

**BURGLARY
FIRST DEGREE
(B felony)
(Dangerous Instrument)
PENAL LAW 140.30(3)
(Committed on or after Sept. 1, 1981)
(Revised January, 2009 and January, 2011)¹**

The _____ 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] uses or threatens the immediate use of a dangerous instrument.

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: “dwelling,” “unlawfully,” “knowingly,” “intent,” and “dangerous instrument.”

¹ The January, 2009, revision was for the purpose of updating the elements to accord with decisional law. That law requires that where the defendant “threatens” the immediate use of a dangerous instrument, the People must prove that the defendant possessed that dangerous instrument at the time of the crime. *People v Ford*, 11 NY3d 875, 878 (2008); *People v Pena*, 50 NY2d 400, 407 (1980). See also *People v Grant*, 17 NY3d 613, 617-618 (2011) decided after the revision of this charge.

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).

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 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

³ See Penal Law § 140.00(3).

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.

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:

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]}

⁸ See Penal Law § 140.00(5).

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.

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.

DANGEROUS INSTRUMENT means any instrument, article or substance (including a vehicle) which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or other serious physical injury,¹³ that is, serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.¹⁴ Under that definition, death or other serious physical injury need not in fact be caused.

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 knowingly¹⁵;

¹³ See Penal Law § 10.00(13).

¹⁴ See Penal Law § 10.00(10).

¹⁵ “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).

3. That the defendant did so with the intent to commit a crime inside the dwelling¹⁶; and
4. That, in effecting entry or while in the dwelling or in immediate flight therefrom, the defendant [or another participant in the crime] possessed a dangerous instrument and used or threatened the immediate use of that dangerous instrument.

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 First 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 First Degree as charged in the ___ count.

¹⁶ 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.”