

BURGLARY IN THE SECOND DEGREE
(Dwelling)
Penal Law § 140.25 (2)
(Committed on or after Sept. 1, 1981)
(Revised Jan. 2013, June 2015, June 2019)¹

The (specify) 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]² unlawfully in a building with the intent to commit a crime therein, and when the building is a dwelling.

The following terms used in that definition have a special meaning:

¹ The January 2013 revision was for the purpose of expanding the definition of “unlawfully” and of “intent” when the burglary is premised on a violation of an order of protection in order to accord with the dictates of *People v Lewis*, 5 NY3d 546 (2005) and *People v Cajigas*, 19 NY3d 697 (2012).

The June 2015 revision was for the purpose of providing the jury with an instruction, when in issue, for determining whether an exception applies to the general rule that any part of a building with residential and non-residential portions is considered a dwelling. See *People v McCray*, 23 NY3d 621, 624 (2014).

The June 2019 revision was for the purpose of modifying the definition of “dwelling” to accord with the holding in *People v. Joseph*, 28 NY3d 1003 (2016) that “*McCray* did not impose a requirement that a building must be ‘large’ in order for the exception to apply. The size of the building may be a factor when considering whether the residential units of the building are remote and inaccessible, but a building being a ‘large’ size, especially given the subjective nature of the word ‘large,’ is not a dispositive factor.”

² When the accusation 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]).

[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.^{3]}

[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 building in itself and a part of the main building.^{4]}

A DWELLING is a building which is usually occupied by a person lodging therein at night.⁵

[Note: Add, where appropriate:

Normally, if a building contains a dwelling, a burglary committed in any part of that building is the burglary of a dwelling

However, a building would not be a dwelling if a burglary was committed in an area so remote and inaccessible from the living quarters that the burglar neither came near, nor readily could have come near, to anyone's living quarters.^{6]}

A person enters [remains] UNLAWFULLY in a building when that person has no license or privilege to enter [remain] in that building.⁷ To have no license or privilege to enter [remain]

³ See Penal Law § 140.00 (2).

⁴ See Penal Law § 140.00 (2).

⁵ See Penal Law § 140.00 (3).

⁶ See *People v McCray*, 23 NY3d 621, 624 (2014); *People v. Joseph*, 28 NY3d 1003 (2016).

⁷ See Penal Law § 140.00 (5).

means to have no right, permission or authority to do so.

[NOTE: Add, where appropriate:

A person who is subject to and knows of an order of protection directing him/her to stay away from a building which he/she knowingly enters, even by invitation or permission, UNLAWFULLY enters that building.^{8]}

[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.⁹

[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.¹⁰

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.¹¹

INTENT means conscious objective or purpose.¹² 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

⁸ See footnote 1.

⁹ See Penal Law § 140.00 (5).

¹⁰ See Penal Law § 140.00 (5).

¹¹ See Penal Law § 15.05 (2).

¹² See Penal Law § 15.05 (1).

that building.

[NOTE: Add, where appropriate:

It is not enough that a person, who is subject to and knows of an order of protection prohibiting entry into a dwelling, intended to violate the order by entering the building. That person must have intended to violate some other provision of the order or to commit a separate crime therein.^{13]}

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 of 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;¹⁴ and

¹³ See footnote 1.

¹⁴ If, in the indictment or bill of particulars, the People allege that the defendant intended a specific crime, that crime must be specified (see *People v Barnes*, 50 NY2d 375, 379 n 3 [1980]) and the third element should then be:

“3. That the defendant did so with the intent to commit the crime of (specify) inside the building.”

4. That the building was a dwelling.¹⁵

If you find the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of this crime.

¹⁵ “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 NY2d 624 [1991]; *People v Wilson*, 245 AD2d 402 [2d Dept 1997]; *People v Davis*, 244 AD2d 1003, 1004 [4th Dept 1997]; *People v Gonzalez*, 240 AD2d 255 [1st Dept 1997]).