

**ENTERING WITHOUT BREAKING
A DWELLING
IN THE NIGHTTIME
WITH INTENT TO COMMIT A FELONY
(NO PERSON THEREIN BEING PUT IN FEAR)**

G.L. c. 266, § 18 – Part I

The defendant is charged with entering a dwelling in the nighttime with intent to commit a felony. To prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: That the defendant entered someone else's dwelling;

Second: That the defendant did so during the nighttime; and

Third: That the defendant did so with the intent to commit a felony in that dwelling.

To prove the first element, the Commonwealth must prove that the defendant entered someone else's dwelling without permission.

A dwelling is a place for human habitation, a residence, or a place where someone has a legal right to live and intends to live, whether it is currently occupied or not. It can be occupied on a temporary or

long-term basis, as long as it is someone other than the defendant who has the lawful right to occupy it as their residence.

[A dwelling consists of rooms used as a residence including secured hallways in multi-unit residential buildings. It also includes other structures whether attached or unattached to the residence. Such structures would include garages, barns, stables and the like, provided they are used in connection with the main residence.]

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).)

See *Commonwealth v. Rodriguez*, 100 Mass. App. Ct. 663, 666 (2022) (a secured hallway accessible only to residents and staff in a multiunit residential building is part of one's dwelling house under the Armed Assault in a Dwelling House statute, G.L. c. 265, § 18A); *Commonwealth v. Tinsley*, 487 Mass. 380, 387 (2021) (entry into an attached garage was an entry into the "dwelling place of another" under the Armed Home Invasion statute, G.L. c. 265, § 18C, which is analogous to a "dwelling house" under the burglary statutes, G.L. c. 266, § 14 & 15); *Commonwealth v. Kingsbury*, 378 Mass. 751, 756-757 (1979); *Commonwealth v. Goldoff*, 24 Mass. App. Ct. 458, 461-462 (1987) (common secured hallways in a multi-unit residential structure are part of a "dwelling" under the burglary statute, G.L. c. 266, § 14). See also *Devoe v. Commonwealth*, 3 Met. 316, 325-326 (1841) (at common law, "every house for the dwelling and habitation of man" was taken to include not only the dwelling house proper, "but also the outhouses, such as barns, stables, cow-houses, dairies, and the like, if they be parcel of the messuage, though they be not under the same roof, or joining contiguous to it.... But no distant barn, warehouse, or the like, is under the same privilege... if it be not parcel of the messuage. [I]f the outhouses be adjoining the dwellinghouse, and occupied as parcel thereof, though there be no common enclosure or curtilage, they may still be considered as parts of the mansion.")

To prove the second element, the Commonwealth must prove that the defendant entered during the nighttime. The law is that “nighttime” begins one hour after sunset and ends one hour before sunrise the next day, measured according to the mean, or average, time at that time of year in the place where the offense was allegedly committed. The Commonwealth may prove that it was nighttime by (presenting evidence that it was completely dark outside at the time of the offense) (offering an almanac or other reference book to show the time of sunset or sunrise on that day) (asking you as jurors to rely on your common knowledge of approximately when the sun rises or sets on [date] in this area). In the end, you must be convinced beyond a reasonable doubt that the crime occurred sometime between one hour after sunset and one hour before sunrise.

G.L. c. 278, § 10. Commonwealth v. Kingsbury, 378 Mass. 751, 752–754 (1979); Commonwealth v. Bergstrom, 10 Mass. App. Ct. 838, 838–839 (1980); Commonwealth v. Servidori, 6 Mass. App. Ct. 969, 969 (1979).

To prove the third element, the Commonwealth must prove that, at the time the defendant entered the dwelling, 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, at the time they entered, have intended to commit a felony. 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 entry, 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).

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

SUPPLEMENTAL INSTRUCTIONS

1. *Judicial notice of time of sunset or sunrise.* The law permits me to take

notice of certain facts that are not subject to reasonable dispute. In

this case, based upon [reference book] , I have decided to accept as

proved the fact that on [date] the sun (set) (rose) at [time] .

Therefore, you may accept this fact as true, even if no evidence has

been introduced about it. You are not required to do so, but you may.

See the notes to the supplemental instruction on “Judicial Notice” in Instruction 2.220 (What Is Evidence; Stipulations; Judicial Notice).

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 *Commonwealth v. Clemente*, 25 Mass. App. Ct. 229, 237 (1988).

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.

5. **Evidence of Time.** The Commonwealth’s failure to provide direct evidence of the time of the crime is not fatal to the Commonwealth’s case because circumstantial evidence is competent evidence to establish guilt. *Commonwealth v. Bennett*, 424 Mass. 64, 67 (1997). Nor is the Commonwealth compelled to provide any evidence of the time of sunrise. *Bennett*, 424 Mass. at 68 (“The jury were entitled to rely on their general knowledge of matters commonly known within the community in determining what inferences may be drawn to establish a material fact not proved by direct evidence, such as the time of sunset or sunrise at a particular time of the year.”).