

**BURGLARY
SECOND DEGREE
(C felony)
(Dwelling)
PENAL LAW 140.25(2)
(Committed on or after Sept. 1, 1981)
(Revised 10-25-01)**

The _____ count is Burglary in the Second Degree.

Under our law, a person is guilty of Burglary in the Second Degree when that person knowingly enters [remains]¹ unlawfully in a building with the intent to commit a crime therein, and when the building is a dwelling.

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: ["building"], "dwelling," "unlawfully," "knowingly," and "intent."

[NOTE: Add, where appropriate:

In addition to its ordinary meaning, the term BUILDING includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer.²]

[NOTE: Add, where appropriate:

Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate

¹ When the evidence is that the defendant entered lawfully upon the premises but remained unlawfully after license and privilege to be on the premises terminated, substitute the word "remains" for the word "enters" as indicated by the use of brackets. See *People v Gaines*, 74 NY2d 358 (1989).

² See Penal Law § 140.00(2).

building in itself and a part of the main building.^{3]}

A DWELLING is a building which is usually occupied by a person lodging therein at night.⁴

A person enters [remains] UNLAWFULLY in a building when that person has no license or privilege to enter [remain] in that building.⁵ To have no license or privilege to enter [remain] means to have no right, permission or authority to do so.

[NOTE: Add, where appropriate:

A person who, regardless of his or her intent, enters [remains] in or upon premises which are at the time open to the public does so with license and privilege unless he or she defies a lawful order not to enter [remain], personally communicated to him or her by the owner of such premises or other authorized person.⁶

[NOTE: Add, where appropriate:

A license or privilege to enter [remain] in a building which is only partly open to the public is not a license or privilege to enter [remain], in that part of the building which is not open to the public.⁷

A person KNOWINGLY enters [remains] unlawfully in a building when that person is aware that he or she is entering [remaining] in such building without license or privilege to do so.⁸

³ See Penal Law § 140.00(2).

⁴ See Penal Law § 140.00(3).

⁵ See Penal Law § 140.00(5).

⁶ See Penal Law § 140.00(5).

⁷ See Penal Law § 140.00(5).

⁸ See Penal Law § 15.05(2).

INTENT means conscious objective or purpose.⁹ Thus, a person has the intent to commit a crime in a building when that person's conscious objective or purpose is to commit a crime in that building.

The crime of burglary is separate and distinct from any crime which a person may commit within the building. The crime of burglary is complete when a person knowingly enters [remains] in a building unlawfully and does so with the intent to commit a crime in the building, regardless of whether that person ever commits, or even attempts to commit, any crime in the building.

In order for you to find the defendant guilty of this crime, the People are required to prove from all the evidence in the case beyond a reasonable doubt each of the following four elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), unlawfully entered [remained] in a building located at (specify);
2. That the defendant did so knowingly;
3. That the defendant did so with the intent to commit a crime inside the building; and ¹⁰

⁹ See Penal Law § 15.05(1).

¹⁰ If, in the indictment or bill of particulars, the People allege that the defendant intended a specific crime, that crime must be specified and the third element should be:

“3. That the defendant did so with the intent to commit the crime of specify inside the dwelling.” See *People v Barnes*, 50 NY2d 375, 379 n 3 (1980).

4. That the building was a dwelling.¹¹

Therefore, if you find that the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of the crime of Burglary in the Second Degree as charged in the ___ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of the crime of Burglary in the Second Degree as charged in the ___ count.

¹¹ “Knowingly” does not modify “dwelling” for this crime because the requirement that the building be a dwelling is in a separate “and when” clause and is thus not modified by the mens rea term “knowingly.” See *People v. Mitchell*, 77 N.Y.2d 624 (1991); *People v. Gonzalez*, 240 A.D.2d 255 (1st Dept. 1997); *People v. Wilson*, 245 A.D.2d 402 (2nd Dept. 1997); *People v. Davis*, 244 A.D.2d 1003, 1004 (4th Dept. 1997).