

**CRIMINAL LAW - ON LINE**

**CRIME ELEMENTS\***

**\*INCLUDES ENTRY CRIMES AND BUGLARY**

**PRESENTED BY:**

DPS – Law Enforcement Academy  
Santa Fe, New Mexico

Date: \_\_\_\_\_

**GOALS**

- Understand what is needed to prove a crime, especially property crimes.
- Knowing elements of property crimes, from trespass to aggravated burglary.
- Gain a comprehensive understanding of burglary by reviewing case law.

**OBJECTIVES**

Upon completion of this course, students will be able to:

- List specific things needed to prove a case in a court of law.
- Define corpus delicti and elements of a crime.
- State elements for a number of property crimes, including criminal trespass, breaking and entering, commercial burglary, residential burglary and aggravated burglary.
- Know the significance of “unauthorized entry” to determine if a crime is a burglary.
- State whether a vending machine is a “structure” when charging burglary.
- Define “breaking the plane.”
- State whether entering an open bed of a pickup truck to take a toolbox is a burglary.
- Explain whether a fence is a “structure” when someone climbs a fence to take something.
- Define a “dwelling house.”
- Explain whether an ordinary item – screwdriver, flashlight – is a burglary tool or not.

**SOURCES**

- New Mexico Criminal and Traffic Manual
- New Mexico Statutes Annotated.
- State and federal case law.

**ESTIMATED TIME**                      Included in a ten hour block on Criminal Law.

**PREPARED BY**

Legal Instructor  
Department of Public Safety  
Law Enforcement Academy  
Santa Fe, New Mexico

**DATE APPROVED** \_\_\_\_\_

**ACCREDITATION NUMBER** \_\_\_\_\_

## INTRODUCTION

The emphasis of this class is to learn what is needed to prove a case by looking at elements of a crime. Elements are the different parts of a criminal offense. All elements of a crime – known collectively as the corpus delicti or “body of a crime” – must be met to prove a case.

We can better understand this by reviewing a number of entry and property crimes. By the end of this class we will also have a good understanding of what burglary is.

Reminder:

To prove someone did a crime, we need to prove all elements of a crime.

- Elements can be found by looking at state statutes, ordinances, and Uniform Jury Instructions.

### Crime Scene Investigation

An officer arrives at a crime scene. A few facts, or elements, can change an offense from one crime to another. A series of property crimes will help illustrate this.

### Criminal Trespass - NMSA 1978, Section 30-14-1

Last night we inadvertently left the door of a building open. This morning we arrive and find a transient sleeping on the floor. There are no signs of forced entry.

What crime do we have?

Answer:

This would be criminal trespass, a misdemeanor. NMSA 1978, Section 30-14-1.

Does there have to be a No Trespassing sign to charge criminal trespass?

Answer:

It's helpful but not required. One way to commit criminal trespass is “knowingly entering or remaining upon the unposted lands of another knowing that such consent to enter or remain is denied . . .” NMSA 1978, Section 30-14-1-C.

Is there a minimum size for a “No Trespassing” sign? Does it have to be bilingual?

Answer:

The notice or sign shall be printed legibly in English and be at least 144 square inches (12 inches by twelve inches) in size. NMSA 1978, Section 30-14-6.

### Breaking & Entering - NMSA 1978, Section 30-14-8

Everything in the building was secured last night. This morning we arrive and find a

window has been broken. A transient is sleeping on the floor.

What crime do we have?

Breaking and entering consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, where entry is obtained by fraud or deception, or by the breaking or dismantling of any part of the vehicle, watercraft, aircraft, dwelling or other structure . . . (fourth degree felony).

- Note that intent is not an element of criminal trespass or breaking and entering. Intent is an element for many crimes, including burglary.

Note:

Breaking and entering is often seen in winter months when transients or homeless people break into a building to keep warm.

**Commercial Burglary** - NMSA 1978, Section 30-16-3

We're going to change the facts a little. It often happens at a crime scene investigation that new facts mean different elements are needed to prove or charge a crime.

Everything in the building was secured last night. This morning we arrive and find the door has been kicked in. A number of items have been moved to the door and stacked on top of one another. A person has fallen asleep nearby. He has no permission to be in the building.

- What crime do we have?

Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.

Answer:

The fact that a number of items were moved to the door and stacked on top of one another indicates intent to commit a burglary. The fact that no one lives in the building would make this a commercial or non-residential burglary. Note: An additional crime would be larceny.

Facts:

A burglary occurs in a tool shed approximately 50 feet from a residence. What crime?

Answer:

If no one lives in the tool shed, it would be a commercial burglary.

- One difference between burglary and breaking and entering is that burglary has intent (to commit a felony or theft therein) while breaking and entering does not.

**Residential Burglary** - NMSA 1978, Section 30-16-3

Same facts as commercial burglary but with this difference: someone lives in the

building, in the same room where the items were moved to the door.

What crime do we have?

Answer:

**Residential burglary.**

- A person who enters a dwelling house is guilty of a third degree (three years) felony. A person who enters any vehicle, watercraft, aircraft or other structure is guilty of a fourth degree (18 months) felony. NMSA 1978, Section 30-16-3.
- Burglars do not want witnesses. Most residential burglaries occur during the day when people are not home. Most commercial burglaries occur at night when businesses are closed.

**Aggravated Burglary** - NMSA 1978, Section 30-16-4

Same facts as commercial burglary but with this difference: someone lives in the building, in the same room where the items were moved to the door. The offender, the person sleeping on the floor, was armed with a gun during the burglary.

What crime do we have?

Answer:

NMSA 1978, Section 30-16-4. Aggravated Burglary

Note: An additional crime would be larceny.

**Elements of an aggravated burglary**

- A burglary
- Where the perpetrator either
- A) is armed with a deadly weapon;
- B) after entering, arms himself with a deadly weapon;
- C) commits a battery upon any person while in such place, or in entering or leaving such place.
- Because there is a greater threat to the safety of citizens, this is a second degree felony which means a sentence of up to nine years.

**Double jeopardy and Crime**

A number of crimes have been discussed, from criminal trespass to aggravated burglary. One point to remember is that under double jeopardy, the lesser offense merges into the greater

offense. That means one crime – the more serious crime – is charged, not multiple crimes.

Burglary, for example, includes criminal trespass (unauthorized entry). Criminal trespass would not be charged since it merges into the greater offense of burglary.

### Conclusion

A few facts can lead to new elements and that can mean a new crime. For example, a burglar is armed with a gun. That fact, that element, can upgrade a burglary to an aggravated burglary.

### A Review of Cases to better understand the Elements of Burglary

We have an idea of what the elements of burglary are. Reviewing a number of burglary cases will give us an even better understanding not only of burglary but also the importance of proving each and every element of a crime.

#### DEFINITION OF BURGLARY

- Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.

#### Element of Burglary: Unauthorized Entry

#### Unauthorized entry

#### FACTS:

Defendant went into a gas station in Hobbs and asked for a wrench. The attendant asked for a deposit which defendant didn't have. The attendant went outside and defendant stayed inside the office. Suddenly, the attendant ran inside. The cash register was open and all of the paper money was gone. The attendant asked for the money back but defendant refused.

- Is this a burglary? If not, why not?
- What key words in the burglary statute should we focus on?

#### Answer:

Court of Appeals held this wasn't a burglary. The element to focus on is **unauthorized entry**. The gas station was open to the public which means the defendant was authorized to be there. Since we can't prove this element, there was no burglary. State v. Rogers (1972).

#### Reminder:

All elements of an offense must be proven to prove a crime.

#### FACTS:

Two defendants were convicted of unrelated burglaries in Albuquerque. One defendant entered the loading dock area of a retail store and stole items. The other defendant entered an office in Presbyterian Hospital and stole a purse. Both the store and hospital were open to the public although access to the loading dock and office was restricted. Burglary? State v. Sanchez (1987).

Answer:

Court of Appeals said we have a burglary in both cases. Defendant had no authorization to enter the loading dock area or the hospital office. The element of unauthorized entry was proven.

One-half inch penetration is enough

An auto store had a burglary alarm activated by a beam of light which was located one-half inch inside a garage door.

The alarm was triggered and officers responded within minutes. There was a four-by-eight inch hole in the door. The piece of door missing was found next to defendant who was hiding nearby. Evidence indicated an unidentified instrument penetrated one-half inch inside the building. Is one-half inch penetration sufficient for burglary? State v. Tixier (1976).

Answer:

This was a burglary. There is a legal principle called “breaking the plane.” There is an invisible plane around a structure; once you enter it with intent to commit a felony or theft, it’s a burglary. Any penetration, however slight, of the interior space is sufficient to constitute entry. That penetration was done with an instrument is also sufficient.

### **Element of Burglary of a Vehicle: Entry**

For many years entry of any part of a vehicle in New Mexico was treated as entry of the vehicle itself. For example, taking tools from the open bed of a pickup or reaching under an engine to take a starter was considered a burglary. In 2012, the Supreme Court of New Mexico reviewed two cases from Albuquerque.

FACTS:

During the early morning hours an Albuquerque police officer heard loud banging noises coming from a dark alley. Quietly approaching, the officer saw Defendant lying underneath a van. Next to Defendant was a red plastic container, positioned to catch fuel dropping from a tank. He was stealing gas!

He admitted using a nail to create a hole in the gas tank to get gas. It was felt that using a nail was the “entry” into the van.

Across town, another Defendant removed two rear wheels of a vehicle and the lug nuts on the front wheels. It was felt that removing the wheels from underneath the wheel well was “entry” of the vehicle.

- Given these facts, do we have “entry” of a vehicle?

Answer:

Supreme Court said no, rejecting the idea that entry of a part of a vehicle (gas tank, wheel wells) is the same as entry of the vehicle itself. They felt if the legislature wanted the burglary statute to say entering “part” of a vehicle is the same as entry of the vehicle itself, it could do so.

Burglary, they added, is about an enclosed space, where one has privacy. It is not about something in the open like a wheel well or a gas tank. Taking tools from the open bed of a pickup or reaching under an engine is no longer a burglary in New Mexico.

Burglary applies, however, for an open window since it provides entry to an enclosed space. State v. Muggdin (mugh-DEEN) (2012).

Note:

This case overturns a number of vehicle burglary cases going back over thirty years. For siphoning gas, a more appropriate charge is Tampering with a Motor Vehicle. NMSA 1978, Section 30-16D-5. Taking wheels from a vehicle can be charged as larceny of tires. NMSA 1978, Section 30-16-1.

Note:

This is an important case for defining what an “entry” is. Although this case affects vehicle burglary cases, it may help decide non-vehicle cases in the future.

### **Element of Burglary: Structure**

Is a vending machine a structure?

FACTS

A soft drink vending machine is located outside a grocery store in Clovis, New Mexico. Defendant breaks into it and steals items. State v. Bybee (1989)

- Do we have a burglary?
- We must satisfy every element for this to be a burglary. Is a vending machine a “structure”, one of the elements of the burglary statute?
- Would a newspaper vending machine or parking meter be a structure?

Answer:

Court of Appeals held that the statute was not intended to include vending machines. The burglary statute states “burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure . . .” If the legislature wants to add vending machines, it can do so. Burglary should not have been charged.

Is a fence a structure?

FACTS:

Defendant made an unauthorized entry while climbing a six-to-eight foot “chain link” fence which enclosed the premises of a business in Socorro, New Mexico. Once inside, he

committed a misdemeanor larceny. The business was engaged in mobile home sales and had a number of mobile homes within the fence. State v. Folunfort (1995).

- Is a fence a structure?
- What charge?

Answer:

One problem is that neither the burglary statute nor the Criminal Code provides a definition of “structure.” Court of Appeals noted that the legislature did not intend to protect space within every physical structure created. They felt a structure should require an enclosure similar to a vehicle, watercraft, or dwelling. These enclosures – unlike a fence – are all capable of completely confining people and their property. Court of Appeals held a fence is not a structure.

FACTS:

An open-air cement pad was attached to a hardware store in Roswell, New Mexico. The open-air pad was covered by a corrugated metal roof supported by metal posts. From the cement pad a door led directly into the store. The covered area – the pad – was surrounded by an open yard and a chain-link fence topped with barbed wire.

Offender cut a hole in the fence, entered the yard, and removed items from the covered area. State v. Gonzales (2008).

- Based on these facts, do we have a structure? Burglary?

Answer:

Had this involved only the fence, we would have a larceny. But entering the covered pad area, even though it was open-air on three sides, was entering a structure. And entering the “prohibited space” of the structure with the intent to steal made this a burglary.

### **Element of Burglary: Dwelling**

When does a garage become part of a “dwelling house” or residence?

FACTS:

Defendant made an unauthorized entry into victim’s garage and stole some tools. The garage had no openings to the house. One wall of the garage was also a wall of one of the rooms of the residence. State v. Rodriguez (1978)

- Is this a residential burglary or commercial burglary?
- Does it matter whether the garage is attached or not?

Answer:

Court of Appeals affirmed conviction of residential burglary. It held that the burglary of the garage was a burglary of a dwelling house because the garage was part of the residence in which the victim lived. It was a functioning part of the residence. One wall of the structure was also a wall of one of the rooms of the residence.

If the garage had been unattached, this would have been a commercial burglary.

Dwelling - When is an unoccupied house a dwelling house?

FACTS:

A house that had not been occupied for over a year was burglarized. Gas, water, and electricity had been shut off; mattresses were stacked against the walls and windows. The lady who lived there was advanced in years and not likely to return in the foreseeable future. Despite this, there was no indication that she did not hope to return. State v. Ervin (1981)

- Is this a dwelling house?
- Is this a burglary?
- At what point does a structure become a dwelling? Or lose its status as a dwelling?

Answer:

Court of Appeals affirmed conviction of residential burglary. A structure is not a dwelling until the first person moves in; it does not lose this status until the last tenant has abandoned the structure with no intent of returning. This was a residential burglary because there was no evidence that the lady did not eventually expect to return.

### **Element of Burglary: Intent**

Intent to commit a felony or theft must be proven

FACTS:

A found out that his long-time good buddy B had been seeing A's girlfriend without A's knowing about it. A was angry and went to B's house. A opened the unlocked door, entered, and smacked B in the face. Note: smacking B in the face is a misdemeanor.

- What would you charge?
- Be careful . . . this is tricky.

Answer:

We don't have an aggravated burglary. The confusing thing is the battery committed in B's house. But it's not enough. We must show that A, upon entering B's house, intended to commit a felony or theft therein.

But we cannot show that A intended or did commit a felony or theft therein – only a misdemeanor battery.

### **Elements of Aggravated Burglary**

Aggravated Burglary - Leaving

- One of the elements of Aggravated Burglary is:

- C. Commits a battery upon any person while in such place, or in entering or leaving such place.

FACTS:

The owner of the Playtime Lounge in Tucumcari, New Mexico, was working alone in the lounge area. Her purse was in her office which was located in the back of the lounge. The office was not open to the public. The entryway to the office was partially covered by a drape. A sign above the office entryway read, "Private-Keep-out".

The owner saw the defendant coming out of her office, carrying her purse, and going towards the exit. She grabbed her purse and held onto it as he pulled her towards the exit. When he reached the exit, he twisted the purse to one side and broke free. Unfortunately, her arm was injured.

Defendant argued that aggravated burglary didn't apply because he was several feet away from the office area and therefore no longer entering or leaving the office where the battery occurred. State v. Romero (1994).

- What charge do we have?
- At what point does a person cease "leaving"?

Answer:

Court of Appeals said this was an Aggravated Burglary – a battery has been committed while defendant was leaving. It held that where the burglarized area is an area of restricted access in an otherwise public building, a person will be deemed to be leaving the area so long as that person is still in the public portion of the building.

### **Possession of Burglary Tools**

Possession of Burglary Tools - What qualifies as a burglary tool?

FACTS:

Albuquerque police officers were watching a gas station which was closed. They could hear the sound of metal pounding on metal coming from the back of the station where there was a stairway leading down to a basement door. Two subjects were apprehended. One had a screwdriver and the other a flashlight. Fresh tool marks on the lock mechanism appeared to be screwdriver marks. State v. Jennings (1984).

Can a screwdriver or flashlight be considered a burglary tool?

Possession of burglary tools consists of having in the person's possession a device . . . designed or commonly used for . . . burglary and under circumstances evincing an intent to use the same in the commission of a burglary. NMSA 1978, Section 30-16-5. (fourth degree felony)

Answer:

Court of Appeals affirmed conviction for possession of burglary tools. It noted that evidence allowed a reasonable inference that the tools were burglary tools.

## **BREAKING & ENTERING**

Breaking & Entering, which consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, moveable or immovable, can occur in three ways:

1. Entry by fraud or deception, or
2. The breaking or dismantling of any part of the vehicle, watercraft, . . . dwelling . . . , or
3. The breaking or dismantling of any device used to secure the vehicle, . . . dwelling . . .

In San Juan County, Defendant knocked on a door and asked for cigarettes. The resident told him to leave. Defendant became angry and kicked and pushed the door as the resident struggled to keep him out. Defendant pushed the resident about a foot back, stepping into the apartment, before he left. Is there enough for Breaking & Entering? (yes)

The state argued that the Defendant entered the apartment without permission by breaking the door (the door being used to secure the house) and entering. The state had to prove two things: a (1) breaking and (2) entering.

Was there a breaking of the door? Yes, Defendant's intent was to enter the apartment by physical force. In pushing the door open, in using physical force, he was "breaking" the door. Was there entry? Once his foot entered the door, entry was obtained; only the slightest penetration is needed to obtain entry. Court of Appeals upheld Defendant's conviction. State v. Sorrelhorse (2011).

## **CONCLUSION**

We have covered crime elements, entry crimes, property crimes, and burglary. A clear understanding of the elements of each crime gives us a better idea of what is needed to investigate and prove a crime.

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