

214.11 SECOND DEGREE BURGLARY. FELONY.

The defendant has been charged with second degree burglary.

For you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt:

First, that the defendant broke<sup>1</sup> and entered<sup>2</sup> a [dwelling house<sup>3</sup>] [sleeping apartment] [house within the curtilage<sup>4</sup> of a dwelling house] [building in which a room was used as a sleeping apartment].

Second, that the breaking and entering was during the nighttime.<sup>5</sup>

Third, that the [owner] [tenant] did not consent to the breaking and entering.

And Fourth, that at the time of the breaking and entering the defendant intended to commit (*name and define felony*)<sup>6</sup> in the [dwelling house] [sleeping apartment] [house within the curtilage of a dwelling house] [building in which a room was used as a sleeping apartment].

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant broke into and entered a [dwelling house] [sleeping apartment] [house within the curtilage of a dwelling house] [building in which a room is used as a sleeping apartment] without the consent of the [owner] [tenant], during the nighttime, and at that time intended to commit (*name felony*) therein, it would be your duty to return a verdict of guilty of second degree burglary. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second degree burglary<sup>7</sup> but would consider whether the defendant is guilty of felonious breaking or entering. Felonious breaking or entering differs from burglary in that both

a breaking and an entry are not necessary, either is enough; the building<sup>8</sup> involved need not have been a [dwelling house] [sleeping apartment], and the breaking or entry need not have been in the nighttime.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant [broke into] [entered] [broke into or entered] a building without the consent of the [owner] [tenant], intending at that time to commit (*name felony*) therein, it would be your duty to return a verdict of guilty of felonious breaking or entering. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of felonious breaking or entering<sup>9</sup> but would consider whether the defendant is guilty of non-felonious breaking or entering. Non-felonious breaking or entering differs from felonious breaking or entering in that it need not be done with the intent to commit a felony so long as the breaking or entering was wrongful, that is, without any claim of right.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant wrongfully [broke into] [entered] [broke into or entered] another person's building without that person's consent, it would be your duty to return a verdict of guilty of non-felonious breaking or entering. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

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1. If the breaking is not actual, but falls into the category of a "constructive" breaking, the trial judge should use an additional explanation, such as: "A breaking need not be actual; that is, the person breaking need not physically remove the barrier himself. He may, by a threat of force (such as threatening to burn down the structure into which entry is sought), inspire such fear as to induce the occupant to allow him to enter. He may, by some trick or fraudulent representation (such as pretending to be a repairman), cause someone in the structure to open an entry to him. In any of these situations, the

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defendant would have constructively broken, and such constructive breaking is as sufficient a breaking for the purposes of this offense as any physical removal by the defendant of a barrier to entry."

2. If the entry is disputed, the judge should use an additional explanation such as entry of [any portion of the body] [any implement under the defendant's control entered into the premises] would constitute an entry.

3. In *State v. Green*, 305 N.C. 463 (1982), the court held that the definition of a dwelling house is not limited to the house proper but rather includes within it not only the house in which the owner or renter and his family, or any member of it, may live and sleep, but all other houses appurtenant thereto, and used as part and parcel thereof, such as a kitchen, smokehouse, and the like, provided they are within the curtilage or are adjacent to or very near to the dwelling house.

4. The curtilage is the land around a dwelling house upon which those outbuildings lie that are "commonly used within the dwelling house." *State v. Twitty*, 2 N.C. 102 (1794) Under common law, houses or buildings within the curtilage that were used as part of the dwelling, such as smokehouses and pantries, were protected by the prohibition against burglary. The question of whether a building was part of the dwelling rested upon whether it served the "comfort and convenience" of the dwelling. *State v. Foster*, 129 N.C. 704 (1901)

5. If there is doubt as to whether it was nighttime, the jury should be told: "The law considers it to be nighttime when it is so dark that a person's face cannot be identified except by artificial light or moonlight."

6. At this juncture, the crime that the defendant allegedly intended to commit should be briefly defined, e.g., "Larceny is the taking and carrying away of the personal property of another without that person's consent with the intent to deprive that person of possession permanently." Failure to define the crime may constitute reversible error. *S. v. Elliott*, 21 N.C. App. 555 (1974).

7. If there is to be no instruction on lesser included offenses, the last phrase should be: ". . . it would be your duty to return a verdict of not guilty."

8. N.C. Gen. Stat. § 14-54(c) states that "building shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, or any other structure designed to house or secure within it any activity or property."

9. If there is to be no instruction on lesser included offenses, that last phrase should be: ". . . it would be your duty to return a verdict of not guilty."