

CHAPTER 4-2

BURGLARY

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The instructions in this chapter cover the offenses defined in §§ 18-4-201 through -205, C.R.S.

4-2:01 FIRST DEGREE BURGLARY

The elements of the crime of first degree burglary are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. [unlawfully entered] [remained unlawfully after a lawful or unlawful entry] a building or occupied structure,

5. with intent to commit therein the crime of _____
(insert specific crime(s) against person or property, other
than trespass), as defined in instruction _____, and

6. while [effecting entry into] [in] [in immediate
flight from] the building or occupied structure,

7. [[the defendant] [another participant in the crime]
[assaulted] [menaced] any person.]

-or-

[[the defendant] [another participant in the crime]
was armed with [explosives] [a deadly weapon].]

8. [without the affirmative defense in instruction
number _____.]

After considering all the evidence, if you decide the
prosecution has proven each of the elements beyond a
reasonable doubt, you should find the defendant guilty of
first degree burglary.

After considering all the evidence, if you decide the
prosecution has failed to prove any one or more of the
elements beyond a reasonable doubt, you should find the
defendant not guilty of first degree burglary.

NOTES ON USE

Delete inapplicable bracketed material.

When this instruction is used, the applicable definition
of "unlawfully entered or remained unlawfully," "building or
occupied structure," "assault," "menace," "explosive," and
"deadly weapon" must be given.

Additional jury findings may be required to determine
the degree of felony and sentence for a conviction. These
findings concern whether the burglary involved theft or
attempted theft of a controlled substance from a place where
possession was lawful.

After considering all the evidence, if you do not unanimously find the prosecution has proven [this element] [any one or more of these elements] beyond a reasonable doubt, you should indicate "No" on the verdict form that has been provided.

NOTES ON USE

This interrogatory should be used only when there is sufficient evidence to support a finding beyond a reasonable doubt that the sentence-enhancing factor was present in this case.

When this interrogatory is used, the applicable definition of "controlled substance" must be given.

SOURCE & AUTHORITY

§18-4-202(3), C.R.S.

COLJI-Crim. No. 14:02 (1983).

4-2:03 SECOND DEGREE BURGLARY

The elements of the crime of second degree burglary are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. [unlawfully broke an entrance into] [unlawfully entered] [remained unlawfully after a lawful or unlawful entry in]
5. a building or occupied structure
6. with intent to commit therein the crime of _____ (insert specific crime(s) against person or property), as defined in instruction _____.

7. [without the affirmative defense in instruction number _____.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree burglary.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree burglary.

NOTES ON USE

Delete inapplicable bracketed material.

When this instruction is used, the applicable definition of "unlawfully entered or remained," and "building or occupied structure," must be given.

Additional jury findings may be required in order to determine the degree of felony and sentence for a conviction. These findings concern (1) whether the building or occupied structure was a dwelling, and (2) whether the defendant's objective was theft of a controlled substance. *People v. Larkins*, 109 P.3d 1003 (Colo. App. 2005) (unlike predecessor statute, specific intent may develop after entry).

SOURCE & AUTHORITY

§18-4-203, C.R.S.

COLJI-Crim. No. 14:03 (1983).

CLASSIFICATION OF OFFENSE

F3, if object is controlled substance or property is a dwelling

F4, otherwise

SENTENCE ENHANCEMENT FOR BURGLARY OF A DWELLING

COMMITTEE NOTE

When there is sufficient evidence to support a finding beyond a reasonable doubt that the defendant committed burglary of a dwelling, then one of the following should be used: (1) Interrogatory on dwelling [No mens rea]; (2) Interrogatory on dwelling [Mens rea required]; (3) Second degree burglary of a dwelling.

It is clear that the "dwelling" aspect of second-degree burglary is a sentence-enhancing factor, not an element. *Armintrout v. People*, 864 P.2d 576 (Colo. 1993); *People v. Ford*, 100 P.3d 540 (Colo. 2004). However, it is less clear what the prosecution is required to prove in order to establish that the burglary was of a "dwelling."

1. Interrogatory: Dwelling [No mens rea]. Because it is a sentence-enhancement factor, the "dwelling" aspect of second degree burglary may be exempt from the presumptive rule applying a mens rea to every element of the offense. See § 18-1-503(4), C.R.S. If so, then the prosecution need only prove that the building or occupied structure was a dwelling - *i.e.*, it was used, intended to be used, or usually used by a person for habitation. This view is contained in the first interrogatory.

2. Interrogatory: Dwelling [Mens rea required]. Sentence-enhancement factors may contain mens rea components. And it may be that the general assembly intended to include such a component here. By defining the enhancing factor as "burglary of a dwelling," the general assembly may have meant to require proof not only that the building or occupied structure be a dwelling, but also that the defendant knew this when he unlawfully entered or remained. This view is contained in the second interrogatory.

3. Second degree burglary of a dwelling. By including "dwelling" among the elements of second degree burglary, the prosecution is here required to prove that the burglary was a dwelling, and that the defendant knew it was a dwelling when he entered or remained unlawfully. If this alternative is used: (1) the applicable definition of "dwelling" must be given; (2) it may appropriate to add an

instruction on second degree burglary (no "dwelling"), as if it were a lesser-included offense.

SOURCE & AUTHORITY

§18-4-203(2)(a), C.R.S.

§18-1-901(1)(g), C.R.S.

**4-2:04.1 INTERROGATORY-DWELLING [NO MENS REA]
SECOND DEGREE BURGLARY**

If you find the defendant not guilty of second degree burglary, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict. If, however, you find the defendant guilty of second degree burglary, you should fill out the verdict form reflecting your guilty verdict, and then answer the following question:

Was the building or occupied structure a dwelling? (Yes or No)

The building or occupied structure was a dwelling if it was it used, intended to be used, or usually used by a person for habitation.

It is the prosecution's burden to prove this element beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has proven this element beyond a reasonable doubt, you should indicate "Yes" on the verdict form that has been provided.

This finding must be unanimous.

After considering all the evidence, if you do not unanimously find the prosecution has proven [this element] [any one or more of these elements] beyond a reasonable doubt, you should indicate "No" on the verdict form that has been provided.

**4-2:04.2 INTERROGATORY-DWELLING [MENS REA
REQUIRED]
SECOND DEGREE BURGLARY**

If you find the defendant not guilty of second degree burglary, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict. If, however, you find the defendant guilty of second degree burglary, you should fill out the verdict form reflecting your guilty verdict, and then answer the following questions:

When the defendant unlawfully [broke an entrance into] [entered] [remained in] the building or occupied structure

(1) Was the structure a dwelling?

and

(2) Did the defendant know that it was a dwelling?

The building or occupied structure was a dwelling if it was it used, intended to be used, or usually used by a person for habitation.

It is the prosecution's burden to prove each of these two elements beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has proven each of these two elements beyond a reasonable doubt, you should indicate "Yes" on the verdict form that has been provided. This finding must be unanimous.

After considering all the evidence, if you do not unanimously find the prosecution has proven [this element] [any one or more of these elements] beyond a reasonable doubt, you should indicate "No" on the verdict form that has been provided.

4-2:04.3 SECOND DEGREE BURGLARY OF A DWELLING

The elements of the crime of second degree burglary of a dwelling are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,

3. knowingly,

4. [unlawfully broke an entrance into] [entered unlawfully] [remained unlawfully after a lawful or unlawful entry in]

5. a dwelling

6. with intent to commit therein the crime of _____ (insert specific crime(s) against person or property), as defined in instruction _____.

7. [without the affirmative defense in instruction number _____.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree burglary.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree burglary.

NOTE ON USE

When this instruction is used, the definitions of "dwelling", "knowingly", "entered unlawfully" and "remained unlawfully" must be given. *People v. Larkins*, 109 P.3d 1003 (Colo. App. 2005) (unlike predecessor statute, specific intent may develop after entry).

SOURCE AND AUTHORITY

§ 18-4-203, C.R.S.

COLJI-Crim. No. 14:03 (1983).

CLASSIFICATION OF OFFENSE

F3

**4-2:05 INTERROGATORY (CONTROLLED SUBSTANCE) SECOND
DEGREE BURGLARY**

If you find the defendant not guilty of second degree burglary, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict. If, however, you find the defendant guilty of second degree burglary, you should fill out the verdict form reflecting your guilty verdict, and then answer the following question:

Was theft of a controlled substance the defendant's objective? (yes or no)

The defendant's objective was theft of a controlled substance if:

1. in committing the burglary,
2. the defendant
3. intended
4. [without authorization] [by threat] [by deception]
5. to obtain or exercise control over
6. a controlled substance
7. which was the property of another
8. lawfully kept within the building or occupied structure
9. and the defendant intended to permanently deprive the other person of the use or benefit of the controlled substance.
10. [without the affirmative defense in instruction number ____.]

It is the prosecution's burden to prove each of these elements beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has proven each of these elements beyond a reasonable doubt, you should indicate "Yes" on the verdict form that has been provided. This finding must be unanimous.

After considering all the evidence, if you do not unanimously find the prosecution has proven [this element] [any one or more of these elements] beyond a reasonable doubt, you should indicate "No" on the verdict form that has been provided.

NOTES ON USE

This interrogatory should be used only when there is sufficient evidence to support a finding beyond a reasonable doubt that the sentence-enhancing factor was present in this case.

When this interrogatory is used, the applicable definition of "controlled substance" must be given.

SOURCE & AUTHORITY

§18-4-203(2)(b), C.R.S.

§18-4-401(1)(a), C.R.S.

COLJI-Crim. No. 14:04 (1983).

CLASSIFICATION OF OFFENSE

F3

4-2:06 THIRD DEGREE BURGLARY

The elements of the crime of third degree burglary are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,

3. with intent to commit the crime of _____
(insert specific crime), as defined in instruction _____,

4. [entered] [broke into]

5. a [vault] [safe] [cash register] [coin vending machine] [product dispenser] [money depository] [safety deposit box] [coin telephone] [coin box] [apparatus or equipment whether or not coin operated].

6. [without the affirmative defense in instruction number _____.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of third degree burglary.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of third degree burglary.

NOTES ON USE

Delete inapplicable bracketed material.

Additional jury findings may be required to determine the degree of felony and sentence for a conviction. These findings concern whether the defendant's objective was theft of a controlled substance from lawful possession.

An employee locker is not a "vault" or "apparatus or equipment" under the statute. *Winter v. People*, 126 P.3d 192 (Colo. 2006)

SOURCE & AUTHORITY

§18-4-204, C.R.S.

COLJI-Crim. No. 14:05 (1983).

People v. Geyer, 942 P.2d 1297 (Colo. App. 1996)
(statute constitutional)

CLASSIFICATION OF OFFENSE

F4, if objective was theft of controlled substances

F5, otherwise

4-2:07 INTERROGATORY (CONTROLLED SUBSTANCE) THIRD DEGREE BURGLARY

If you find the defendant not guilty of third degree burglary, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict. If, however, you find the defendant guilty of third degree burglary, you should fill out the verdict form reflecting your guilty verdict, and then answer the following question:

Was theft of a controlled substance the defendant's objective? (yes or no)

The defendant's objective was theft of a controlled substance if:

1. in committing the burglary,
2. the defendant
3. intended
4. [without authorization] [by threat] [by deception]
5. to obtain or exercise control over
6. a controlled substance
7. which was the property of another
8. lawfully kept within the building or occupied structure
9. and the defendant intended to permanently deprive the other person of the use or benefit of the controlled substance.
10. [without the affirmative defense in instruction number ____.]

It is the prosecution's burden to prove each of these elements beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has proven each of these elements beyond a reasonable doubt, you should indicate "Yes" on the verdict form that has been provided. This finding must be unanimous.

After considering all the evidence, if you do not unanimously find the prosecution has proven [this element] [any one or more of these elements] beyond a reasonable doubt, you should indicate "No" on the verdict form that has been provided.

NOTES ON USE

This interrogatory should be used only when there is sufficient evidence to support a finding beyond a reasonable doubt that the sentence-enhancing factor was present in this case.

When this interrogatory is used, the applicable definitions of "intent", "controlled substance" and "building or occupied structure" must be given.

SOURCE & AUTHORITY

§18-4-204(2), C.R.S.

§18-4-401(1)(a), C.R.S.

4-2:08 POSSESSION OF BURGLARY TOOLS

The elements of the crime of possession of burglary tools are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed

4. any [explosive] [tool] [instrument] [article] which was

5. adapted, designed, or commonly used for [committing] [facilitating the commission of]

6. an offense involving [forcible entry into premises] [theft by a physical taking],

7. [with intent to use the thing possessed] [with knowledge that some person intends to use the thing possessed] in the commission of such an offense.

8. [without the affirmative defense in instruction number ____.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of burglary tools.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of burglary tools.

NOTES ON USE

Delete inapplicable bracketed material.

When this instruction is used, the applicable definition of "possession", "intent" and "knowingly" must be used.

SOURCE & AUTHORITY

§18-4-205, C.R.S.

COLJI-Crim. No. 14:07 (1983).

CLASSIFICATION OF OFFENSE

F5

SPECIAL RULES

4-2(1) LICENSE TO ENTER OR REMAIN

A person who enters or remains in or upon premises which are, at the time, open to the public does so lawfully, with license and privilege. (This is true regardless of the person's intent.)

But if the owner of the premises (or someone else who is authorized) personally and lawfully orders the person not to enter or remain, there is no license or privilege. A person who defies such an order does so unlawfully. [§18-4-201(3), C.R.S.]

4-2(2) PARTIAL LICENSE TO ENTER OR REMAIN

A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. [§18-4-201(3), C.R.S.]