

BURGLARY IN THE FIRST DEGREE
(Displays Firearm)
Penal Law § 140.30(4)
(Committed on or after Sept. 1, 1981)
(Revised January 2013)¹

The (*specify*) count is Burglary in the First Degree.

Under our law, a person is guilty of Burglary in the First Degree when that person knowingly enters [remains]² unlawfully in a dwelling with the intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, that person [or another participant in the crime] displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

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

A DWELLING is a building which is usually occupied by a person lodging therein at night.³

[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

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).

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).

³ See Penal Law § 140.00(3).

therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer.^{4]}]

[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.^{5]}]

A person enters [remains] UNLAWFULLY in a dwelling when that person has no license or privilege to enter [remain] in that dwelling.⁶ 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 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.^{7]}

[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.^{8]}

[NOTE: Add, where appropriate:

⁴ See Penal Law § 140.00(2).

⁵ See Penal Law § 140.00(2).

⁶ See Penal Law § 140.00(5).

⁷ See footnote 1.

⁸ See Penal Law § 140.00(5).

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.^{9]}

A person KNOWINGLY enters [remains] unlawfully in a dwelling when that person is aware that he or she is entering [remaining] in such dwelling without license or privilege to do so.¹⁰

INTENT means conscious objective or purpose.¹¹ Thus, a person has the intent to commit a crime in a dwelling when that person's conscious objective or purpose is to commit a crime in that dwelling.

[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.^{12]}

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

⁹ See Penal Law § 140.00(5).

¹⁰ See Penal Law § 15.05(2).

¹¹ See Penal Law § 15.05(1).

¹² See footnote 1.

A person DISPLAYS what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm when that person consciously displays or manifests the presence of an object that can reasonably be perceived as a pistol, revolver, rifle, shotgun, machine gun or other firearm, and when the person to whom that object is displayed or manifested perceives it as a pistol, revolver, rifle, shotgun, machine gun or other firearm.¹³ It need not be shown, however, that the object displayed was in fact a pistol, revolver, rifle, shotgun, machine gun or other firearm.

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 dwelling located at (specify);
2. That the defendant did so knowingly¹⁴;
3. That the defendant did so with the intent to commit a crime inside the dwelling¹⁵; and

¹³ See *People v Baskerville*, 60 NY2d 374 (1983); *People v Lopez*, 73 NY2d 214 (1989).

¹⁴ "Knowingly" modifies "dwelling" for this crime because the requirement that the building be a dwelling follows and is modified by the mens rea term "knowingly." See *People v. Ryan*, 82 N.Y.2d 497 (1993). Cf. *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).

¹⁵ If, in the indictment or bill of particulars, the People allege that the defendant intended a specific crime, that crime must be specified [*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, in effecting entry or while in the dwelling or in immediate flight therefrom, the defendant [or another participant in the crime] displayed what appeared to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

[NOTE: If the affirmative defense does not apply:

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.]

[NOTE: If the affirmative defense applies:

If you find that the People have not proven beyond a reasonable doubt any one or more of those elements, then you must find the defendant not guilty of Burglary in the First Degree as charged in the ___ count.

On the other hand, if you find that the People have proven beyond a reasonable doubt each of the elements, then you must consider an affirmative defense the defendant has raised. That defense, if proved, does not relieve the defendant from responsibility for the Burglary, but, under our law, it does reduce the seriousness of the crime from Burglary in the First Degree to Burglary in the Second Degree. Remember, if you have already found the defendant not guilty of Burglary in the First Degree, you will not consider the affirmative defense.

Under our law, it is an affirmative defense to this charge of Burglary in the First Degree that the pistol, revolver, rifle, shotgun, machine gun or other firearm which the defendant displayed was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged.

Under the law, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider evidence introduced by the People or by the defendant.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time to present the evidence, but in terms of its quality, weight and convincing effect. For the affirmative defense to be proven by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

Therefore, if you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People have proven beyond a reasonable doubt each of the elements of Burglary in the First Degree, you must find the defendant guilty of that crime as charged in the _____ count.

On the other hand, if you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of Burglary in the First Degree as charged in the _____ count, and you must find the defendant guilty of the reduced charge of Burglary in the Second Degree.]