

13.1 BURGLARY

§ 810.02, Fla. Stat.

Give if the information or indictment charges entering with the intent to commit an offense.

To prove the crime of Burglary, the State must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) entered a [structure] [conveyance] owned by or in the possession of (person alleged).**
- 2. At the time of entering the [structure] [conveyance], (defendant) had the intent to commit [(the crime alleged)] [an offense other than burglary or trespass] in that [structure] [conveyance].**

The offense intended cannot be trespass or burglary. If requested, the jury should be instructed on the elements of the offense(s) intended.

Affirmative defenses. Give only if defendant meets his or her burden of production that he or she had an invitation or license to enter or that the premises were open to the public. State v. Hicks, 421 So. 2d 510 (Fla. 1982) and State v. Waters, 436 So. 2d 66 (Fla. 1983). Failure to instruct on consent constitutes fundamental error where consent is the sole or primary defense. Faulk v. State, 222 So. 3d 621 (Fla. 1st DCA 2017) and Harrison v. State, 229 So. 3d 830 (Fla. 4th DCA 2017).

It is a defense to the crime of Burglary if [(defendant) was [licensed] [or] [invited] to enter the [structure] [conveyance]] [the premises were open to the public at the time of the entering]. The State has the burden of proving beyond a reasonable doubt that [(defendant) was not [licensed] [or] [invited] to enter the [structure] [conveyance]] [the premises were not open to the public at the time of the entering].

Trick, fraud, or deceit. Johnson v. State, 921 So. 2d 490, 508 (Fla. 2005).

If the [license] [invitation] to enter was obtained by (defendant's) trick or fraud or deceit, then the [license] [invitation] to enter was not valid.

Area closed to the public. Dakes v. State, 545 So. 2d 939 (Fla. 3d DCA 1989).

If (defendant) entered premises that were open to the public, but then entered an area of the premises that [he] [she] knew or should have known was not open to the public, (defendant) committed a Burglary if [he] [she] entered that non-public area with the intent to commit [(the crime alleged)] [an offense other than burglary or trespass] in that non-public area.

Limited scope of consent. State v. Sawko, 624 So. 2d 751 (Fla. 5th DCA 1993).

If a defendant exceeded the scope of [his] [her] [license] [invitation] with respect to the time of the entering, the place that [he] [she] entered, or the purpose of [his] [her] entering, then the [license] [invitation] was not valid.

Give only if applicable. § 810.07, Fla. Stat.

You may infer that (defendant) had the intent to commit a crime inside a [structure] [conveyance] if the [entering] [attempted entering] of the [structure] [conveyance] was done stealthily and without the consent of the owner or occupant.

Give if applicable.

The entry necessary need not be the whole body of the defendant. It is sufficient if the defendant, with the intent to commit a crime, extends any part of [his] [her] body into the [structure] [conveyance].

Give if the information or indictment charges remaining with the intent to commit an offense.

To prove the crime of Burglary, the State must prove the following two elements beyond a reasonable doubt:

- 1. (Defendant) had permission or consent to enter a [structure] [conveyance] owned by or in the possession of (person alleged).**
- 2. (Defendant), after entering the [structure] [conveyance], remained therein**

Give 2a, 2b, 2c, or any combination as applicable.

- a. surreptitiously and with the intent to commit [(the crime alleged)] [an offense other than burglary or trespass] inside the [structure] [conveyance].**
- b. after permission to remain had been withdrawn and with the intent to commit [(the crime alleged)] [an offense other than burglary or trespass] inside the [structure] [conveyance].**
- c. to commit or attempt to commit a [forcible felony] [(the forcible felony alleged)].**

The offense intended cannot be trespass or burglary. Forcible felonies are listed in § 776.08 Fla. Stat. If requested, the jury should be instructed on the elements of the offense(s) or forcible felony/felonies intended.

The intent with which an act is done is an operation of the mind and, therefore, is not always capable of direct and positive proof. It may be established by circumstantial evidence like any other fact in a case.

Even though an unlawful [entering] [remaining in] a [structure] [conveyance] is proved, if the evidence does not establish that it was done with the intent to commit [(the crime alleged)] [an offense other than burglary or trespass], the defendant must be found not guilty of Burglary.

Proof of possession of stolen property.

Proof of possession by an accused of property recently stolen by means of a burglary, unless satisfactorily explained, may justify a conviction of Burglary if the circumstances of the burglary and of the possession of the stolen property convince you beyond a reasonable doubt that the defendant committed the burglary.

§ 810.011, Fla. Stat. Dubose v. State, 210 So. 3d 641 (Fla. 2017).

“Structure” means any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure. [The enclosure need not be continuous as it may have an ungated opening for entering and exiting.]

§ 810.011, Fla. Stat.

“Conveyance” means any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft or sleeping car; and to enter a conveyance includes taking apart any portion of the conveyance.

Higher Degrees of Burglary. With an assault.

If you find (defendant) guilty of Burglary, you must also determine if the State has proved beyond a reasonable doubt whether, in the course of committing the Burglary, (defendant) assaulted any person. An assault is an intentional and unlawful threat, either by word or act, to do violence to another, at a time when the defendant appeared to have the ability to carry out the threat and [his] [her] act created a well-founded fear in the other person that the violence was about to take place.

With a battery.

If you find (defendant) guilty of Burglary, you must also determine if the State has proved beyond a reasonable doubt whether, in the course of committing the Burglary, (defendant) battered any person. A battery is an actual and intentional touching or striking of another person against that person’s will or the intentional causing of bodily harm to another person.

While armed.

If you find (defendant) guilty of Burglary, you must also determine if the State has proved beyond a reasonable doubt whether, in the course of committing the Burglary, (defendant) was armed or armed [himself] [herself] within the [structure] [conveyance] with [explosives] [a dangerous weapon].

§ 790.001, Fla. Stat., but may need to add exceptions.

“Explosive” means any chemical compound or mixture that has the property of yielding readily to combustion or oxidation upon application of heat, flame, or shock, including but not limited to dynamite, nitroglycerin, trinitrotoluene, or ammonium nitrate when combined with other ingredients to form an explosive mixture, blasting caps, and detonators.

State v. Rodriguez, 402 So. 2d 86 (Fla. 3d DCA 1981).

For an object that was designed and constructed to cause death or great bodily harm if used in its ordinary and usual manner, it is not necessary for the State to prove that the defendant was willing to use the object in furtherance of the burglary for an object to constitute a “dangerous weapon.”

Give if applicable.

An object not designed to inflict bodily harm may nonetheless be a “dangerous weapon” if it was [used] [or] [threatened to be used] [or] [intended to be used] in a manner likely to cause death or great bodily harm. “Great bodily harm” means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises.

Give if applicable. Hardee v. State, 534 So. 2d 706 (Fla. 1988).

If you find a firearm to be a “dangerous weapon,” then to “arm” oneself during the course of a Burglary includes possessing a firearm, whether loaded with ammunition or not, at any time during the course of committing the Burglary. Firearm and ammunition are defined in § 790.001, Fla. Stat.

Structure or conveyance is a dwelling.

If you find (defendant) guilty of Burglary, you must also determine if the State has proved beyond a reasonable doubt whether the [structure] [conveyance] [entered] [remained in] was a dwelling.

Dubose v. State, 210 So. 3d 641 (Fla. 2017).

“Dwelling” means a building [or conveyance] of any kind, whether such building [or conveyance] is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the enclosed space of ground and outbuildings immediately surrounding it. [The enclosure need not be continuous as it may have an ungated opening for entering and exiting.] For purposes of Burglary, a “dwelling” includes an attached porch or attached garage.

Human being in structure or conveyance.

If you find (defendant) guilty of Burglary, you must also determine if the State has proved beyond a reasonable doubt whether, in the course of committing the Burglary, there was another human being in the [structure] [conveyance], at the time [he] [she] [entered] [remained in] the [structure] [conveyance].

Offense intended is theft of a controlled substance.

If you find (defendant) guilty of Burglary, you must also determine whether the State has proved beyond a reasonable doubt that the offense intended to be committed therein was theft of a controlled substance. Pursuant to Florida law, (name of controlled substance) is a controlled substance. A theft occurs when a person knowingly and unlawfully obtains or uses or endeavors to obtain or use the property of the victim and does so with the intent to, either temporarily or permanently, deprive the victim of his or her right to the property or any benefit

from it or to appropriate the property of the victim to his or her own use or to the use of any person not entitled to it.

Traveling from county of residence into another county with intent to commit a burglary. § 843.22, Fla. Stat.

If you find (defendant) guilty of [Burglary] [Attempted Burglary] [Solicitation to Commit Burglary] [Conspiracy to Commit Burglary], you must also determine whether the State proved beyond a reasonable doubt that:

- 1. (Defendant) resided in Florida;**
and
- 2. (Defendant) travelled any distance with the intent to commit a burglary in a county in Florida other than the Florida county where [he] [she] resided.**

Dwelling or structure with use of motor vehicle or damage.

If you find (defendant) guilty of Burglary, you must also determine if the State has proved beyond a reasonable doubt whether, in the course of committing the Burglary, (defendant) entered a [dwelling] [structure] and

- 1. used a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the offense, and thereby damaged the [dwelling] [structure].**
or
- 2. caused damage to the [dwelling] [structure] [property within the [dwelling] [structure]], in excess of \$1,000.**

Give if applicable. Key v. State, 348 So. 3d 691 (Fla. 1DCA 2022).

The enclosure itself, such as a fence, that surrounds a [dwelling] [structure] is considered part of the [dwelling] [structure].

Authorized emergency vehicle.

If you find (defendant) guilty of Burglary, you must also determine if the State has proved beyond a reasonable doubt whether the conveyance [entered] [remained in] was an authorized emergency vehicle.

§ 316.003, Fla. Stat.

An “authorized emergency vehicle” is a vehicle of the fire department (fire patrol), police vehicles, and such ambulances and emergency vehicles of municipal departments, public service corporations operated by private corporations, the Department of Environmental Protection, the Department of Health, the Department of Transportation, and the Department of Corrections as are designated or authorized by their respective department or the chief of police of an incorporated city or any sheriff of a county.

State of emergency. Also use to increase scoresheet points one level higher. See § 810.02(3)(f), Fla. Stat.

The definitions of structure, dwelling, and conveyance are different for counties where a state of emergency has been declared under chapter 252. See § 810.011(1), (2), and (3), Fla. Stat.

If you find (defendant) guilty of Burglary, you must also determine if the State has proved beyond a reasonable doubt whether

- 1. the Burglary was committed within a county that was subject to a state of emergency that had been declared by the governor under chapter 252, the “State Emergency Management Act,”**
and
- 2. the perpetration of the Burglary was facilitated by conditions arising from the emergency.**

The term “conditions arising from the emergency” means civil unrest, power outages, curfews, voluntary or mandatory evacuations, or a reduction in the presence of or response time for first responders or homeland security personnel.

§ 810.011(4), Fla. Stat.

An act is committed “in the course of committing” if it occurs in the attempt to commit the offense or in flight after the attempt or commission.

Lesser Included Offenses

It may be better for the jury to make special findings regarding higher degrees of Burglary instead of listing all the necessary lesser-included offenses of the highest form of Burglary charged. See *Sanders v. State*, 944 So. 2d 203 (Fla. 2006) (Pariente, J., concurring).

BURGLARY WITH ASSAULT OR BATTERY OR WHILE ARMED OR WITH USE OF MOTOR VEHICLE OR PROPERTY DAMAGE — 810.02(2)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Burglary		810.02(4)	13.1
	Aggravated battery	784.045	8.4
	Persons Engaged in Criminal Offense Having Firearm	790.07(2)	10.3
	Battery	784.03	8.3
	Aggravated assault	784.021	8.2
	Persons Engaged in Criminal Offense Having Weapon	790.07(1)	10.3
	Assault	784.011	8.1
	Attempt	777.04(1)	5.1

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
	Burglary	810.02(3)	13.1
	Trespass	810.08(2)(a)	13.3
	Trespass	810.08(2)(b)	13.3
	Trespass	810.08(2)(c)	13.3
	Criminal Mischief	806.13	12.4

**BURGLARY OF DWELLING; BURGLARY OF STRUCTURE OR CONVEYANCE WITH HUMAN BEING INSIDE; BURGLARY OF AN AUTHORIZED EMERGENCY VEHICLE*
— 810.02(3)**

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Burglary		810.02(4)	13.1
	Attempt	777.04(1)	5.1
	Trespass	810.08(2)(a)	13.3
	Trespass	810.08(2)(b)	13.3
	Trespass	810.08(2)(c)	13.3

BURGLARY — 810.02(4)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Attempt	777.04(1)	5.1
	Trespass	810.08(2)(a)	13.3
	Trespass	810.08(2)(b)	13.3
	Trespass	810.08(2)(c)	13.3
	Criminal Mischief	806.13	12.4

Comments

As of November 2022, the courts had not determined which definition of “motor vehicle” applies to the burglary statute.

When the compounded offense of burglary with an assault or burglary with a battery is charged, the jury can convict on two lesser-included offenses. *See Gian-Grasso v. State*, 899 So. 2d 392 (Fla. 4th DCA 2005).

A special instruction will be necessary in cases where the dangerous weapon was an animal or a substance or something that is not commonly referred to as an “object.”

This instruction was adopted in 1981 and amended in 1985 [477 So. 2d 985], 1997 [697 So. 2d 84], 2003 [850 So. 2d 1272], 2007 [962 So. 2d 310], 2008 [986 So. 2d 563], 2013 [109 So. 3d 721], 2015 [176 So. 3d 938], 2017 [217 So. 3d 965], 2018 [257 So. 3d 925], on April 3, 2020, and on December 21, 2022.