BREAKING & ENTERING A (BUILDING) (SHIP) (VESSEL) (VEHICLE) WITH INTENT TO COMMIT A FELONY PUTTING A PERSON THEREIN IN FEAR

G.L. c. 266, § 17 – Part II

The defendant is charged with breaking and entering a (building) (ship) (vessel) (vehicle) with intent to commit a felony thereby putting a person lawfully therein in fear. To prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

***First*: That the defendant broke into someone else's (building) (ship) (vessel) (vehicle);**

***Second:* That the defendant entered that (building) (ship) (vessel) (vehicle);**

***Third:* That the defendant did so with the intent to commit a felony in that (building) (ship) (vessel) (vehicle); and**

***Fourth:* That a person who was lawfully inside was put in fear.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant exerted physical force,

however slight, and thereby removed an obstruction to gaining entry into someone else's (building) (ship) (vessel) (vehicle). Breaking includes moving in a significant manner anything that barred the way into the (building) (ship) (vessel) (vehicle). Examples would include such things as (opening a closed door whether locked or unlocked) (opening a closed window whether locked or unlocked) (going in through an open window that is not intended for use as an entrance). On the other hand, going through an unobstructed entrance such as an open door does not constitute breaking.

Commonwealth v. Burke, 392 Mass. 688, 689–690 (1984) (shattering outer storm window was breaking); *Commonwealth v. Tilley,* 355 Mass. 507, 508–509 (1969) (reasonable to infer that intruders "moved to a material degree something that barred the way" and did not enter through unobstructed entrance; entry through an open window not intended for use as an entry was breaking); *Commonwealth v. Shedd,* 140 Mass. 451, 453 (1886) (opening closed window was breaking); *Commonwealth v. Hall*, 48 Mass. App. Ct. 727, 731 (2000) (entry through open window was breaking). See *Commonwealth v. Jeffrey Pearson,* 72 Mass. App. Ct. 1101 (unpublished) (leaning torso and arms through car window was breaking).

To prove the second element the Commonwealth must prove beyond a reasonable doubt that the defendant in fact entered the (building) (ship) (vessel) (vehicle). An entry occurs when there is any intrusion – no matter how slight – into a protected enclosure by any part of the defendant's body. (An entry is not proven if all that passed

over the threshold was an object controlled by the defendant unless that object was used to commit a felony inside the (building) (ship) (vessel) (vehicle).) The Commonwealth is not required to prove whether the entry occurred during the daytime or nighttime, but it must prove that the defendant entered the (building) (ship) (vessel) (vehicle).

Commonwealth v. *Cotto*, 52 Mass. App. Ct. 225, 229 (2001), further appellate review denied, 435 Mass. 1101 (entry occurs when any part of defendant's body, or an instrument used to commit the intended felony, crosses the threshold). See also *Commonwealth* v. *Burke,* 392 Mass. at 691 (reaching between outer and inner window with a tool, but not a hand, insufficient); *Commonwealth v. Lewis,* 346 Mass. 373, 377 (1963) (reasonable to infer that some portion of defendant's hand or arm entered house in course of opening door).

To prove the third element, the Commonwealth must prove beyond a reasonable doubt that, at the time the defendant broke into the (building) (ship) (vessel) (vehicle), the defendant had the specific intent to commit a crime that is a felony. A person's intent is their purpose or objective. This requires you to make a decision about the defendant's state of mind at that time. You may examine any actions or words of the defendant, and all of the surrounding circumstances, to help you determine what the defendant's intent was at that time.

As I just said, the defendant must have intended to commit a felony at the time of the break. A felony is an offense for which a

person may be sentenced to state prison. The offense(s) of [name of offense(s)] **is (are) punishable by a sentence to state prison. (While the Commonwealth is not required to prove that the defendant intended to commit any particular felony, it must prove that at the time of the break the defendant intended to commit a crime that is a felony.)**

Rogan v. Commonwealth, 415 Mass. 376, 379 (1993) (jury may find intent to commit an unspecified felony); *Commonwealth v. Poff,* 56 Mass. App. Ct. 201, 203 (2002) (felonious intent must be present at the time of the breaking and entering); *Commonwealth v. Clemente*, 25 Mass. App. Ct. 229, 235 n.10 (1988) (statute apparently does not require an intent to commit a felony in the same building into which the break was made).

To prove the fourth element, the Commonwealth must prove beyond a reasonable doubt that a person lawfully in the (building) (ship) (vessel) (vehicle) was put in fear. The Commonwealth is not required to prove that the defendant specifically intended to put anyone in fear.

If you find that the Commonwealth has proved all four elements beyond a reasonable doubt, then you should return a verdict of guilty. If the Commonwealth has failed to prove one or more elements beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTIONS

1. Trick or threat. **A person may be convicted if they convinced or compelled an innocent person by trick or threat to assist them in the break.**

Commonwealth v. Lockwood, 95 Mass. App. Ct. 189, 193 (2019) ("Compelling another to open a closed door so as to gain entry, whether by agreement, trickery, force, or - as here - fear, is sufficient to constitute a breaking even though it is accomplished by indirect means."); *Commonwealth v. Labare,* 11 Mass. App. Ct. 370, 377 (1981) (phony name).

2. When the Commonwealth alleges intent to steal. **(Stealing property under the protection of a building when it has been placed there for safekeeping and is not under the eye or personal care of someone is a felony.) (Stealing property valued at over $1,200 is a felony.) You are permitted to draw an inference that the defendant intended to steal (in a building) (more than $1,200) if you think it reasonable based on the evidence. You are not required to draw such an inference, but you may, if it is supported by the evidence.**

Commonwealth v. McGovern, 397 Mass. 863, 868 (1986) (when a person forcefully enters a building without right, it is fair to infer intent to steal); *Commonwealth v. Hughes,* 380 Mass. 596, 602–604 (1980) (dwelling); *Commonwealth v. Wygrzywalski,* 362 Mass. 790, 792 (1973) (store); *Commonwealth v. Eppich,* 342 Mass. 487, 493 (1961) (same); *Commonwealth v. Ronchetti,* 333 Mass. 78, 81 (1955) (inference permissible even where defendant attacked homeowner, apparently spontaneously); *Commonwealth v. Shedd,* 140 Mass. 451, 453 (1886) (jury may make inference based on circumstances, including "conduct and declarations" of defendant). See G.L. c. 266, § 20; G.L. c. 266, § 30 (1).

NOTES:

1. **"Another's" property.** The Commonwealth need not allege the building or vehicle owner's name in the complaint, G.L. c. 277, § 25, and if it does, at trial need only prove that the property was owned by someone other than the defendant. *Commonwealth v. Kalinowski,* 360 Mass. 682, 684–685

(1971). At common law, one could not burglarize one's own dwelling, but the issue turned on rights of occupancy rather than ownership. *Commonwealth v. Ricardo*, 26 Mass. App. Ct. 345, 354–357 (1988) (charge of armed assault in dwelling). But see *Commonwealth v. Derome*, 6 Mass. App. Ct. 900, 901 (1978) (directing verdict for defendant where Commonwealth charged the break of one premise but proved the break of another).

2. **One break or several?** Multiple breaks into different units in a single building may be prosecuted and sentenced as separate crimes. See *Clemente,* 25 Mass. App. Ct. at 237.

3. **Variance in intended felony.** The complaint need not specify the intended felony. *Commonwealth v. Porcher*, 26 Mass. App. Ct. 517, 521 (1988); *Commonwealth v. Wainio*, 1 Mass. App. Ct. 866, 867 (1974). Since a complaint's specification of the intended felony is surplusage, proof of a different felony is permissible if the defendant is not misled or the jury confused. *Commonwealth v. Costello,* 392 Mass. 393, 402–404 (1984); *Commonwealth v. Hobbs,* 385 Mass. 863, 869–871 (1982); see also *Commonwealth v. Randolph*, 415 Mass. 364, 367 (1993). See also *Rogan, 415 Mass. at 380* (jury may find intent to commit an unspecified misdemeanor on charge of breaking and entering in daytime with intent to commit felony). However, the judge must clearly instruct the jury that the Commonwealth must prove the defendant had a specific intent at the time of the break to commit a crime that was a felony.

4. **Elements of intended felony.** Because the specific intended felony is surplusage, and the jury can find an intent to commit an unspecified felony, a judge is not required to instruct the jury as to the elements of the intended felony. *Commonwealth v. Willard*, 53 Mass. App. Ct. 650, 656 (2002). As a practical matter, the factual circumstances of many breaking-and-entering offenses will potentially support a finding that the defendant intended to commit one or more different felonies, including larceny from a building (G.L. c. 266, § 20), larceny from the person (G.L. c. 266, § 25), or larceny of property with a value exceeding $1,200 (G.L. c. 266, § 30). *Willard*, 53 Mass. App. Ct. at 654-655 & n.7.