2020); *Seo v. State*, 148 N.E.3d 952, 955 (Ind. 2020); *State v. Day*, 230 A.3d 965, 970 (Md. 2020); *State v. Bennett*, 843 S.E.2d 222, 230 (N.C. 2020); *Ark. Dep’t of Fin. & Admin. v. Carpenter Farms Med. Grp., LLC*, 601 S.W.3d 111, 117 (Ark. 2020); *Brown v. Halpern*, 202 A.3d 687, 698 (Pa. 2019); *Smith v. Commonwealth*, 520 S.W.3d 340, 354 (Ky. 2017); see also Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017), https://perma_cc/JZR7-P85A (arguing for use of (cleaned up) as a new parenthetical intended to tell readers the author has removed extraneous material for readability and guarantees that nothing removed was important); accord Bryan A. Garner, *LawProse Lesson #303: Cleaned-up quotations and citations.*, LAWPROSE (June 5, 2018), <http://lawprose.org/lawprose-lesson-303-cleaned-up-quotations-and-citations/> (extolling “(cleaned up)” as a “cosmetic alteration, something like a bibliographic face lift[]” and antidote to the “tedious and pointless[]” signaling of quotes within quotes); but see *State v. Irwin*, 592 S.W.3d 96, 105 n.4 (Mo. App. E.D. 2019) (“[W]e urge advocates to avoid using “(cleaned up)” in the briefs they submit to this Court.”).

643, 645 (1946)); *see also State v. Severe*, 307 S.W.3d 640, 643 n.6 (Mo. banc 2010) (“The words in criminal statutes, because they affect the general public and are written by lay legislatures, are interpreted in accordance with common understanding.”).

Here, the General Assembly did not define what it means to reside “within one thousand feet of” a public school, *et al.*, for purposes of section 566.147. The referential definition of “public school” similarly provides no guidance on decoding section 566.147. *See* section 160.011(7).

As was evident at trial, the plain and ordinary meaning of “within one thousand feet of” in section 566.147 is subject to differing interpretations. Respondent’s theory was that this phrase meant less than 1,000 feet from the registrant’s property line to the property line of the building in question. Tr. 84-85; Exs. 4, 5. Conversely, Matthew’s trial counsel contended that “within one thousand feet of” meant the 1,000-foot distance was measured from building to building. Tr. 150-52. Inasmuch, giving effect to the plain and ordinary meaning of “within one thousand feet of” a public school leaves section 566.147 open to more than one interpretation and does not answer the current dispute as to its meaning. Therefore, the duplicity, indistinctness, and uncertainty of this expression make it ambiguous. *J.B. Vending Cook*, 54 S.W.3d at 188.

On its face, then, the phrase “within one thousand feet of” in section 566.147 is reasonably susceptible to differing interpretations under a common-sense understanding of those words. *See Liberty*, 370 S.W.3d at 549. As much as statutory interpretation is about legislative intent, it is also about assuring clarity for and the expectations of all citizens in what those statutes communicate. *See Faruqi*, 344 S.W.3d at 199 (citing *Lanzetta*, 306 U.S. at 453). Matthew and similarly situated sex offenders should not have to speculate as to the meaning of “within one thousand feet of” at their peril. *See id.* Therefore, and without adding words by implication, section 566.147 is ambiguous under an ordinary understanding of its terms. *Liberty*, 370 S.W.3d at 549.

B. The 2018 amendment to section 566.147 substantively changed its 2016 distance reckoning.

Matthew was convicted under section 566.147 (2016), which prohibited him from residing “within one thousand feet of” a school or child care facility, but did not define how the residence-to-school distance was to be reckoned. Section 566.147.1. In 2018, this statute was amended to include the additional express provision that “[f]or purposes of this section, one thousand feet shall be measured from the edge of the offender’s property nearest the public school, private school, child care facility, or former victim to the nearest edge of the public school, private school, child care facility or former victim’s property.” Section 566.147.4 (2018). The 2019 amendment to section 566.147 contains this same clarifying language. *See* section 566.147.4 (2019).

“[A]n amended statute should be construed on the theory that the legislature intended to accomplish a substantive change in the law.” *State v. Knox*, 604 S.W.3d 316, 322 (Mo. banc 2020) (cleaned up) (quoting *Sermchief v. Gonzales*, 660 S.W.2d 683, 689 (Mo. banc 1983)). “When the legislature amends a statute, that amendment is presumed to change the existing law.” *Cox v. Dir. of Revenue*, 98 S.W.3d 548, 550 (Mo. banc 2003) (citation omitted). This Court does not construe a statute “in a way that would moot the legislative changes because the legislature is never presumed to have committed a useless act.” *Selig v. Russell*, 604 S.W.3d 817, (Mo. App. W.D. 2020) (cleaned up) (quoting *Wilson v. Progressive Waste Solutions of Mo., Inc.*, 515 S.W.3d 804, 810 (Mo. App. E.D. 2017)).

The two recent amendments to the proximal residency statute further confirm the General Assembly was capable of inserting more specific language in the prior version of section 566.147, but declined to do so. *See* section 566.147.4 (2018); section 566.147.4 (2019). Because the 2016 criminal code version of section 566.147 was silent as to how the 1,000-foot buffer between residence and school was to be measured, yet the 2018 amendment to that statute changed this section to

mean 1,000 feet must be measured from property line to property line, this was a presumptively substantive change to an existing law. *See Knox*, 604 S.W.3d at 322; *Cox*, 98 S.W.3d at 550. Correspondingly, the only possible meaning to be ascribed to the 2018 amendment to section 566.147 is that it could not have been the substantive law under the 2016 statute that residence-to-school distance was reckoned exclusively from property line to property line. *See Knox*, 604 S.W.3d at 322; *Cox*, 98 S.W.3d at 550. Likewise, without mooted it, the presumed substantive change to section 566.147 (2016) meant at minimum that the phrase “within one thousand feet of” was theretofore ambiguous. This Court cannot read the 2018 version of section 566.147 as confirming an unstated definition of “within one thousand feet of” which existed prior to its enactment. *See Kersting v. Replogle*, 492 S.W.3d 600, 605 n.4 (Mo. App. W.D. 2016). Accordingly, had the legislature intended “within one thousand feet of” a school in the applicable prior iteration of section 566.147 to mean property line to property line, it could have included this requirement. *See McCree*, 573 S.W.3d at 47. Therefore, because the 2018 amendment confirmed it did not mean a measurement from property line to property line, failure to so specify the distance reckoning for “within one thousand feet of” in section 566.147 (2016) means this Court can only guess as to the remainder of the legislature’s intent for that phrase.

C. Rules of construction do not resolve the ambiguity of section 566.147 (2016).⁴

⁴ There is at least one appellate panel that has observed a split in authority as to whether appeals courts must always apply canons of construction to ambiguous criminal statutes prior to employing the rule of lenity. *See State v. Slavens*, 375 S.W.3d 915, 919 n.2 (Mo. App. S.D. 2012) (noting that courts have either applied canons of construction or “started and ended their statutory interpretation review with the rule of lenity[,]” the Court choosing “the latter approach.”) (citing *Turner v. State*, 245 S.W.3d 826, 828 (Mo. banc 2008) (canons precede lenity); *State v. Pesce*, 325 S.W.3d 565, 575 (Mo. App. W.D. 2010) (canons precede lenity);

Applying canons of statutory interpretation does not resolve the facial ambiguity of section 566.147. It is true that “where the legislature has defined a term in one statute, its failure to do so in another may be instructive on the subject

Fainter v. State, 174 S.W.3d 718, 721 (Mo. App. W.D. 2005) (lenity only); *State v. Ondo*, 232 S.W.3d 622, 628 (Mo. App. S.D. 2007) (lenity only)).

It is true that this Court’s *Turner* opinion recites that “the rule of lenity is a default rule[]” and “should only be used in the event the other canons are inapplicable.” 245 S.W.3d at 828 (citing *United States v. Wells*, 519 U.S. 482, 499 (1997)); accord *Liberty*, 370 S.W.3d at 547. However, since those opinions other appellate courts have since seemingly strayed from their rule by appearing to move forward with applying the rule of lenity after only going so far into the statutory construction analysis as necessary to confirm existence of an ambiguity. See, e.g., *State v. Rodgers*, 396 S.W.3d 398, 401-403 (Mo. App. W.D. 2013) (looking to standard dictionary definitions and foreign statutory definitions to determine “fugitive from justice” in section 571.070.1(2) was ambiguous and applying rule of lenity); but see *State v. Ross*, 479 S.W.3d 140, 141-42 (declining to apply rule of lenity by relying on extant legislative intent analysis to confirm meaning of section 570.030).

If this is still an unsettled point of law, then the Court should finally clarify for all appeals courts the correct procedure for analyzing ambiguous criminal statutes. Nonetheless, “is applied haphazardly or indiscriminately, the canons of statutory interpretation can lead to a problematic result-oriented jurisprudence.” *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 605-606 (Mo. banc 2019) (cleaned up) (citing *Parktown Imps, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672-73 (Mo. banc 2009)). Where the stuff of section 566.147, viz. proximal residency of sex offenders from children, is emotionally fraught, the danger of even an implicitly biased application of interpretive canons particularly threatens to encroach. See *id.* The fact that Matthew either did or did not reside “within one thousand feet of” a middle school under multiple reasonable interpretations of that phrase is decisive in this appeal; and the Court need not adopt a definitive definition of this phrase to decide Matthew’s appeal. Cf. *State v. Chase*, 490 S.W.3d 771, 776 (Mo. App. W.D. 2016) (“The fact that Chase was not a ‘fugitive from justice’ under multiple reasonable interpretations of the term is decisive in this appeal; we need not adopt a definitive definition of the term to decide this appeal.” (citing *State v. Rodgers*, 396 S.W.3d 398, 403 (Mo. App. W.D. 2013))). Therefore, to the extent that section 566.147 is so inherently ambiguous, and its subsequent amendments that the 1,000-foot distance be measured from property line to property line are so obviously a substantive change to the proximal residency law by the legislature, then Matthew urges this Court to avoid indiscriminate further application of the canons and to proceed directly to applying the rule of lenity in his favor.

of intent.” *Mansfield v. Horner*, 443 S.W.3d 627, 659 (Mo. App. W.D. 2014) (citations omitted). This is confirmed by the sex offender loitering statutes. Section 566.148 forbids any sex offender’s knowing physical presence of loitering “within five hundred feet of...any child care facility building, on the real property comprising any child care facility when persons under the age of eighteen are present in the building, on the grounds, or in the conveyance[.]” Section 566.148.1 (emphasis supplied). The following section forbids any sex offender to “be present in or loiter within five hundred feet of any school building, on real property comprising any school, or in any conveyance owned, leased, or contracted by a school to transport students to or from school or a school-related activity when persons under the age of eighteen are present in the building[.]” Section 566.149.1

The plain text of these statutes specifically reference both “building” and “real property” and forbid sex offenders from loitering near either; yet these statutes further confuse the issue by limiting their terms to when children “are present *in the building*.” See sections 566.148.1; 566.149.1 (emphasis supplied). Accordingly, given the divergence in statutory language, the similar, adjacent loitering statutes do not lend any clarity to the proximal residence statute, since the meaning of “within five hundred feet of” a child care facility or school contemplates both within person-to-building or person-to-real-property radii within those sections. See *id*.

Likewise, section 566.147 does not become less ambiguous with statutes *in pari materia*. If the statutory language is unclear from consideration of the statute alone, the Court “should interpret the meaning of the statute *in pari materia* with other statutes dealing with the same or similar subject matter.” *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo. banc 2014). The preceding paragraphs argued that the loitering statutes in Chapter 566, while similarly proscribing distances within which sex offenders must not be found near children, are not helpful to giving meaning to “within one thousand feet of” in section 566.147 because these statutes criminalize sex offender proximity to either or both buildings and real property. See sections 566.148.1; 566.149.1. In this way, the loitering

statutes are neither more specific nor more general *in pari materia* to the proximal residency statute and are not sufficiently congruent for the former to be harmonized with the latter. *See, e.g., State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 606 (Mo. banc 2019) (similar statutes should be read together, “but where one statute deals with the subject in general terms and the other deals in a specific way, to the extent they conflict, the specific statute prevails over the general statute.”). Therefore, the canon of *in pari materia* does not resolve the ambiguity of section 566.147.

Giving shape to “within five hundred feet of” in sections 566.148 and 566.149 by specifically mentioning “building” and “real property,” but not doing so with “within one thousand feet of” a public school in section 566.147 not only amplifies the ambiguity of the latter statute but betrays the General Assembly’s purpose. This is because including more exacting language in the loitering statutes but omitting it from section 566.147 means “[t]he legislature clearly knew how to make such a distinction,” yet intentionally did not. *State v. Moore*, 303 S.W.3d 515, 520 (Mo. banc 2010). Nevertheless, any argument that the express terms of the loitering statutes should be used to define “within one thousand feet of” in the absence of a definition in section 566.147 asks this Court to ignore well-settled law and impermissibly add missing words by implication. *See McCree*, 573 S.W.3d at 47.

Of similarly little utility is the canon of examining the whole act to discern its purpose or the problem it was enacted to remedy. *See Turner*, 245 S.W.3d at 829. Given that section 566.147 appears amidst other codified sex offenses and adjacent to other proximity loitering sections, it can be readily deduced that the purpose of section 566.147 is to reduce the opportunity for sex offenders to access prospective child victims by creating a 1,000-foot buffer between them and the sex offender’s residence. As such, it can just as easily be reasoned that either a building to building or property line to property line measurement for this buffer can effectuate such a purpose. Inasmuch, it is difficult to consider the problem to be remedied when section 566.147 contemplates conflicting solutions, one that includes measuring

from property line to property line and another measuring from building to building. *See id.* Therefore, canons of statutory construction do not resolve the ambiguity of “within one thousand feet on” in section 566.147.

D. The rule of lenity inures to Matthew’s benefit.

The rule of lenity should give Matthew the benefit of the most favorable construction of section 566.147. “The rule of lenity gives a criminal defendant the benefit of a lesser penalty where there is ambiguity in the statute allowing for more than one interpretation.” *State v. Ondo*, 232 S.W.3d 622, 628 (Mo. App. S.D. 2007) (citing *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. banc 2002)). “[T]he rule of lenity applies to interpretation of statutes only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what the legislature intended.” *Liberty*, 370 S.W.3d at 547 (cleaned up) (citing, *inter alia*, *United States v. Wells*, 519 U.S. 482, 499 (1997)). “Even if ‘common sense’ would indicate that a harsher punishment may provide greater deterrence[...], once it is determined that the statute is ambiguous, this Court has no discretion to resolve the ambiguity in favor of the harsher of two possible interpretations; rather the rule of lenity intervenes to require that the more lenient interpretation govern if no rule of construction resolves the ambiguity.” *Id.* at 549 n.16

Missouri’s statutes restricting sex offender behavior are Byzantine by any reckoning. *See, e.g.*, Dariya Tsyrenzhapova, “*Extremely complex*” sex offender residency restrictions are challenging to enforce, Columbia Missourian, May 6, 2018, available at https://www.columbiamissourian.com/news/local/extremely-complex-sex-offender-residency-restrictions-are-challenging-to-enforce/article_ca5cac0c-4fd7-11e8-9ebc-7b85485fdce1.html. The plain language of section 566.147 (2016) did nothing to quell that reputation, and statutory construction principles do nothing to disambiguate the meaning of the most crucial expression in that section. Matthew should not have to needlessly accumulate another felony just because the General Assembly clearly omitted to specify how to

measure 1,000 feet in the former statute. *Cf. State v. Bazell*, 497 S.W.3d 263, 266-67 (Mo. banc 2016) (“We cannot know why the legislature, in 2002, decided to amend section 570.030.3 to add the requirement that only offenses for which ‘the value of property or services is an element’ may be enhanced to a felony, but this is what the legislature clearly and unambiguously did.”). Inasmuch, according Matthew the most liberal construction of section 566.147 (2016) inuring to his benefit makes “within one thousand feet of” a public school mean this measurement must be made from building to building. *See Liberty*, 370 S.W.3d at 549 n.16; *Ondo*, 232 S.W.3d at 628.

D. Insufficient evidence Matthew resided within 1,000 feet of Carver Middle School.

Applying the rule of lenity to the facts adduced at trial means respondent failed to make a submissible case for Count II. Under the construction of Section 566.174 most favorable to Matthew, 3241 W. Glenwood was “within one thousand feet of” Carver Middle School measured building to building, which was an essential element of the crime of residing within 1,000 feet of a school. Section 566.147.1; *see State v. Gonzales*, 253 S.W.3d 86, 90 (Mo. App. E.D. 2008). Simmons testified that the proximity of Carver Middle School to 3241 W. Glenwood was 839 feet measured property line to property line, but “if extended to the actual school, it would be outside the thousand feet.” Tr. 99. Accordingly, there was no evidence by which the trial court could find beyond a reasonable doubt 3241 W. Glenwood was “within one thousand feet of” Carver Middle School measured building to building. Therefore, the trial court’s sentence and judgment convicting Matthew of violating section 566.147 was erroneous and must be reversed.

CONCLUSION

For the foregoing, because there was insufficient evidence Matthew resided within 1,000 feet of Carver Middle School, the trial court erred in entering sentence and judgment under section 566.147, and Matthew respectfully requests this Court reverse his conviction and sentence on Count II.

Respectfully submitted,

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Certificate of Compliance and Service

I, Jedd C. Schneider, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,558 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 21st day of September, 2020, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Jedd C. Schneider

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