

BURGLARY IN THE SECOND DEGREE
(N.J.S.A. 2C:18-2b)

The indictment charges the defendant with committing the crime of burglary. The indictment reads as follows:

(Read Indictment)

The pertinent part of the statute on which this indictment is based reads as follows:

A person is guilty of burglary in the third degree if, with purpose to commit an offense therein the person:

- (1) Enters a (research facility) (structure), or a separately secured or occupied portion thereof, unless the (research facility) (structure) was at the time open to the public or the person is licensed or privileged to enter; or
- (2) Surreptitiously remains in a (research facility) (structure) or a separately secured or occupied portion thereof knowing that he is not licensed or privileged to do so.

That person is guilty of burglary in the second degree if, in the course of committing the offense I just described to you, that person:

- (1) Purposely, knowingly or recklessly inflicts, attempts to inflict or threatens to inflict bodily injury on anyone; or
- (2) Is armed with or displays what appears to be explosives or a deadly weapon.

In order for you to find the defendant guilty of the crime of burglary, the State must prove beyond a reasonable doubt the following elements:

- (1) That the defendant entered¹ the (research facility) (structure) known as _____ without permission;
- (2) That the defendant did so with the purpose to commit an offense therein.

(WHERE APPLICABLE CHARGE PERTINENT PART OF N.J.S.A. 2C:1-14p)

¹ If “surreptitiously remaining” is in your case, charge as follows: that the defendant surreptitiously remained for some duration in the (research facility) (structure), or a separately secured or occupied portion thereof knowing that (he/she) was not licensed or privileged to do so. [See N.J.S.A. 2C:18-2a(2) and Cannel, Criminal Code Annotated, Comment 4, N.J.S.A. 2C:18-2 (requirement that this offense “requires a stay of some duration”)]. “Surreptitiously” means secretly, stealthily, or fraudulently. [Black’s Law Dictionary at p. 1445 (6th ed. 1990)].

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Research facility means any building, laboratory, institution, organization, or school engaged in research, testing, educational or experimental activities, or any commercial or academic enterprise that uses warm-blooded or cold-blooded animals for food or fiber production, agriculture, research, testing, experimentation, or education. A research facility includes, but is not limited to, any enclosure, separately secured yard, pad, pond, vehicle, building structure or premises or separately secured portion thereof.

Structure includes any building [**OR** room, ship, vessel, car, vehicle, or airplane, and also means any place adapted for overnight accommodation of persons or for carrying on business therein] whether or not a person is actually present.²

[Charge when appropriate]

A structure includes a place adapted for business when it is specifically used for conducting commercial activity and is secured from the public whether or not a person is actually present.³

“Purpose to commit an offense” means that the defendant intended to commit an unlawful act⁴ inside the (structure) (research facility). [**WHERE APPLICABLE CHARGE:** The unlawful act(s) allegedly intended are set forth in count(s) _____ of this indictment.]⁵

A person acts purposely with respect to the nature of his/her conduct or a result thereof if it is his/her conscious object to engage in conduct of that nature or to cause such a result. Purpose, with purpose, and similar words have the same meaning.⁶ In other words, in order for you to find that the defendant acted purposely, the State must prove beyond a reasonable doubt that it was the defendant's conscious object at the time he/she unlawfully entered [**OR** surreptitiously remained in] the premises to commit an unlawful act.⁷

² N.J.S.A. 2C:18-1.

³ State v. Olivero, 221 N.J. 632, 635, 643 (2015).

⁴ State v. Robinson, 289 N.J. Super. 447, 455 (App. Div. 1996); N.J.S.A. 2C:1-14k.

⁵ “[W]here the circumstances surrounding the unlawful entry do not give rise to any ambiguity or uncertainty as to a defendant’s purpose in entering a structure without privilege to do so [and] led inevitably and reasonably to the conclusion that some unlawful act is intended to be committed inside the structure, then specific instructions delineating the precise unlawful acts intended are unnecessary.” Robinson, 289 N.J. Super. at 458 (emphasis in original). However, where the circumstances surrounding defendant’s purpose in entering or surreptitiously remaining in the structure or research facility are ambiguous, i.e., the evidence suggests both criminal and non-criminal purposes for the entry, then it might be necessary to direct the jury’s consideration to the specific criminal acts alleged in the indictment, if there are any. See, for instance, State v. Marquez, 277 N.J. Super. 162, 168-69 (App. Div. 1994).

⁶ N.J.S.A. 2C:2-2b(1).

⁷ If the jury may find from the facts that although defendant entered the premises without permission, he did not do so with the purpose to commit an offense therein, then the unauthorized entry

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A person's purpose is a state or a condition of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts. A state of mind is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. Therefore, it is not necessary, members of the jury, that witnesses be produced to testify that an accused said he/she had a certain state of mind when he/she engaged in a particular act. His/Her state of mind may be gathered from his/her acts and his/her conduct, and from all he/she said and did at the particular time and place, and from all of the surrounding circumstances.

If you find that the State has proved beyond a reasonable doubt the elements of the crime of burglary, then you must determine whether the State has proven the following additional element(s) beyond a reasonable doubt.

I have already informed you that a section of the statute provides that a burglary becomes a crime of the second degree if the burglar (purposely, knowingly or recklessly) inflicts (or purposely attempts to inflict), or threatens to inflict bodily injury on anyone or is armed with or displays what appears to be explosives or a deadly weapon during the course of the burglary.

(Charge when appropriate)

(A) In this case the State has alleged that the defendant purposely inflicted (attempted to inflict or threatened to inflict) bodily injury upon _____ (Alleged victim).

I have already defined the term "purposely."

(Charge when appropriate)

In this case the State has alleged that the defendant knowingly inflicted bodily injury upon _____ (Alleged victim). A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of a high probability of their existence. A person acts knowingly with respect to a result of his/her conduct if he/she is aware that it is practically certain that his/her conduct will cause such a result. "Knowing," "with knowledge," or equivalent terms have the same meaning.⁸

(Charge when appropriate)

In this case the State has alleged that the defendant recklessly inflicted bodily injury upon _____ (Alleged victim). A person acts recklessly with respect to a material element of an offense when he/she consciously disregards a substantial and unjustifiable risk that

may constitute a criminal trespass. In that case, the jury should be charged on the appropriate lesser included offense of criminal trespass. See N.J.S.A. 2C:18-3.

⁸ N.J.S.A. 2C:2-2b(2).

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the material element exists or will result from his/her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him/her, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Recklessness," "with recklessness" or equivalent terms have the same meaning.⁹

(Charge if applicable)

A person is guilty of an attempt to inflict bodily injury if he/she purposely commits an act which constitutes a substantial step toward the commission of the infliction of bodily injury.¹⁰

The phrase "bodily injury" means physical pain, illness or impairment of physical condition.¹¹

(Charge when appropriate)

(B) In this case the State alleges that the defendant was armed with or displayed what appeared to be (explosives¹²) (a deadly weapon¹³).

In order for a person to be armed with or display what appears to be (explosives) (a deadly weapon), he/she must first be in possession of them. The word "possess" means a knowing, intentional control of a designated thing, accompanied by a knowledge of its character. I have already defined the term "knowingly."

Thus, the person must know or be aware that he/she possesses the item (in this case), and he/she must know what it is that he/she possesses or controls (that it is _____).

[WHERE APPLICABLE CHARGE: This possession cannot merely be a passing control that is fleeting or uncertain in its nature. In other words, to "possess" within the meaning

⁹ N.J.S.A. 2C:2-2b(3).

¹⁰ For alternative definitions of attempt, see N.J.S.A. 2C:5-1.

¹¹ See definition in N.J.S.A. 2C:11-1a.

¹² If applicable, use the following definition from N.J.S.A. 2C:39-1(e): "Explosive" means any chemical compound or mixture that is commonly used or is possessed for the purpose of producing an explosion and which contains any oxidizing and combustible materials or other ingredients in such proportions, quantities or packing that an ignition by fire, by friction, by concussion or by detonation of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects on continuous objects.

¹³ Where applicable, use the following definitions of "deadly weapon" [N.J.S.A. 2C:11-1(c)] and serious bodily injury [N.J.S.A. 2C:11-1(b)]: "Deadly weapon" means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury or which in the manner it is fashioned would lead the victim reasonably to believe it to be capable of producing death or serious bodily injury. "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

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of the law, the defendant must knowingly procure or receive the item possessed or be aware of his/her control thereof for a sufficient period of time to have been able to relinquish his/her control if he/she chose to do so.]

When we speak of possession, we mean a conscious, knowing possession. The law recognizes two kinds of possession: they are actual possession and constructive possession.

A person is in actual possession of a particular article or thing when he/she knows what it is: that is, he/she has knowledge of its character and knowingly has it on his/her person at a given time. A person who, with knowledge of its character, knowingly has direct physical control over a thing, at a given time, is in actual possession of it.

Constructive possession means possession in which the person does not physically have the property, but though not physically on one's person, he/she is aware of the presence of the property and is able to and has the intention to exercise control over it.

A person who, although not in actual possession, has knowledge of its character, knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.

[WHERE APPLICABLE CHARGE: The law recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint; that is, if they knowingly share control over the article.]

In order for defendant to be guilty of being “armed with” (explosives) (a deadly weapon), however, the State must prove not only possession but also immediate access to that (explosive) (deadly weapon). The State must prove beyond a reasonable doubt that the weapon was easily accessible and readily available for use during the burglary.¹⁴ **[WHERE APPLICABLE CHARGE:** As long as such ready accessibility is proven, it does not matter whether defendant

¹⁴ State v. Merritt, 247 N.J. Super. 425, 430-31 (App. Div. 1991) (“[T]he term ‘armed’ is not synonymous with the term ‘in possession of a weapon’...,” which is the standard for mandatory sentencing under the Graves Act [N.J.S.A. 2C:43-6c]). “The term ‘armed’ connotes not only possession but also immediate access to a weapon.” Id. at 430. Note that in State v. Rolon, 199 N.J. 575, 584-85 (2009), in which it was held that in a prosecution for first degree robbery involving a non-firearm weapon, “a defendant cannot be considered to have been ‘armed with a deadly weapon’ unless he had immediate access to the potential weapon and an intent to use it in a way that is ‘capable of producing death or serious bodily injury,’” the Court rejected the State’s reliance on the above-quoted definition of “armed” because Merritt was “decided under an entirely different statutory scheme.” However, in footnote 1 of Rolon, the Court cautioned that “[w]e do not decide here whether our reasoning regarding the robbery statute is applicable in the burglary setting.” Id. at 585. But see the concurring opinion in Rolon, 199 N.J. at 587-91, in which two justices expressed the belief that the rationale of Rolon regarding non-firearm armed robbery applies equally to the second degree burglary statute.

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was armed prior to arriving at the scene of the burglary or obtained the weapon during the course of the burglary.]¹⁵

If you find beyond a reasonable doubt that the defendant committed the crime of burglary and in the course of committing that offense, he/she [purposely, knowingly or recklessly inflicted (**OR** purposely attempted to inflict) (**OR** threatened to inflict) bodily injury upon (alleged victim)]

OR

[was armed with or displayed what appeared to be (explosives) (a deadly weapon)], then you must find the defendant guilty of burglary in the second degree.

If you find the State did prove beyond a reasonable doubt all of the elements of the crime of burglary but that the State has not proven beyond a reasonable doubt the additional element(s) of the crime of burglary in the second degree as I have defined that (those) element(s) to you, then you must find the defendant not guilty of burglary in the second degree but guilty of burglary.

If you find that the State has not proven beyond a reasonable doubt any element of the crime of burglary as I have defined that crime to you, then you must find the defendant not guilty.

¹⁵ This sentence should be considered when it is alleged that the weapon with which defendant was “armed” was part of the proceeds of a theft committed during the burglary. Merritt, 247 N.J. Super. at 430.