

Document: C.R.S. 18-4-202

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Colorado Revised Statutes Annotated **Title 18. Criminal Code (Arts. 1 — 26)** **Article 4. Offenses Against Property (Pts. 1 — 8)** **Part 2. Burglary and Related Offenses (§§ 18-4-201 — 18-4-205)**

18-4-202. First degree burglary.

(1) A person commits first degree burglary if the person knowingly enters unlawfully, or remains unlawfully after a lawful or unlawful entry, in a building or occupied structure with intent to commit therein a crime, other than trespass as defined in this article, against another person or property, and if in effecting entry or while in the building or occupied structure or in immediate flight therefrom, the person or another participant in the crime assaults or menaces any person, the person or another participant is armed with explosives, or the person or another participant uses a deadly weapon or possesses and threatens the use of a deadly weapon.

(2) First degree burglary is a class 3 felony.

(3) If under the circumstances stated in subsection (1) of this section the property involved is a controlled substance, as defined in section 18-18-102 (5), within a pharmacy or other place having lawful possession thereof, such person commits first degree burglary of controlled substances, which is a class 2 felony.

History

Source: **L. 71:**R&RE, p. 427, § 1.**C.R.S. 1963:**§ 40-4-202. **L. 73:**P. 572, § 10. **L. 81:**(3) amended, p. 737, § 20, effective July 1. **L. 99:**(1) amended, p. 327, § 2, effective July 1. **L. 2012:**(3) amended,(HB

12-1311), ch. 281, p. 1618, § 40, effective July 1. **L. 2013:(1)** amended,(SB 13-229), ch. 272, p. 1429, § 8, effective July 1.

▼ Annotations

Research References & Practice Aids

Hierarchy Notes:

C.R.S. Title 18

C.R.S. Title 18, Art. 4

State Notes

ANNOTATION

Law reviews.

For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note.

Since § 18-4-202 is similar to former § 40-3-5, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

For conspiracy to commit burglary,

see *People v. Montoya*, 667 P.2d 1377 (Colo. 1983).

Conviction for both assault and burglary constitutional.

A conviction for both first degree assault and first degree burglary does not violate the constitutional guarantee against double jeopardy. *People v. Rael*, 199 Colo. 201, 612 P.2d 1095 (1980).

Assault is clearly a lesser included offense of first degree burglary when assault is the predicate offense.

Under the terms of subsection (1), assault is one of four predicate offenses for first degree burglary in Colorado. Where assault is the predicate offense, the elements of first degree burglary necessarily include all of the elements of assault. *Litwinsky v. Zavaras*, 132 F. Supp. 2d 1316 (D. Colo. 2001).

Assault, a predicate offense for first degree burglary, is a lesser included offense of first degree burglary.

Therefore, the two counts merge. In a case where the lesser included offense carries a higher penalty, the court must vacate the conviction carrying the lower penalty and impose the higher penalty in order to maximize the jury's verdict. *People v. Delci*, 109 P.3d 1035 (Colo. App. 2004).

Burglary is an offense against property, and the general assembly intended the additional element of assault

in this section to modify and aggravate the offense of burglary and not to change the gravamen of the crime. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

A single entry can support only one conviction of first degree burglary, even if multiple assaults occur. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011); *People v. Carter*, 2015 COA 24M-2, 402 P.3d 480.

Multiple burglary convictions cannot be supported by acts of menacing separate victims during a single unlawful entry.

People v. Carter, 2015 COA 24M-2, 402 P.3d 480.

The element of intent has remained unchanged

in burglary cases. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Specific intent to commit a specific crime is an essential element of the offense of burglary.

Garcia v. People, 174 Colo. 372, 483 P.2d 1347 (1971).

Although the jury must agree on the underlying felony defendant intended to commit,

the jury is not required to agree on the intended victim of the underlying crime. To commit an actual crime, there must be a victim, however, a person can have the mental state of intent to commit a crime without having an identified specific victim. *People v. Palmer*, 87 P.3d 137 (Colo. App. 2003).

Violation of a restraining order is a sufficient predicate offense

for conviction under this section. *People v. Widhalm*, 991 P.2d 291 (Colo. App. 1999).

Burglary is complete when burglar enters with requisite intent, even though object of entry may be impossible.

People v. Gill, 180 Colo. 382, 506 P.2d 134 (1973).

Subsection (1) contains no "surreptitious" requirement

concerning remaining unlawfully. *People v. Simpson*, 93 P.3d 551 (Colo. App. 2003).

Formal defects in information could not be raised after verdict

where the information under this section for burglary, charged the use of explosives "with the purpose, etc.", instead of "for the purpose, etc.". The information also failed to aver expressly the incorporation of the owner of the building. *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916).

Criminal trespass is not a lesser included offense of burglary

since the crime of criminal trespass contains essential elements which are not elements of the offense of burglary. *Garcia v. People*, 174 Colo. 372, 483 P.2d 1347 (1971).

First degree criminal trespass is not a lesser included offense

of first degree burglary. However, it is a lesser non-included offense, and the trial court may instruct a jury on such offense over the objection of the defendant if the charging document provides notice that defendant might have to defend against that charge. *People v. Satre*, 950 P.2d 667 (Colo. App. 1997). But see *People v. Gillis*, 2020 COA 68, 471 P.3d 1197.

The crime of criminal mischief is not a lesser-included burglary offense

because the elements are far different. While criminal mischief requires damage to property, burglary does not. *People v. Cisneros*, 193 Colo. 380, 566 P.2d 703 (1977).

Attempted first degree burglary is a lesser-included offense

of first degree burglary. *People v. Simien*, 656 P.2d 698 (Colo. 1983).

First degree criminal trespass is a lesser included offense of first degree burglary.

People v. Gillis, 2020 COA 68, 471 P.3d 1197. But see *People v. Satre*, 950 P.2d 667 (Colo. App. 1997), annotated above.

Distinguished from felony menacing.

It is possible to commit a first degree burglary without also perpetrating felony menacing. The merger doctrine does not apply because there is no requirement in this section that a victim be placed in fear of imminent serious bodily injury by a deadly weapon as there is in the felony menacing statute. *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980).

There is no requirement that victim be placed in fear of imminent serious bodily injury by a deadly weapon

under the first degree burglary statute. *People v. Montanez*, 944 P.2d 529 (Colo. App. 1996).

Specific intent may be inferred

from the circumstances surrounding the accused's entry into an apartment, together with what occurred after the entry was gained. *People v. McCormick*, 181 Colo. 162, 508 P.2d 1270 (1973).

Sufficient evidence of specific intent.

Where defendant was caught by the police inside a pharmacy while armed and while taking drugs off the shelves, and a crowbar and suitcases were found inside the pharmacy, and during his arrest, he told the police that "he did it for the drugs", and even admitted during cross-examination that he "broke into the pharmacy" to get drugs, this evidence amply supports a jury finding that defendant had the requisite specific intent to commit first degree burglary. *People v. Thomas*, 189 Colo. 490, 542 P.2d 387 (1975).

The immediate flight standard of this section requires that the entry, the assault, and the flight be close in time and that the assault occur while fleeing from the building or occupied structure.

Therefore, a person commits an assault in immediate flight from a building where the assault is part of a continuous integrated attempt to get away from the building. *People v. Fuentes*, 258 P.3d 320 (Colo. App. 2011).

Evidence relevant to show plan, scheme, or design.

Where evidence relating to the burglary of another apartment was of a transaction similar in nature and closely related to the transaction upon which the defendant was being tried in point of time, in the areas where the burglaries were committed, and in the methods used in obtaining entrance, this evidence was relevant to show plan, scheme, or design, and the trial court committed no error in admitting it into evidence. *People v. Moen*, 186 Colo. 196, 526 P.2d 654 (1974).

Possession of stolen goods after burglary is sufficient to warrant conviction,

unless the attending circumstances or other evidence is such as to overcome the presumption raised by such possession, sufficient to create a reasonable doubt of the defendant's guilt. *People v. Moen*, 186 Colo. 196, 526 P.2d 654 (1974).

Use of explosive with intent to commit crime sufficient.

The breaking and entering must have been with the intent to commit the crime of larceny and the explosive must have been used for the purpose of committing such a crime. It was sufficient if the forcible entry and the use of an explosive were with the intent to and for the purpose of committing the crime. *Howard v. People*, 62 Colo. 131, 160 P. 1060 (1916).

Evidence insufficient to support conviction.

Where the facts adduced at the trial are just as consistent with a theory of innocence of burglary as of guilt, the conviction cannot stand. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Where the only evidence that defendant entered a room with intent to commit theft is the strong circumstantial evidence that he took a billfold, the evidence is insufficient to establish intent. *Hutton v. People*, 177 Colo. 448, 494 P.2d 822 (1972).

Refusal to instruct on criminal trespass not error.

In a prosecution for burglary, the contention that the trial court erred in refusing to instruct the jury on a misdemeanor of criminal trespass, as a lesser included offense of the crime of burglary, is without merit. *Howard v. People*, 173 Colo. 209, 477 P.2d 378 (1970).

Circumstantial evidence as foundation for instructions.

Circumstantial evidence, when tied together, can support and provide a foundation for instructions on each of the crimes of first degree murder, first degree burglary, and theft arising out of the same transaction. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Intent must coincide with the moment of trespass.

If burglary is based upon remaining in a structure unlawfully, intent must be present at that time. Pattern jury instruction sufficiently described elements of crime. *People v. Ramirez*, 18 P.3d 822 (Colo. App. 2000).

Jury instruction is sufficient if it conveys that the intent to commit a crime must be contemporaneous with the moment of trespass. *People v. Simpson*, 93 P.3d 551 (Colo. App. 2003).

Instructions for crimes of theft and burglary which were phrased in language of statutes were sufficient.

People v. Bowen, 182 Colo. 294, 512 P.2d 1157 (1973).

The court did not commit plain error when it failed to instruct the jury that it must unanimously agree on the underlying felony for the first degree burglary conviction.

Because the jury unanimously found defendant guilty of attempted aggravated robbery, the finding satisfied the intent requirement of first degree burglary as well as any requirement that the jury agree unanimously to the underlying offense. Therefore, the court's failure to give a unanimity instruction was not plain error because there was no reasonable possibility that any error contributed to defendant's conviction. *People v. Linares-Guzman*, 195 P.3d 1130 (Colo. App. 2008).

Verdicts of guilt as to theft, but not as to burglary, are consistent.

Where evidence linking the defendant with the burglary was conflicting or was rebutted, but the evidence clearly established that the defendant was in possession of property recently taken in a burglary, there was evidence to sustain a conviction of larceny and the verdicts of not guilty of burglary but guilty of larceny were not inconsistent as being irreconcilable with the evidence of each case. *Renfrow v. People*, 176 Colo. 160, 489 P.2d 582 (1971).

Guiltv verdicts for first degree burqlary and attempted second degree murder are

consistent

where reasonable jury could find that defendant entered or remained in home with intent to menace and while there took a substantial step toward causing occupant's death. *People v. Simpson*, 93 P.3d 551 (Colo. App. 2003).

Sentence, on separate counts, for first degree burglary-assault/menace and for first degree burglary-deadly weapon was erroneous

because, while the general assembly may proscribe alternative means of committing the same offense, a court may not impose multiple punishments for each prohibited method a defendant uses if he or she uses more than one of the proscribed methods to accomplish the offense. *People v. Moore*, 321 P.3d 510 (Colo. App. 2010), *aff'd* on other grounds, 2014 CO 8, 318 P.3d 511.

Sentence concurrent with life sentence proper.

Where the defendant was sentenced for life imprisonment for first degree murder and lesser sentences for first degree burglary and theft which the jury found he had committed, and all sentences were imposed concurrently with the life sentence which the jury ordered, there was no error. *People v. Salas*, 189 Colo. 111, 538 P.2d 437 (1975).

Sentence of 10 to 20 years did not constitute an abuse of discretion.

People v. McKenna, 199 Colo. 452, 611 P.2d 574 (1980).

Where the only evidence concerning the presence of deadly weapons at the time of the robbery

was that defendant was carrying stolen items, including weapons, in a canvas sack during commission of the burglary, such evidence was insufficient to prove that defendant was armed with a deadly weapon, a requisite element of burglary. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

Second degree burglary is a lesser included offense of first degree burglary.

Armintrout v. People, 864 P.2d 576 (Colo. 1993).

Second degree burglary becomes first degree burglary

when the perpetrator increases the risk of deadly or bodily harm to an occupant or other person present by possessing a deadly weapon such that he knowingly places or attempts to place such person in fear of serious bodily injury or intends to and does cause serious bodily injury to any person. *People v. Moore*, 841 P.2d 320 (Colo. App. 1992).

If the defendant steals a deadly weapon and thereby becomes armed with a deadly weapon,

the burglary is elevated to first degree, and there is no requirement that the prosecution show that the defendant assaulted or menaced anyone with the deadly weapon. *People v. Loomis*, 857 P.2d 478 (Colo. App. 1992).

The defendant is considered "armed" with a deadly weapon

if the weapon is easily accessible and readily available for use by the defendant. The court need not consider the defendant's willingness or present ability to use the deadly weapon. *People v. Loomis*, 857 P.2d 478 (Colo. App. 1992).

Applied

in *People v. Strong*, 190 Colo. 189, 544 P.2d 966 (1976); *Pigford v. People*, 197 Colo. 358, 593 P.2d 354 (1979); *People v. Johnson*, 634 P.2d 407 (Colo. 1981); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Aragon*, 653 P.2d 715 (Colo. 1982); *People v. District Court*, 663 P.2d 616 (Colo. 1983).

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