

**BREAKING INTO, BURNING, INJURING, OR DESTROYING  
A SAFE, VAULT, OR OTHER DEPOSITORY  
WITH INTENT TO COMMIT A LARCENY OR FELONY**

**G.L. c. 266, § 16 – Part II**

The defendant is charged with (breaking) (burning) (blowing up) (injuring) (destroying) a (safe) (vault) (depository of money, bonds, or other valuables) with intent to commit a (larceny) (felony). To prove the defendant guilty of this offense, the Commonwealth must prove two things beyond a reasonable doubt:

*First:* That the defendant (broke into) (burned) (blew up) (injured) (destroyed) someone else's (safe) (vault) (depository of money, bonds, or other valuables) and;

*Second:* That the defendant did so with the intent to commit a (larceny) (felony).

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant (broke into) (burned) (blew up) (injured) (destroyed) someone else's (safe) (vault) (depository of money, bonds, or other valuables).

**Breaking**

**To prove the defendant broke into a (safe) (vault) (depository of money, bonds, or other valuables), 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 it. Breaking includes moving in a significant manner anything that bars the way into the (safe) (vault) (depository).**

*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 Ct. 1101 (unpublished) (leaning torso and arms through car window was breaking).

*The below are common definitions for explanatory purposes, depending on the facts alleged.*

**Burning**

**To prove the defendant burned a (safe) (vault) (depository of money, bonds, or other valuables), the Commonwealth must prove beyond a reasonable doubt that the defendant burned it with a flame or heat.**

***Blowing Up***

To prove the defendant blew up a (safe) (vault) (depository of money, bonds, or other valuables), the Commonwealth must prove beyond a reasonable doubt the defendant damaged it with an explosion.

***Injuring***

To prove that the defendant injured a (safe) (vault) (depository of money, bonds, or other valuables), the Commonwealth must prove beyond a reasonable doubt that the defendant damaged it either in appearance or functionality.

***Destroying***

To prove that the defendant destroyed a (safe) (vault) (depository of money, bonds, or other valuables), the Commonwealth must prove beyond a reasonable doubt that the defendant destroyed it so that it was no longer capable of being used for its intended purpose.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that at the time the defendant (broke into) (burned) (blew up) (injured) (destroyed) the (safe) (vault) (depository

**for money, bonds, or other valuables), the defendant had the specific intent to commit a (larceny) (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 of the break have intended to commit a (larceny) (felony).**

**Larceny**

**Larceny is the taking of property of another with the intent at the time of the taking to permanently deprive the owner of that property.**

**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 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 both elements beyond a reasonable doubt, 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 INSTRUCTION

**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).

#### 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. 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, supra* (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 to commit a crime that was a felony.

**3. 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.