Document: C.R.S. 18-4-203

C.R.S. 18-4-203

Copy Citation

Statutes current through all 2021 Regular Session legislation, as compiled and edited by the Colorado Office of Legislative Legal Services.

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)

18-4-203. Second degree burglary.

- (1) A person commits second degree burglary, if the person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property.
- (2) [Editor's note: This version of subsection (2) is effective until March 1, 2022.] Second degree burglary is a class 4 felony, but it is a class 3 felony if:
- (a) It is a burglary of a dwelling;
- (b) The objective of the burglary is the theft of a controlled substance, as defined in section 18-18-102
- (5), lawfully kept within any building or occupied structure; or
- (c) The objective of the burglary is the theft of one or more firearms or ammunition.
- (2) [Editor's note: This version of subsection (2) is effective March 1, 2022.] (a) Except as provided in subsection (2)(b) or (2)(c) of this section, second degree burglary is a class 4 felony.
- **(b)** Second degree burglary is a class 3 felony if:
- (I) It is a burglary of a dwelling;
- (II) The objective of the burglary is the theft of a controlled substance, as defined in section 18-18-102
- (5), lawfully kept within any building or occupied structure; or
- (III) The objective of the burglary is the theft of one or more firearms or ammunition.
- (c) Second degree burglary is a class 2 misdemeanor if the person knowingly violated a written notice by a retailer or an order by a court of lawful jurisdiction specifically restraining a person from entering a particular retail location during hours which the retail store is open to the public.

History

Source: L. **71:**R&RE, p. 427, § 1.**C.R.S. 1963:**§ 40-4-203. L. **81:**(2) amended, p. 974, § 9, effective July 1; (2)(b) amended, p. 2031, § 44, effective July 14. L. **99:**(1) amended, p. 327, § 3, effective July 1. L. **2012:**(2)(b) amended,(HB 12-1311), ch. 281, p. 1618, § 41, effective July 1. L. **2018:**(2)(a) and (2)(b) amended and (2)(c) added,(HB 18-1077), ch. 376, p. 2280, § 1, effective June 6. L. **2021:**(2) amended,(SB 21-271), ch. 462, p. 3176, § 202, effective March 1, 2022.

Annotations

Research References & Practice Aids

Hierarchy Notes:

C.R.S. Title 18

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

State Notes

Notes

Editor's note:

Section 803(2) of chapter 462 (SB 21-271), Session Laws of Colorado 2021, provides that the act changing this section applies to offenses committed on or after March 1, 2022.

ANNOTATION

- **▲ I. GENERAL CONSIDERATION.**
- **II.** ELEMENTS OF OFFENSE.
- **III.** TRIAL AND PROSECUTION.

- 🕹 A. In General.
- **B.** Indictment or Information.
- 🛓 1. In General.
- **≥** 2. Possession of Stolen Property.
- ★ 3. Sufficiency.
- 📩 D. Jury.
- **E.** Instructions.
- **★ IV. VERDICT AND SENTENCE.**
- **TI.** GENERAL CONSIDERATION.

Law reviews.

For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note.

Since § 18-4-203 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.

Second degree burglary and second degree sexual assault are not the same offense

for purposes of the prohibition against double jeopardy because the elements of the two offenses are different. Childs v. Zavaras, 90 F. Supp. 2d 1141 (D. Colo. 1999).

Common-law burglary

consisted of breaking and entering a dwelling at night with felonious intent. Sanchez v. People, 142 Colo. 58, 349 P.2d 561 (1960).

By statute in Colorado the common law definition of burglary has been modified and broadened to include in some instances, and under some circumstances, a legal entry into the building of another with felonious intent. Macias v. People, 161 Colo. 233, 421 P.2d 116 (1966).

In determining whether the crime of burglary has been committed,

the focus is upon the possessory rights of the parties, and not their ownership rights. The law of burglary was designed to protect the dweller, and hence, the controlling question is occupancy rather than ownership. People v. Hollenbeck, 944 P.2d 537 (Colo. App. 1996); People v. Mondragon, 217 P.3d 936 (Colo. App. 2009).

In determining whether an offense is "a crime against another person or property"

for purposes of establishing a second degree burglary offense, the proper approach involves a caseby-case examination of the underlying elements of the offense as charged and proved. People v. Poindexter, 2013 COA 93, 338 P.3d 352.

A person can be convicted of a burglary if previously granted permission to enter the premises is withdrawn and

the person enters or remains on the premises with the intent to commit a crime therein. People v. Ager, 928 P.2d 784 (Colo, App. 1996).

Possessory interest established by previously inhabiting a residence, frequently staying there, and leaving possessions there does not preclude a conviction of burglary if the residence is entered unlawfully with the intent to commit a crime.

People v. Joosten, 2018 COA 115, 441 P.3d 14.

Defendant kicked in the door to enter his girlfriend's apartment and destroy her property, thereby relinquishing his possessory interest. People v. Joosten, 2018 COA 115, 441 P.3d 14.

"Open to the public" defined.

"Open to the public" means premises which by their physical nature, function, custom, usage, notice or lack thereof, or other circumstances at the time would cause a reasonable person to believe no permission to enter or remain is required. People v. Bozeman, 624 P.2d 916 (Colo. App. 1980).

"Dwelling" includes attached garage.

A garage attached to a residence is part of a "dwelling" within the meaning of this section. People v. Jiminez, 651 P.2d 395 (Colo. 1982).

"Dwelling" includes homes under renovation

that are intended to be used for habitation in the future. The definition of "dwelling" in § 18-1-901 (3)(g) specifically includes buildings intended to be used for habitation. Because a home undergoing renovation cannot be presently used for habitation does not exclude it from the statute. People v. Morales, 2012 COA 2, 298 P.3d 1000.

Burglary of fenced enclosure.

A fenced enclosure surrounding a concrete building which serves as a dog pound is within the definition of "occupied structure" in § 18-4-101(2) so as to support a second degree burglary charge for the unlawful entry of the enclosure. People v. Moyer, 635 P.2d 553 (Colo. 1981).

A fenced enclosure surrounding a concrete building which serves as a dog pound is not within the statutory meaning of "building" in § 18-4-101(1) so as to support a second degree burglary charge for the unlawful entry of the enclosure, where the fenced enclosure's design is directed to containment of exclusion and affords little protection against inclement weather and extreme temperatures. People v. Moyer, 635 P.2d 553 (Colo. 1981).

Police officer may be guilty of burglary.

A contention that a defendant, being a police officer, had a right to enter the building being burglarized by his confederates, and therefore could not be held guilty of burglary, is hostile to the status of implied licensee, since one entitled to such status must be performing a duty. Clews v. People, 151 Colo. 219, 377 P.2d 125 (1962).

Violation of a restraining order is a sufficient predicate offense

for conviction under this section. People v. Rhorer, 967 P.2d 147 (Colo. 1998).

Even in the absence of a restraining order, an estranged spouse is not privileged or licensed

to enter the separate residence of the other spouse so as to create a defense to a charge of second degree burglary. People v. Johnson, 906 P.2d 122 (Colo. 1995).

Crime of criminal trespass is not a lesser included offense in the crime of burglary;

it requires an element not essential to the crime of burglary. Howard v. People, 173 Colo. 209, 477 P.2d 378 (1970).

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).

Offenses of burglary and assault with intent to rob are separate

and independent since burglary is a crime of entering a dwelling place with intent to commit a felony, while assault with intent to rob is a crime requiring unlawful attempt coupled with a present ability to commit a violent injury on a person, with the specific intent to commit robbery. Trujillo v. Patterson, 266 F. Supp. 901 (D. Colo. 1966), aff'd per curiam, 389 F.2d 1003 (10th Cir. 1967); Trujillo v. People, 178 Colo. 136, 496 P.2d 1026 (1972).

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

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

First degree criminal trespass is not a lesser included offense of second degree burglary.

People v. Garcia, 920 P.2d 878 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 357 (Colo. 1997).

Second degree criminal trespass (§ 18-4-503) is a lesser included offense of second degree burglary.

Second degree criminal trespass requires the defendant to unlawfully enter or remain on the premises of another that are enclosed in a manner designed to exclude intruders. By definition, if a building or structure exists, entry of which is required for second degree burglary, the building or structure is designed to exclude intruders. Thus, all of the elements of second degree criminal trespass are included in the offense of second degree burglary. People v. MacBlane, 952 P.2d 824 (Colo. App. 1997).

Jail cell qualifies as a "dwelling"

within the meaning of this section. People v. Nichols, 920 P.2d 901 (Colo. App. 1996).

Second degree burglary and attempted second degree burglary are not per se grave and serious offenses.

People v. Session, 2020 COA 158, 480 P.3d 747.

Applied

in Vigil v. People, 150 Colo. 582, 375 P.2d 103 (1962); People v. Mangum, 189 Colo. 246, 539 P.2d 120 (1975); People v. Strong, 190 Colo. 189, 544 P.2d 966 (1976); People v. Davis, 194 Colo. 138, 568 P.2d 1175 (1977); People v. Warren, 196 Colo. 75, 582 P.2d 663 (1978); People v. Girard, 196 Colo. 68, 582 P.2d 666 (1978); People v. Bielecki, 41 Colo. App. 256, 588 P.2d 377 (1978); People v. Jacquez, 196 Colo. 569, 588 P.2d 871 (1979); People v. Hillyard, 197 Colo. 83, 589 P.2d 939 (1979); People v. Griffith, 197 Colo. 544, 595 P.2d 231 (1979); People v. Jacobs, 198 Colo. 75, 596 P.2d 1187 (1979); Germany v. People, 198 Colo. 337, 599 P.2d 904 (1979); People v. Weber, 199 Colo. 25, 604 P.2d 30 (1979); People v. Soper, 628 P.2d 604 (Colo. 1981); People v. Martinez, 628 P.2d 608 (Colo. 1981); People v. Savage, 630 P.2d 1070 (Colo. 1981); People v. Henry, 631 P.2d 1122 (Colo. 1981); People v. Chavez, 632 P.2d 574 (Colo. 1981); People v. Hotopp, 632 P.2d 600 (Colo. 1981); People v. District Court, 632 P.2d 1022 (Colo. 1981); People v. Brown, 632 P.2d 1025 (Colo. 1981); People in Interest of M.R.J., 633 P.2d 474 (Colo. 1981); People v. Johnson, 634 P.2d 407 (Colo. 1981); People v. Quintana, 634 P.2d 413 (Colo. 1981), overruled on other grounds in People v. Porter, 2015 CO 34, 348 P.3d 922; People v. Cohen, 640 P.2d 1138 (Colo. 1982); People ex rel. VanMeveren v. District Court, 643 P.2d 37 (Colo. 1982); People v. Leonard, 644 P.2d 85 (Colo. App. 1982); People v. Constant, 645 P.2d 843 (Colo. 1982); Chavez v. District Court, 648 P.2d 658 (Colo. 1982); People v. Hollowav, 649 P.2d 318 (Colo. 1982); People v. Conwell, 649 P.2d

1099 (Colo. 1982); People v. Elmore, 652 P.2d 571 (Colo. 1982); People v. Johnson, 653 P.2d 737 (Colo. 1982); People v. Fisher, 657 P.2d 922 (Colo. 1983); People v. Quintero, 657 P.2d 948 (Colo. 1983); Flower v. People, 658 P.2d 266 (Colo. 1983); People v. District Court, 664 P.2d 247 (Colo. 1983); People v. Jones, 140 P.3d 325 (Colo. App. 2006).

TII. ELEMENTS OF OFFENSE.

This section may be violated in either of the ways mentioned;

however, the final result is burglary. People v. Holmes, 129 Colo. 180, 268 P.2d 406 (1954).

Former Colorado burglary statute contained different situations under which the crime of burglary might be committed: A direct trespass to the property, with or without force, but without the consent, express or implied, of the owner or person in possession, and an initial lawful entry into the property or premises with the express or implied invitation or consent of the owner, with a subsequent trespass by an unauthorized entry into any room, apartment, or compartment of the same building. Macias v. People, 161 Colo. 233, 421 P.2d 116 (1966).

The element of intent has remained unchanged

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

In order to sustain a conviction for second degree burglary, there must be evidence that the accused entered the building with intent to commit a crime. People v. Barnhart, 638 P.2d 814 (Colo. App. 1981).

Specific intent at time of entry essential.

An essential element in a charge of burglary is that the accused have the intent to commit a specific crime at the very time and place of breaking and entering. Gomez v. People, 162 Colo. 77, 424 P.2d 387 (1967); Martinez v. People, 163 Colo. 503, 431 P.2d 765 (1967); People v. Archuleta, 180 Colo. 156, 503 P.2d 346 (1972).

To be convicted under this section, the jury must find that the defendant had made up his mind to commit some other offense at the point at which he or she becomes a trespasser. A person cannot be convicted under this section if the jury finds that the defendant formed the necessary intent at any time while unlawfully remaining on the premises. Cooper v. People, 973 P.2d 1234 (Colo. 1999).

Jury must find that the defendant either (1) broke and entered or unlawfully entered with the intent to commit a crime therein or (2) entered lawfully but subsequently remained unlawfully with the intent to commit a crime therein. Cooper v. People, 973 P.2d 1234 (Colo. 1999).

But intent at the time of entry is not the sole element

of burglary under the statute. People v. Carstensen, 161 Colo. 249, 420 P.2d 820 (1966).

A person can be found guilty of second degree burglary if

the intent to commit a crime is formed after the unlawful entry. People v. Angell, 917 P.2d 312 (Colo. App. 1995), overruled in Cooper v. People, 973 P.2d 1234 (Colo. 1999); People v. Wartena, 2012 COA 12, 296 P.3d 136.

When the general assembly amended second degree burglary

to add the language, "after a lawful or unlawful entry", the general assembly removed the requirement that the intent to commit a crime exist at the time of entry. People v. Larkins, 109 P.3d 1003 (Colo. App. 2004); People v. Wartena, 2012 COA 12, 296 P.3d 136.

Where defendant was given permission to enter the crawlspace and such permission to enter was not limited to any discrete portion of the crawlspace,

the entry was not "unlawful" even though defendant entered the crawlspace with an intent to commit a sexual offense. People v. Waddell, 24 P.3d 3 (Colo. App. 2000).

Burglary includes an element of actual or constructive trespass

on the property of another with intent to commit some other crime once the intruder has effected an entry into the building of another. Macias v. People, 161 Colo. 233, 421 P.2d 116 (1966).

If the owner had not unlocked the apartment, and if the defendant had not been given permission to enter, then the theft of which he was convicted would have been the result of an unlawful breaking or entering, which in turn would support a conviction of burglary. People v. Carstensen, 161 Colo. 249, 420 P.2d 820 (1966).

While not explicitly requiring an unauthorized entry, burglary statutes have always been interpreted as requiring an unauthorized entry as well as the intent to commit a felony or misdemeanor. People v. Peery, 180 Colo. 161, 503 P.2d 350 (1972).

One element of the crime of burglary under this statute is that the defendant be a trespasser. People v. Diaz, 182 Colo. 369, 513 P.2d 444 (1973).

Proof of no lawful right to be in building required.

In addition to unlawful intent at the time of entry, this burglary statute requires the people to prove that the defendant had no lawful right to be in the building. People v. Diaz, 182 Colo. 369, 513 P.2d 444 (1973).

Unlawful entry of a railroad box car

without force, under this section, constitutes the crime of burglary. Panion v. People, 138 Colo. 236, 331 P.2d 501 (1958).

Where evidence that the defendant was unlawfully in the victim's home was overwhelming,

the court's failure to provide further clarification on the unlawful entry into the dwelling element of the crime did not constitute plain error. People v. Angell, 917 P.2d 312 (Colo. App. 1995).

Character of structure as a "dwelling" is a sentence enhancer, not an element of the offense.

Therefore, first degree criminal trespass, which has as an essential element entry into a "dwelling," is not a lesser included offense of second degree burglary. People v. Garcia, 920 P.2d 878 (Colo. App. 1996).

Ownership means any rightful possession.

The object is to describe the place where the offense was committed, not to determine the ownership of the property. Ownership as against the burglar means any possession which is rightful. Sloan v. People, 65 Colo. 456, 176 P. 481 (1918).

Such possession may be actual or constructive.

Possession which is equivalent to ownership for the purpose of proving the offense in this class of cases need not be a possession coupled with actual occupancy, as a dwelling or otherwise, of the burglarized premises. Proof that one was in actual or constructive possession of the burglarized premises is sufficient to establish his alleged ownership. Sloan v. People, 65 Colo. 456, 176 P. 481 (1918).

Agent may be the owner.

Under this section breaking into an unoccupied house is burglary. The ownership is properly laid in an agent having general charge and control of the premises. Sloan v. People, 65 Colo. 456, 176 P. 481 (1918).

Or corporation having possession of the building.

A banking corporation having possession of the building burglariously entered, occupying it for the conduct of its business, is the owner for the purposes of a prosecution under this section. Howard v.

Unlawful entry

is an element of the offense of second degree burglary. People v. Esquibel, 794 P.2d 1065 (Colo. App. 1990).

A perpetrator is guilty of second degree burglary

when, unarmed, he breaks into a building and removes items even though those items may, in other circumstances, be used as deadly weapons. People v. Moore, 841 P.2d 320 (Colo. App. 1992).

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).

Actual taking of property, or the value of property taken, need not be proven.

This section requires only that the defendant intended to take property. People v. Gillis, 883 P.2d 554 (Colo. App. 1994).

Violation of a no-contact order constitutes a predicate crime for purposes of second degree burglary.

Violation of a municipal no-contact order constitutes a crime under § 18-6-803.5. Therefore, intent to violate a no-contact order by breaking into a home constitutes an "intent to commit therein a crime against person or property" and fulfills the element of the crime of second degree burglary. People v. Rhorer, 967 P.2d 147 (Colo. 1998).

Intrusion of any body part into the prohibited premises is sufficient to constitute entry

as element of crime. Jury instruction clarifying term was a correct statement of the law in this case. People v. Gonyea, 195 P.3d 1171 (Colo. App. 2008).

Crime of obstructing a peace officer did not qualify as a crime against another person or property

when defendant broke into apartment building to hide from pursuing police after stealing a car. Defendant did not use or threaten the use of force against a peace officer nor did he commit a crime against, or threaten to commit a crime against, the body of anyone, including a peace officer. Therefore, defendant's offense was not a crime against a person and could not be used as a predicate offense for second degree burglary. People v. Poindexter, 2013 COA 93, 338 P.3d 352.

Definition in subsection (2)(a) of the class 4 felony offense to which defendant pleaded guilty in 1999 is too broad to constitute generic burglary for purposes of enhancing a sentence under the Armed Career Criminal Act,

18 U.S.C. § 924(e). Defendant's burglary conviction could not qualify therefore as a predicate violent felony. The definition of "building", for purposes of this section, includes entry into vehicles, which is too broad to constitute generic burglary. United States v. Lozado, 968 F.3d 1145 (10th Cir. 2020).

TIII. TRIAL AND PROSECUTION.

齐 A. In General.

Proof of the breaking with intent to steal is all that is required under this section.

In the trial of a burglary case under this section, when the people establish the breaking with intent to steal, nothing more is required. Windolph v. People, 96 Colo. 285, 42 P.2d 197 (1935).

Burglary is committed whenever a person willfully breaks and enters, either with or without force, any building with the intent to commit a larceny. No other act is necessary for the commission of the crime of burglary to be complete. Howard v. People, 173 Colo. 209, 477 P.2d 378 (1970).

Second degree burglary requires that the prosecution prove that defendant knowingly broke into and entered the liquor store with the intent to commit the crime of theft. People v. Gomez, 189 Colo. 91, 537 P.2d 297 (1975).

Crime intended does not have to be actually committed.

It is not essential to a conviction under this section that the crime intended in the burglarious entry should have been actually committed. Howard v. People, 62 Colo. 131, 160 P. 1060 (1916).

Under this section one can commit the crime of burglary by entering a building with the unlawful intent prescribed, and where the intent is to commit larceny, the offense is complete regardless of whether the theft is consummated. Ex parte Hill, 101 Colo. 243, 72 P.2d 471 (1937).

The contemplated theft may be forcibly prevented by an inmate of the building, or the purpose to steal abandoned, and still the perpetrator would be guilty of the crime of burglary. If accomplished, evidence of the larceny would be admissible on the burglary count as the highest proof of the larcenous intent with which entry was made, yet not make the actual larceny one of the essential ingredients of the crime of burglary. Ex parte Hill, 101 Colo. 243, 72 P.2d 471 (1937).

TB. Indictment or Information.

Charge of breaking and entering

the store building with the intent to commit larceny therein constitutes the charge of burglary and not of larceny. Gallegos v. People, 166 Colo. 409, 444 P.2d 267 (1968).

Information charging burglary must specify by name the ulterior crime

which it is alleged the accused intended to commit upon entry into the building. Martinez v. People, 163 Colo. 503, 431 P.2d 765 (1967).

The element of intent to commit a specific crime is a matter of substance, not form, and must be set forth in the information; otherwise, the charge is fatally defective. Gomez v. People, 162 Colo. 77, 424 P.2d 387 (1967).

An information charging breaking and entering "with the intent then and there to commit a crime" clearly is insufficient, since a specific crime must be alleged. Henson v. People, 166 Colo. 428, 444 P.2d 275 (1968).

In a burglary charge, the allegation "with the intent then and there to commit the crime of theft" meets the requirements of sufficiency to adequately apprise a defendant of the offense charged. People v. Cordova, 172 Colo. 522, 474 P.2d 615 (1970).

It is necessary that the specific conduct which constitutes the ulterior crime be clearly defined in order to determine if the defendant's intent was that prescribed by the burglary statute. People v. Archuleta, 180 Colo. 156, 503 P.2d 346 (1972); People v. Barnhart, 638 P.2d 814 (Colo. App. 1981).

Information reciting elements of attempt, and referring to provision defining ulterior crime, adequate.

Where the information recited the elements of the inchoate crime of attempt in the language § 18-2-101 and included a reference to the section defining the burglary allegedly attempted, and where the defendant claimed no surprise or prejudice resulting from the absence of an allegation specifying the ulterior crime to be relied upon by the prosecution in its proof of the elements of burglary, the information adequately described the offense of attempt. People v. Jiron, 44 Colo. App. 246, 616 P.2d 166 (1980).

Insufficient to charge mere larceny in separate count.

The mere fact that larceny, as a part of the same transaction, was charged in another count is insufficient to fulfill the requirement that all the basic elements of a burglary charge, including the intent of the accused to commit the specific crime at the time and place of breaking and entering,

Allegations as to ownership in burglary cases

under this section might be placed on the same footing as such averments in charges of larceny. In an information charging larceny the ownership of the goods stolen may be laid in the person in whose possession the property was at the time of the theft, although such person is merely an agent and not the real owner. Sloan v. People, 65 Colo. 456, 176 P. 481 (1918).

Objection that incorporation was not proven too late in supreme court.

With respect to an information for the burglary of the banking house of a named state bank, a corporation, the suggestion that the incorporation of the bank was not proven will not be heard, if first presented in the supreme court. Howard v. People, 62 Colo. 131, 160 P. 1060 (1916).

Related acts charged in one count not duplicitous.

This section by the use of the word "or" provides disjunctively the ways of its violation; however, acts may be so closely related that they may be charged conjunctively in a single count without being duplicitous. People v. Holmes, 129 Colo. 180, 268 P.2d 406 (1954).

Any error in the form of the information was harmless

where the defendant had sufficient notice of the elements and the factual basis for the charges prior to trial. People v. Richardson, 58 P.3d 1039 (Colo. App. 2002).

Variance in description of building not prejudicial.

Where ample evidence established that the lumber company structure involved was a building, and an "office, shop, and warehouse" describes a building, no prejudice arose from this discrepancy in wording of the information. Ciccarelli v. People, 147 Colo. 413, 364 P.2d 368 (1961).

7 1. In General.

Crime may be proven by circumstantial or direct evidence.

The essential elements of the crime of burglary may be established by circumstantial evidence as well as direct. A case of circumstantial evidence by its very nature implies the weaving of a fabric of known facts, which, often infinitesimal, immaterial, or even prejudicial when considered alone, become important only as they are tied to others, and when so tied lead to inevitable conclusions as to facts in issue. Pena v. People, 147 Colo. 253, 363 P.2d 672 (1961).

Circumstantial evidence, consisting of the possession of goods recently stolen in a burglary, is sufficient to sustain a conviction. Davis v. People, 137 Colo. 113, 321 P.2d 1103 (1958).

Frequently burglary must be established by circumstantial evidence, it seldom being provable by direct evidence of actual breaking and entry by the person charged. Wilcox v. People, 152 Colo. 173, 380 P.2d 912 (1963), cert. denied, 376 U.S. 931, 84 S. Ct. 702, 11 L. Ed. 2d 652 (1964).

Want of consent by the owner to enter into his premises may be proved by circumstantial evidence. White v. People, 172 Colo. 271, 472 P.2d 674 (1970).

Circumstantial evidence may be, and frequently is, most convincing and satisfactory. Southard v. People, 174 Colo. 324, 483 P.2d 962 (1971).

Quantum of proof is the same.

The quantum of proof where quilt is based upon circumstantial evidence is the same as where it is based on direct evidence; that is, it must be sufficient to establish guilt beyond a reasonable doubt. Southard v. People, 174 Colo. 324, 483 P.2d 962 (1971).

Intent inferred from actions.

An accused is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts, knowingly performed. Keller v. People, 153 Colo. 590, 387 P.2d 421 (1963).

In the absence of a restraining order or an order granting one party exclusive possession of the marital residence,

the question whether one spouse has the sole possessory interest in it depends on whether the evidence shows that both parties had decided to live separately. People v. Hollenbeck, 944 P.2d 537 (Colo. App. 1996).

Sufficient evidence was presented to establish that defendant had relinquished his possessory interests in the home

where defendant and his wife separated two and one-half months before the burglary, defendant's wife told him she wanted a divorce, defendant left and took his belongings, and defendant's wife changed the locks on the home. People v. Hollenbeck, 944 P.2d 537 (Colo. App. 1996).

Specific intent may be inferred from commission of crime after entry.

In the case of burglary, the fact that a felony was committed after breaking and entering is admissible as evidence from which the jury can infer that the intent to commit the felony existed at the time of the breaking and entering. Keller v. People, 153 Colo. 590, 387 P.2d 421 (1963).

Where one breaks and enters into the property of another in the night time, an inference may be drawn that he did so with the intent to commit larceny. Garcia v. People, 174 Colo, 372, 483 P.2d 1347 (1971).

Acts subsequent to entry are admissible to allow the jury to infer the requisite intent for the crime charged, and therefore testimony that certain items on a burglarized premises are moved from their previous locations to a centralized location on the day of the burglary is admissible. People v. Peery, 180 Colo. 161, 503 P.2d 350 (1972).

The specific intent to commit the crime of theft does not have to be proved by direct, substantive evidence, but can be inferred from the defendant's conduct and the reasonable inferences which may be drawn from the circumstances of the case. People v. Germany, 643 P.2d 776 (Colo. App. 1980).

Evidence showing a forcible unauthorized entry and an attempt to conceal the entry imposes a duty on the court to draw an inference of an intent to commit theft. People ex rel. Russel v. Hall, 620 P.2d 34 (Colo. 1980).

Trespass alone is immaterial as to specific intent.

The fact that the defendant may have committed a trespass at the time he entered the office where the alleged burglary took place is immaterial as to intent to commit theft. Hutton v. People, 177 Colo. 448, 494 P.2d 822 (1972).

Trespass to be proved beyond reasonable doubt.

The people must prove the element of trespass in prosecution for crime of burglary, like other material elements of the crime charged, beyond a reasonable doubt. People v. Diaz, 182 Colo. 369, 513 P.2d 444 (1973).

Evidence establishing motive admissible.

Evidence which has a direct tendency to establish motive is admissible against the accused, even though it may show him guilty of crimes other than that for which he is on trial. Wilkinson v. People, 170 Colo. 336, 460 P.2d 774 (1969).

As are acts at time of arrest.

The circumstance of the finding of part of the items stolen from the drugstore had already led to a suspicion that the accused was involved in the burglary. The acts surrounding his conduct when he was arrested, indicating drug use, could be found to support the inference that he had a motive for the burglary. This made evidence of defendant's acts at the time of the arrest material and relevant to the offense with which he was charged. Wilkinson v. People, 170 Colo. 336, 460 P.2d 774 (1969).

Where a defendant is arrested inside a store under circumstances which conclusively establish that his optmy was unlawful, articles which are then found on the promises in the personal of

his entry was unidwruf, articles which are then found on the premises in the possession of defendant, or reasonably attributed to him, and which are foreign to the store, are admissible. Baca v. People, 139 Colo. 111, 336 P.2d 712 (1959).

Burglars tools admissible.

Exhibits of a tire iron, jack hammer, and punch, although not intrinsically and exclusively burglary tools, but capable of use for that purpose, were admissible under the burglary charge and in support of the charge of possession. Smalley v. People, 116 Colo. 598, 183 P.2d 558 (1947).

Articles such as a stocking mask, hammer, and flashlight belonging to a defendant and found in his possession shortly after a burglary are admissible as part of the history of arrest, and when coupled with other pertinent evidence, tends to establish the charge. Davis v. People, 137 Colo. 113, 321 P.2d 1103 (1958).

A weapon or other instrument found in the possession of an accused when arrested is admissible as part of the history of the arrest. Davis v. People, 137 Colo. 113, 321 P.2d 1103 (1958).

The acquisition or possession of instruments, tools, or other means of committing burglary is admissible as a significant circumstance; the possession signifies a probable design to use and the instruments need not be such as are entirely appropriate, nor such as were actually put to use. Baca v. People, 139 Colo. 111, 336 P.2d 712 (1959).

In a prosecution for burglary, evidence of possession of burglary tools and of property allegedly taken from burglarized premises, is properly admitted. Wilcox v. People, 152 Colo. 173, 380 P.2d 912 (1963), cert. denied, 376 U.S. 931, 84 S. Ct. 702, 11 L. Ed. 2d 652 (1964).

It is not error to admit into evidence in a burglary case pry bars not belonging to the store which are found near the back doors of the store in which the defendant is found hiding. People v. Margues, 180 Colo. 154, 503 P.2d 339 (1972).

But only after burglary shown to have been committed.

The possession of burglary tools as evidence in connection with the charge of burglary can only be considered when a burglary is first shown to have been committed. Wilcox v. People, 152 Colo. 173, 380 P.2d 912 (1963), cert. denied, 376 U.S. 931, 84 S. Ct. 702, 11 L. Ed. 2d 652 (1964).

? 2. Possession of Stolen Property.

Possession of stolen property admissible.

Defendant was shown to have had possession of the stolen tools soon after the burglary, and this is sufficient to justify the reception of such evidence. Ciccarelli v. People, 147 Colo. 413, 364 P.2d 368 (1961).

Evidence of theft and recent possession of goods stolen were important as establishing the identity, and the intent which accompanied the breaking and entering. Windolph v. People, 96 Colo. 285, 42 P.2d 197 (1935); Wilcox v. People, 152 Colo. 173, 380 P.2d 912 (1963), cert. denied, 376 U.S. 931, 84 S. Ct. 702, 11 L. Ed. 2d 652 (1964).

It requires explanation from defendant.

Although the burden of proof cannot be validly shifted to the defendant in a criminal case, the onus of explanation can be placed upon him. An inference from possession of stolen property recently after the theft is an aid in proof which calls for rebutting or explanatory evidence. Ciccarelli v. People, 147 Colo. 413, 364 P.2d 368 (1961).

Jury may infer guilt from recent unexplained possession.

In a prosecution for larceny or burglary, the jury may infer that the accused committed the theft from the circumstances of his recent, unexplained, exclusive possession of the stolen articles involved. Noble v. People, 173 Colo. 333, 478 P.2d 662 (1970); Diebold v. People, 175 Colo. 96, 485 P.2d 900 (1971).

Such possession and proof of burglary support conviction.

Proof that a burglary was committed, and that goods were then and there stolen, and shortly thereafter found in the necessaries of the accused will custain a conviction. David v. Doonle 127

thereafter round in the possession of the accused, will sustain a conviction. Davis v. reopie, 137 Colo. 113, 321 P.2d 1103 (1958); Wilcox v. People, 152 Colo. 173, 380 P.2d 912 (1963), cert. denied, 376 U.S. 931, 84 S. Ct. 702, 11 L. Ed. 2d 652 (1964).

Defendant's explanation need only raise reasonable doubt.

Possession of stolen goods after a burglary or theft is sufficient to warrant a 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. Rueda v. People, 141 Colo. 504, 348 P.2d 958, cert. denied, 362 U.S. 923, 80 S. Ct. 673, 4 L. Ed. 2d 744 (1960).

If the possession of the property by defendant, unexplained, constitutes a criminating circumstance, he need not show, even by a preponderance of testimony, that he came by it honestly. It is not necessary that the explanation should be satisfactory to the jury; if it raises in their minds a reasonable doubt of the defendant's guilt, it is sufficient to require an acquittal. Ciccarelli v. People, 147 Colo. 413, 364 P.2d 368 (1961).

Unexplained possession instruction may be given

where there is evidence that defendant had exclusive possession of the recently stolen goods whether the time of that possession was at the time of defendant's arrest or at an earlier time. People v. Card, 42 Colo. App. 259, 596 P.2d 402 (1979).

Rationale of unexplained possession doctrine

is that when property is in a defendant's possession recently after a burglary, there is a "high probability" that the defendant has committed the burglary. People v. Card, 42 Colo. App. 259, 596 P.2d 402 (1979).

Testimony showing possession of stolen property.

Possession of the stolen property for purposes of the unexplained possession doctrine may be established by the testimony of the arresting officer or by the testimony of other witnesses. People v. Card, 42 Colo. App. 259, 596 P.2d 402 (1979).

3. Sufficiency.

Evidence insufficient to establish intent.

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).

Circumstantial evidence sufficient to support conviction of burglary.

Nunn v. People, 177 Colo. 87, 493 P.2d 6 (1972).

When no one testified to seeing the actual breaking and entering, but witnesses heard a noise which alerted them and caused them to go see what was happening, and they saw the defendant coming out of the liquor store carrying four bottles of vodka, and investigation disclosed that the door had been forcibly opened, and that the crowbar found in the defendant's car fit exactly the prymarks adjacent to the broken hasp, there is sufficient circumstantial evidence to rebut the defendant's testimony that he purchased the vodka from a youth and was carrying it from the side of the building to his car. People v. Florez, 179 Colo. 176, 498 P.2d 1162 (1972).

Evidence held sufficient to support conviction.

Smalley v. People, 116 Colo. 598, 183 P.2d 558 (1947); People v. Marques, 180 Colo. 154, 503 P.2d 339 (1972); People v. Pleasant, 182 Colo. 144, 511 P.2d 488 (1973); People v. Bueno, 183 Colo. 304, 516 P.2d 434 (1973); People v. Maestas, 187 Colo. 107, 528 P.2d 916 (1974); People v. Gomez, 189 Colo. 91, 537 P.2d 297 (1975); People v. Quintana, 665 P.2d 605 (Colo. 1983).

Defendant's admissions of the break-in and larceny to several officers and direction of them to a locker in the bus station where he had placed the loot and where it was found was sufficient to establish his quilt beyond a reasonable doubt. Hubbard v. People, 152 Colo. 529, 383 P.2d 317 (1963).

Evidence that a building was burglarized and certain property stolen therefrom, that a defendant was arrested shortly thereafter with the stolen property in his possession, and that heelprints left on papers strewn on the floor of the burglarized building matched the heelprint of a shoe worn by

defendant when arrested is sufficient to sustain a conviction. Brown v. People, 138 Colo. 354, 332 P.2d 996 (1958).

Evidence, when viewed in the light most favorable to the prosecution, supports defendant's burglary conviction. Facts were sufficient to allow a reasonable fact finder to determine that victim had possessory interest in apartment, defendant entered victim's apartment without permission, and, for purposes of the burglary statutes, defendant entered a building or occupied structure unlawfully. Accordingly, defendant may properly be retried on burglary charges. People v. Mondragon, 217 P.3d 936 (Colo. App. 2009).

Where prosecution's chief witness identifies defendant as his accomplice in burglary, evidence is sufficient to support jury's verdict of guilty. People v. Lewis, 180 Colo. 423, 506 P.2d 125 (1973).

Verbal warning regarding restraining order given prior to entry was sufficient to establish defendant's knowledge that he was not licensed or privileged to enter. Absent circumstances not present in the case, the court perceives no basis for limiting the dweller's right to occupancy of the structure to those cases in which the intruder is informed in writing that his former possessory rights are no longer in effect. People v. Smith, 943 P.2d 31 (Colo. App. 1996).

Evidence sufficient to sustain conviction for conspiracy to commit burglary.

People v. Coca, 185 Colo. 10, 521 P.2d 781 (1974).

Evidence insufficient to support conviction.

Where defendant offered to buy all stolen television sets the witness could provide, but the record did not disclose that defendant was informed that burglaries would be committed, it was conceivable that the sets could have been obtained by theft without burglary, and the evidence was insufficient to sustain a conviction of burglary. People v. Lamirato, 180 Colo. 250, 504 P.2d 661 (1972).

Where the evidence establishes that the defendant touched the outer surface of the inside door of the milk chute at the residence burglarized, no innocent purpose was suggested which would be consistent with that activity, but there was no evidence as to the time that the fingerprint was left on the door, no evidence placed the defendant inside the plaintiff's residence on the day of the burglary or at any other time and the fingerprint was the only evidence tending to tie the defendant to the crime, this evidence, when viewed as a whole and in the light most favorable to the prosecution, was not substantial nor sufficient enough to support a conclusion by a reasonable mind that the defendant was quilty of the burglary beyond a reasonable doubt. People v. Ray, 626 P.2d 167 (Colo. 1981).

Since it was not possible for defendant to have walked eight blocks to the gallery, broken in, picked out items to take, loaded plastic bags with the stolen objects, and then carried them back to his residence, evidence, even aided by the inference that arose from his possession of the stolen goods, was insufficient. People v. Weems, 676 P.2d 1222 (Colo. App. 1983).

Evidence insufficient to justify overturning sentence.

Triggs v. People, 197 Colo. 229, 591 P.2d 1024 (1979).



Questions for the jury.

In a prosecution for burglary the identity of stolen property, the effect of proof of recent possession thereof by a defendant, and whether an explanation offered as to the manner in which it was acquired is satisfactory are questions for a jury to determine. Brown v. People, 138 Colo. 354, 332 P.2d 996 (1958).

Issue of specific intent to steal was clearly one for the jury to determine from all the evidence and reasonable inferences that could be drawn therefrom. People v. Romero, 182 Colo. 50, 511 P.2d 466 (1973); People v. Green, 38 Colo. App. 165, 553 P.2d 839 (1976).

"Recent" possession of stolen goods is determined by the facts

in each particular case and it may vary from a few days to two years. In practically all cases whether the period of time is "recent" is a question for the jury, and a period of six weeks has been

upheld. Rueda v. People, 141 Colo. 504, 348 P.2d 958, cert. denied, 362 U.S. 923, 80 S. Ct. 673, 4 L. Ed. 2d 744 (1960).

Sufficient evidence to go to jury.

People v. Gilkey, 181 Colo. 103, 507 P.2d 855 (1973).

The argument that a case should not be submitted to the jury when there is no evidence that defendant did breaking and entering is without merit in Colorado, for one may be convicted under the charge of being a principal by proof that he was an accessory thereto. People v. Archuleta, 180 Colo. 156, 503 P.2d 346 (1972).

TE. Instructions.

Specific ulterior crime must be clearly and accurately defined.

An essential element of burglary is that at the time and place of entering the structure, the accused must have an intent to commit therein a crime. It is therefore necessary that the specific ulterior crime be clearly and accurately defined in order to determine if the defendant's intent was that proscribed by the burglary statute, People v. Archuleta, 191 Colo. 482, 554 P.2d 307 (1976).

Elements of theft explained to jury in attempted burglary case.

The elements constituting the crime of theft must be explained to the jury when that is the ulterior crime referred to in a case alleging an attempted burglary offense. People v. Jiron, 44 Colo. App. 246, 616 P.2d 166 (1980).

The trial court's failure to include the term "unlawful entry" in the jury instruction on second degree burglary was not plain error

where, even if the instructions could have been worded more clearly, the jury was instructed using the exact language of the applicable statutory sections. People v. Hollenbeck, 944 P.2d 537 (Colo. App. 1996).

Instruction on unexplained recent possession of stolen property,

which indicated to the jury that the burden of proving rightful possession was on the defendant, shifted the burden to the defendant to prove his innocence and was prejudicial error. Martinez v. People, 163 Colo. 503, 431 P.2d 765 (1967).

It would be desirable for the trial court to instruct the jury that the exclusive possession of stolen property recently after a theft or burglary serves to create an inference or incriminating circumstance that the defendant stole such property or burglarized the premises of the owner of such property and that such evidence, if established beyond a reasonable doubt, is sufficient in and of itself to justify a verdict of guilty in the absence of an explanation derived from the evidence in the case or furnished by the defendant raising a reasonable doubt as to his quilt. Ciccarelli v. People, 147 Colo. 413, 364 P.2d 368 (1961).

Instruction specifying that permission to enter part of a building does not necessarily include permission to enter other parts of the building was properly applied to a dwelling.

Defendant, who lived with his mother and stepfather, was charged with burglary arising from the defendant's alleged theft of money from his mother's bedroom. The instruction was appropriate because defendant was specifically forbidden to enter his mother's bedroom. People v. Lopez, 946 P.2d 478 (Colo. App. 1997).

Instruction on burglary with intent to rape.

Where the information simply charged burglary with intent to rape, the giving of an instruction that

rape could be accomplished by sexual intercourse with the woman's permission if that permission was secured by the perpetrator fraudulently inducing her to believe that he was her husband, was not error. Thistle v. People, 199 Colo. 1, 199 P.2d 642 (1948).

Instruction on crime not lesser offense properly refused.

In a prosecution for burglary, the contention that the trial court erred in refusing to instruct the jury on the 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).

Instruction indicating that defendant was not otherwise privileged to enter if he knew about a restraining order at the time he entered the premises is a correct statement of the law.

Entry into a dwelling in violation of a restraining order is necessarily an unlawful entry. People v. Smith, 943 P.2d 31 (Colo. App. 1996).

Defendant is entitled to a theory of case instruction.

If the tendered instruction is unacceptable, so long as it, at least in principle, sets forth a valid theory, the trial court has a duty to work with counsel to draft an acceptable instruction. People v. Joosten, 2018 COA 115, 441 P.3d 14.

Attempted first degree criminal trespass may be a lesser included offense to attempted second degree burglary under this section.

People v. Austin, 799 P.2d 408 (Colo. App. 1990).

TIV. VERDICT AND SENTENCE.

Double jeopardy.

Defendant, who had been charged with second degree burglary and acquitted on the ground that he had authority to enter the building in question, could not be retried because of double jeopardy provision in state constitution. People v. Woods, 182 Colo. 3, 510 P.2d 435 (1973).

Verdict of guilty on charge of conspiracy to commit burglary and verdict of innocent on substantive charge of burglary held not inconsistent.

People v. Coca, 185 Colo. 10, 521 P.2d 781 (1974).

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

Where there was no evidence to link the defendant with the burglary except his possession of the stolen items shortly after the burglary occurred, and defendant denied any implication in the burglary, the jury could have well believed that the evidence linking defendant with the burglary was too weak to convict, but that the evidence of theft was ample, and therefore, there was no inconsistency in verdicts of guilty of theft and not guilty of burglary. Renfrow v. People, 176 Colo. 160, 489 P.2d 582 (1971).

Consecutive sentences for burglary and for larceny are improper.

Maes v. People, 169 Colo. 200, 454 P.2d 792 (1969).

The burglary and larceny should be viewed as a single transaction, indivisible for purposes of punishment. Reason and justice dictate that for the purpose of punishment under these circumstances, these offenses should be merged by concurrent sentencing. Maynes v. People, 169 Colo. 186, 454 P.2d 797 (1969).

But consecutive sentences may be imposed for burglary and assault.

Conviction and sentences for the two distinct offenses of burglary and assault with intent to rob did

not put appellees twice in jeopardy. The offenses are separate and independent; two consecutive sentences were within the law and such imposition did not constitute a violation of any federally protected right. Trujillo v. Patterson, 266 F. Supp. 901 (D. Colo. 1966), aff'd per curiam, 389 F.2d 1003 (10th Cir. 1967).

Under circumstances of case, a minimum 20-year term for second degree burglary was excessive.

People v. Cohen, 617 P.2d 1205 (Colo. 1980).

Sentence of eight years was not an abuse of discretion.

Defendant had previous convictions for domestic violence and had not complied with a lenient probationary sentence. The defendant had demonstrated an escalating pattern of perpetrating violence on his family based upon his numerous arrests and repeat offenses after release from incarceration and had refused to take personal responsibility for his violent acts. People v. Smith, 943 P.2d 31 (Colo. App. 1996).

On remand, trial court should not treat defendant's second degree burglary convictions as per se grave and serious.

The supreme court did not hold, however, that second degree burglary is never a per se grave or serious offense. Instead, a trial court should analyze the facts of each offense to determine whether it is grave and serious. People v. Tran, 2020 COA 99, 469 P.3d 568.

Sentence under habitual criminal act valid.

Hackett v. Tinsley, 143 Colo. 203, 352 P.2d 799, cert. denied, 364 U.S. 874, 81 S. Ct. 118, 5 L. Ed. 2d 96 (1960).

Mittimus valid.

Entering with or without force with the intent to commit larceny constitutes the crime of burglary; hence a mittimus issued following conviction on a charge of breaking and entering without force which recites conviction of burglary is lawful and valid. McGrath v. Tinsley, 138 Colo. 18, 328 P.2d 579 (1958).

Colorado Revised Statutes Annotated

Copyright © 2021 COLORADO REVISED STATUTES All rights reserved.

Content Type:

Terms:

Narrow By: -None-

Date and Time: Nov 02, 2021 03:54:14 a.m. EDT



Terms & Conditions