NY Burglary Materials: Facts, Statutes, Cases, Instructions for Memo #1

LEGAL ANALYSIS, WRITING, & RESEARCH

FALL 2017

Professor Stephen Paskey
**Facts for Class Discussion – People v. Welty**

Alice Welty is a UB engineering student who lives in a rental house next door to Paul Lutz, a 48-year-old used car salesman. In Lutz’s back yard, a 30-foot-long wooden boat sits on concrete blocks. Lutz moved the boat to his yard ten years ago after he hit a rock in the Niagara River and the boat sank. There is still a hole in the bottom.

An extension cord from the house supplies the boat with power. There is no running water. The boat is equipped with two bunks, a stereo, a small fridge, a coffee pot, and a hot plate. There is a marine “head” – a toilet – but it’s not connected to anything.

The boat has a large cockpit with shade, and Lutz mostly uses the boat as a place to hang out when he’s relaxing. However, Lutz has used it as a “guest” room four or five times a year, and he’s recently rented it out several times on Airbnb.

At roughly 11:40 p.m. on a Tuesday night, Lutz returned home from a disappointing date, went inside the boat, poured a shot of rye, and started blasting Lady Gaga’s “Bad Romance” on the stereo. When the song ended, he started it again.

Welty was studying for an electromagnetism exam and was not amused. Feeling seriously angry, she grabbed an empty coffee mug, walked next door, climbed the steps to the boat’s cockpit, and pounded on the door. The mug had a handle on one side shaped like the grip of a pistol, and a ceramic “barrel” sticking out of the other side.

Lutz opened the door six inches and Welty began yelling, but Lutz could not hear what she said. Without speaking or opening the door further, Lutz turned his back and turned off the stereo. Continuing to express her outrage, Welty pushed the door open and stepped inside. Lutz then turned to face Welty and, in a stern voice, ordered her to leave. Welty threw the mug at Lutz but missed him, and then walked out.

*Below are excerpts from New York’s burglary statutes. Assume Welty committed an attempted assault – a misdemeanor – by throwing the mug. Also, assume Lutz violated the City’s noise ordinance, and that City ordinances prohibit him from keeping the boat in his yard.*

*Did Welty commit burglary? Why or why not? And if she did, was it second or third degree?*
**Facts for Memo #1 – People v. Moran**

To: [Your Name Here]  
From: Stephanie Adams  
Date: August 24, 2016  
Re: People v. Moran: did Moran “enter” a building?

Our client, Chris Moran, has been charged with second degree burglary under N.Y. Penal Law § 140.25. Moran admits she attempted to pry open the windows of a house with the intent of stealing a collection of rare Roman coins, and that she stole a package she found inside the front screen door. The pivotal issue is whether she “entered” the house by opening the screen door or attempting to pry open the windows. If she did, Moran committed second degree burglary. If she did not, then at most Moran is guilty of attempted burglary and petty larceny. The difference is critical: the maximum sentence for second degree burglary is fifteen years, while the maximum for attempted burglary is seven years. The maximum for petty larceny is one year.

Following is a summary of the evidence presented to the grand jury.

On the morning of May 30, 2017, Lee Martel left his Buffalo home and drove to work. About noon, Tara Cole, who lives across the street, came home for lunch. Looking through a window, Cole saw a person later identified as Moran wearing jeans, a purple t-shirt, a red backpack, and grey gloves. Moran, who had a screwdriver in one hand, seemed to be trying to force open a window. Cole called the police.

As Cole continued to watch, Moran went to a different window and attempted to open that window. She could not do so. Moran then walked to the front of the house, approached the front door, and opened the screen door. When she did, a package fell to the ground. Moran picked up the package, left the porch, and got into a silver Honda Civic. She drove four houses down the street, rounded a corner, parked in front of a convenience store, got out, and went inside.

By this time, officer Tim Foreman had arrived. Foreman approached Moran as she was leaving the store with a pack of cigarettes. Foreman asked Moran whether she owned the Honda, and Moran said she did not. Foreman asked Moran what she was doing, and Moran said she was waiting for a friend named Rodrigo. Through a dispatcher, Foreman confirmed that Moran matched the description reported by Cole, and that Moran owned the Honda.

When Foreman attempted to speak to Moran again, Moran ran. Foreman chased Moran, tackled her, and arrested her. Foreman searched Moran’s pants pocket and found a pair of black gloves and a screwdriver with a bent blade.

From the Honda, police recovered both the package and a red backpack. The package was from Amazon.com. It was addressed to Martel and contained two books valued at $40. UPS records indicate the package was delivered to the house approximately one hour prior to the arrest. A search of the backpack found a pry bar, a hammer, and a recent magazine article about the collection of rare Roman coins that Martel keeps in his home.
Going to the Martel house, Foreman found pry marks and rub marks on the bathroom and bedroom windows that could have been made by Moran’s screwdriver. On one window, pry marks seem to show that the tip of the screwdriver had been inserted by roughly 1/2 inch into the gap between the window and window frame. The window was securely locked at the time.

During a police lineup, Cole identified Moran as the man she had seen. Video taken by a home surveillance camera on Martel’s front porch shows a person who is clearly Moran opening the screen door and picking up the package.
§ 140.00 Criminal trespass and burglary; definitions of terms

The following definitions are applicable to this article:

1. “Premises” includes the term “building,” as defined herein, and any real property.

2. “Building,” in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer. Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and a part of the main building.

3. “Dwelling” means a building which is usually occupied by a person lodging therein at night.

4. “Night” means the period between thirty minutes after sunset and thirty minutes before sunrise.

5. “Enter or remain unlawfully.” A person “enters or remains unlawfully” in or upon premises when she is not licensed or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless she defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. …

§ 140.10 Criminal Trespass in the third degree

A person is guilty of criminal trespass in the third degree when she knowingly enters or remains unlawfully in a building or upon real property (a) which is fenced or otherwise enclosed in a manner designed to exclude intruders … Criminal trespass in the third degree is a class B misdemeanor.

§ 140.15 Criminal Trespass in the second degree

A person is guilty of criminal trespass in the second degree when she knowingly enters or remains unlawfully in a dwelling. Criminal trespass in the second degree is a class A misdemeanor.
§ 140.20 Burglary in the third degree

A person is guilty of burglary in the third degree when she knowingly enters or remains unlawfully in a building with intent to commit a crime therein. Burglary in the third degree is a class D felony.

§ 140.25 Burglary in the second degree

A person is guilty of burglary in the second degree when she knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when:

1. In effecting entry or while in the building or in immediate flight therefrom, she or another participant in the crime:
   (a) Is armed with explosives or a deadly weapon; or
   (b) Causes physical injury to any person who is not a participant in the crime; or
   (c) Uses or threatens the immediate use of a dangerous instrument; or
   (d) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

2. The building is a dwelling.

Burglary in the second degree is a class C felony.
The PEOPLE of the State of New York, Respondent,
v.
Anthony KING, Appellant.

March 29, 1984.

Defendant was convicted in the Supreme Court, New York County, Francis N. Pecora, J., of attempted burglary in third degree and possession of burglary tools, and defendant appealed. The Court of Appeals, 94 A.D.2d 983, 463 N.Y.S.2d 348 affirmed. On appeal, the Court of Appeals, Cooke, C.J., held that evidence was sufficient to support conviction.

Affirmed.

*552

OPINION OF THE COURT

COOKE, Chief Judge.

That element of a crime of burglary which requires that a person “enter * * * in a building” is met when the person or any part of his body intrudes within the building. Additionally, the recessed entry area of a store abutting the sidewalk, enclosed by display windows, a door, a roof and a security gate at the sidewalk line may be deemed part of a “building” under the Penal Law. Thus, evidence that defendant was found crouched beside a one-foot-square hole which had been cut in a metal gate extending across the front of a jewelry store, and pulling and pushing on the gate, is sufficient to establish attempted entry into a building for purposes of a conviction for attempted burglary in the third degree.

Two plain-clothes police officers sitting in an unmarked car observed defendant in front of a jewelry store on Fifth Avenue in New York City at approximately 4:30 a.m. on a Sunday. The store, which was well lit by street lamps and the lights in its display windows and vestibule, was guarded by a metal gate that covered the entire storefront where it abutted the sidewalk and prevented access to the front door and the display cases. The officers saw defendant crouched and making pulling and pushing motions on the gate while holding an unidentified object in his right hand. When defendant looked in the officers’ direction, he switched the object to his left hand and began running north on Fifth Avenue. The police gave chase and, after losing sight of defendant for a moment, apprehended him beside a construction site and handcuffed him. The officers did not see defendant dispose of any object during the chase. Upon returning to the jewelry store, the officers noticed that several metal bars from the gate were strewn inside the vestibule, leaving a hole approximately one-foot square. A search of defendant yielded a claw hammer inside a paper bag in defendant’s left coat pocket. The evidence at trial established that the metal bars had been detached by means of a cutting instrument, such as bolt cutters; however, a search of the entire area did not produce any such tool.
Similar to many storefronts, the doorway to the jewelry store is recessed about 15 feet from the sidewalk in a vestibule with a roof formed by the second floor of the building, and lined on both sides by glass display windows that extend out to and face the sidewalk. After business hours, the entrance to the vestibule is closed to pedestrians by the metal gate described above, which is designed to deter would-be intruders while permitting passers-by to view the displays. The gate had been cut to the left of the center, about two feet distant from one of the display windows.

A jury convicted defendant of attempted burglary in the third degree and possession of burglar’s tools. The Appellate Division, 94 A.D.2d 983, 463 N.Y.S.2d 348 affirmed the judgment, without opinion.

Defendant makes two arguments that are founded on the factual predicate that he did not possess a tool for cutting the gate’s metal bars and widening the hole. Defendant urges that his conviction should be reversed because it was factually impossible for him to have introduced his entire body into the building area, which, he argues, is legally required for a burglary conviction. Thus, he contends that he could not have completed the crime of burglary. Alternatively, defendant asserts that the evidence was insufficient to establish attempted burglary because the vestibule is not a “building” within the meaning of the Penal Law, and he only had the means to put his arm through the gate *554 into the vestibule. Neither argument is persuasive. This court now affirms.

In order to commit “burglary in the third degree,” a person must “knowingly enter[ ] or remain[ ] unlawfully in a building with intent to commit a crime therein” (Penal Law, § 140.20). Although the Penal Law defines “enter or remain unlawfully” (see Penal Law, § 140.00, subd. 5), it does not provide any insight into whether entry by the entire body is required.

At common law, “entry” for purposes of burglary was accomplished by insertion of any part of the body into the premises for the purpose of committing a felony (see People v. Tragni, 113 Misc.2d 852, 856, 449 N.Y.S.2d 923; Commonwealth v. Lewis, 346 Mass. 373, 191 N.E.2d 753, cert. den. **603** U.S. 933, 84 S.Ct. 704, 11 L.Ed.2d 653; State v. Pigues, 310 S.W.2d 942, 945 [Mo.]; 3 Wharton’s Criminal Law [Torcia-14th ed.], § 332). Under the former Penal ***262 Law, the term “enter” was essentially a codification of the common-law definition (see Penal Law of 1909, § 400, subd. 4). When the Legislature enacted the present statute, this definition was deleted. This does not mean, however, that the current amendment was meant to alter the entry element of burglary by requiring that the intruder must introduce his or her entire body inside the premises (see Hechtman, Practice Commentaries, McKinney’s Cons.Law of N.Y., Book 39, Penal Law, art. 140, p. 15). The statute now focuses on the unlawful aspect of the entry, rather than on the entry itself: “A person ‘enters or remains unlawfully’ in or upon premises when he is not licensed or privileged to do so” (Penal Law, § 140.00, subd. 5; see People v. Tragni, 113 Misc.2d 852, 854, 449 N.Y.S.2d 923, *supra*). In effect, the drafters eliminated any definition of “entry”, without any indication of intention to narrow its meaning.

The presumption is that no change from the rule of common law is intended, “unless the enactment is clear and explicit in that direction” (see People v. Phyfe, 136 N.Y. 554, 558, 32 N.E. 978). In the absence of such intent to change the common-law definition, there should not
be a radical departure from the established definition. Indeed, if a statute uses a word which has a
definite and well-known meaning at common law, it will be construed with the aid of common-
law definitions, unless it clearly appears that it was *555 not so intended (see Adamson v. City of
New York, 188 N.Y. 255, 258, 80 N.E. 937). Further, if the terms of a statute are subject to two
interpretations, that which most comports with the common law should be adopted (see People v.
Phyfe, 136 N.Y. 554, 558–559, 32 N.E. 978, *supra*). Therefore, as there is no contrary indication
from the Legislature, the entry requirement under the current Penal Law is met, at least when a
person intrudes within a building, no matter how slightly, with any part of his or her body (see
People v. Tragni, 113 Misc.2d 852, 856, 449 N.Y.S.2d 923, *supra,* State v. Pigques, 310 S.W.2d
942, 945 [Mo.], *supra*).

Defendant, here, was found in a position where he could have reached into the vestibule and
stolen goods from a display window after smashing it with the hammer found in his pocket. That
it may have been physically impossible for him to pass his body completely through the hole
does not preclude a determination that a successful burglary was within his capability and thus,
that a conviction for attempted burglary was warranted.

Defendant’s second contention that the vestibule is not a “building” within the meaning of the
Penal Law is also without merit. The statute provides that, “in addition to its ordinary meaning,
[a ‘building’] includes any structure * * * used for overnight lodging of persons, or used by
persons for carrying on business therein * * *. Where a building consists of two or more units
separately secured or occupied, each unit shall be deemed both a separate building in itself and a
part of the main building” (Penal Law, § 140.00, subd. 2). The existence of the security gate,
which can be pulled down to completely enclose the vestibule from public access, albeit with a
temporary fourth wall, makes the vestibule functionally indistinguishable from the space inside
the display cases or the rest of the store. Consequently, this area is included within the statutory
definition of a building (cf. McGary v. People, 45 N.Y. 153, 160–161; People v. O’Keefe, 80

Defendant’s other arguments have been considered and found to be without merit.

Accordingly, the order of the Appellate Division should be affirmed.

*556 JASEN, JONES, WACHTLER, MORAN, SIMONS and KAYE, JJ., concur.*
Defendants charged with burglary moved to dismiss. The District Court, Sand, J., held that: (1) indictment stated an offense, but (2) defendants could not be convicted of burglary based on evidence that they climbed onto the roof of a building without any evidence that they ever entered inside the four walls or beneath the roof.

*144

OPINION

SAND, District Judge.

This criminal case involves charges arising from acts allegedly committed by the defendants at the United States Armed Forces Recruiting Station at Times Square in New York City. Count three of the indictment, brought pursuant to the Assimilative Crimes Act, 18 U.S.C. § 13, charges the defendants with burglary in the third degree in violation of N.Y. Penal Law § 140.20 (McKinney 1988). Presently before this Court are the defendants’ motions to dismiss count three of the indictment, or, in the alternative, to permit an inspection of the grand jury minutes.

The issue raised by defendants’ motions is what constitutes “enter[ing] ... a building with intent to commit a crime therein” under the burglary provisions of the New York Penal Law. The government opposes defendants’ motions but asks this Court to issue a ruling on how the jury will be charged on the burglary count. For the reasons given below, this Court denies the motion to dismiss and the motion to inspect. However, we grant the government’s request and set forth our determination as to how the jury will be charged with respect to the elements of the burglary count.

I. BACKGROUND

.... On September 11, 1990, defendants Shawn Eichman and Joseph Urgo went to the Armed Forces Recruiting Station at Times Square and climbed onto the roof of the one story structure using a ladder. Once on the roof the defendants poured motor oil over the surface of the roof and onto the exterior signs of the building. The defendants then lowered the American flag flying over the building, doused it with lighter fluid and set it on fire. Defendants claim that their activities were acts of political protest symbolizing their objection to American policy in the Persian Gulf.

Shortly after they ignited the flag, defendants were arrested on the roof by New York City police
officers. The next day they were arraigned on a complaint charging attempted arson of the recruiting station. The government subsequently decided not to pursue the arson charge. Instead, the indictment returned by the grand jury charged defendants with three other crimes: (1) injuring and committing depredations against property of the United States, in violation of 18 U.S.C. §§ 1361, 1362 (1988); (2) reckless endangerment, in violation of 18 U.S.C. §§ 7, 13 (1988) and N.Y.Penal Law § 120.20 (McKinney 1988); and (3) burglary in the third degree, in violation of 18 U.S.C. §§ 7, 13 and N.Y.Penal Law § 140.20.

On December 17, 1990, defendants moved to dismiss the burglary count of the indictment on the ground that absent an allegation that defendants entered within the four walls of the recruiting station, the government would be unable to prove the “entry” element of the burglary count at trial. … The government argues that the defendants’ motions should be denied because the indictment pleads all the necessary elements of burglary under New York law. …

II. DISCUSSION

A. Defendants’ Motion to Dismiss

For purposes of evaluating a motion to dismiss an indictment, all well-pleaded allegations are taken as true. United States v. South Florida Asphalt Co., 329 F.2d 860, 865 (5th Cir.), cert. denied, 379 U.S. 880, 85 S.Ct. 149, 13 L.Ed.2d 87 (1964). *146 A motion to dismiss is not a device for the summary trial of the evidence; it is addressed only to the facial validity of the indictment. … So long as the indictment sets forth the elements of the offense in sufficient detail to provide the defendant with notice of the charges against him and does not present double jeopardy problems, it is impervious to attack on a motion to dismiss. See United States v. Mobile Materials, Inc., 871 F.2d 902, 906 (10th Cir.1989).

In this case, count three of the indictment pleads all of the elements of the offense of burglary. Under New York law, a person is guilty of burglary in the third degree when he “knowingly enters or remains unlawfully in a building with intent to commit a crime therein.” N.Y.Penal Law § 140.20. The third count tracks the statutory language, charging that the defendants “knowingly entered and remained in ... [the recruiting station] with intent to commit one or more crimes therein.” Assuming the factual allegations contained in count three to be true, the count properly pleads the charge of burglary in the third degree. Consequently, the motion to dismiss must be denied.

* * *

C. Government’s Request for Ruling on Charge to Jury

The underlying issue raised by defendants’ motions is whether the defendants can be convicted of burglary under New York law if the government does not attempt to prove that they ever entered within the four walls or beneath the roof of the recruiting station. This court is convinced that they cannot.

Under New York law, a person must “enter or remain unlawfully in a building” in order to be
guilty of burglary in the third degree. N.Y.Penal Law § 140.20. In defining unlawful entry the Penal Law focuses on the requirement of unlawfulness, defining it in terms of lack of license or privilege to be in a building. See N.Y.Penal Law § 140.00(5). However, the Penal Law does not define the breadth of the concept of entering in a building.

In the absence of statutory guidance, the parties place their reliance on a recent Court of Appeals decision, People v. King, 61 N.Y.2d 550, 463 N.E.2d 601, 475 N.Y.S.2d 260 (1984). In King, the defendant appealed his conviction for attempted burglary of a jewelry store. The store was on the ground floor and had a metal security gate covering the display windows and the vestibule area which led past the display windows and into the interior of the store. The defendant was apprehended after he cut a small hole in the part of the security gate directly in front of the vestibule area. See id. at 552–53, 463 N.E.2d at 602, 475 N.Y.S.2d at 261.

The defendant’s first contention in King was that he should not have been convicted because it would have been impossible for him to enter the store in that the hole was not big enough for his body to pass through. The Court rejected this contention, holding that because the Penal Law does not define “enter” the term retains its common law meaning, which is that entry is accomplished when a person “intrudes within a building, no matter how slightly.” Id. at 555, 463 N.E.2d at 603, 475 N.Y.S.2d at 262.

The defendant’s second contention was that the vestibule area was not part of the “building” within the meaning of the statute, such that his attempt to enter it was not attempted burglary. The Court also rejected this contention, holding that the “existence of the security gate, which can be pulled down to completely enclose the vestibule area from public access, albeit with a temporary fourth wall, makes the vestibule functionally indistinguishable from the space inside the display cases or the rest of the store.” Id.

In this case, both parties focus on the part of the King opinion which discusses the vestibule area. The government reads that part as standing for the proposition that the element of entering is satisfied so long as the defendant goes into “an area of or related to a building to which the public has been or can be denied access.” Government’s Memorandum of Law at 7. The defendants interpret King to mean that in order to be guilty of burglary, the defendant must intrude into some enclosed space in or connected to a building.

*148 In deciding which view of King is correct, the appropriate starting point is the common law of burglary since, according to the King Court, the element of entry still retains its common law meaning in New York. See King, 61 N.Y.2d at 555, 463 N.E.2d at 603, 475 N.Y.S.2d at 262. At common law, burglary was the breaking and entering of a dwelling house at night with the intent to commit a felony therein. The predominate impetus of common law burglary was “to protect the security of the home, and the person within his home.” Note, Statutory Burglary—The Magic of Four Walls and a Roof, 100 U.Pa.L.Rev. 401, 427 (1951). The offense was directed at preserving the internal security of the dwelling; consequently, an entry into the structure itself was an essential element of the crime. The intrusion of any part of the defendant’s body, or of an object held in his hand, was sufficient to establish the element of entry. Yet there had to be some movement by the defendant across the external boundaries of the structure, some breaking of the planes created by the threshold and the four walls. See 3 Wharton’s Criminal Law §§ 331–332
Activity conducted outside the external boundaries of a dwelling, no matter how felonious, was not burglary at common law. Thus, Lord Hale maintained that firing a gun into a house was not burglary unless some part of the weapon crossed the threshold.

* * *

Because the common law required that a defendant penetrate the exterior walls of a structure in order to be guilty of burglary, such penetration is required for the commission of statutory burglary in New York. ... Thus in this case, the defendants may be convicted of burglary only if the government can prove that they actually entered within the four walls or beneath the roof of the recruiting station.

This conclusion comports with the Court of Appeal’s decision in King and the case law of New York’s lower courts. In King, the vestibule of the jewelry store was within the planes created by the four exterior walls of the building. See id. ... In People v. Pringle, 96 A.D.2d 873, 873–74, 465 N.Y.S.2d 742, 743 (App.Div.1983), the defendant’s conviction for burglary was upheld where he entered a separately secured nurse’s station within a prison and committed an assault. The common thread in these cases is that ... the defendants actually entered into the interiors of enclosed and separately secured structures.

... [This] view of the entry requirement ... [also] comports with the restraints imposed by the rule of lenity. That rule is implicit in the concept of due process. As expressed by the Supreme Court, the rule of lenity requires that “before a man can be punished as a criminal ... his case must be ‘plainly and unmistakably’ *149 within the provisions of some statute.” United States v. Gradwell, 243 U.S. 476, 485, 37 S.Ct. 407, 410, 61 L.Ed. 857 (1917). ... Courts should not interpret a criminal statute to encompass situations which a reasonable layperson could not foresee as being within the ambit of the statute. In this case, there is little doubt but that the defendants knew that their actions on the rooftop of the recruiting station violated the law. Trespass, destruction of government property, reckless endangerment and perhaps even attempted arson were foreseeable charges stemming from their conduct. That the defendants could reasonably have foreseen the charge of burglary is, however, a much more doubtful proposition.

In sum, this Court is of the view that the New York Penal Law requires that a defendant actually enter within the four walls or beneath the roof of a building in order to be guilty of burglary in the third degree. At trial, the jury will be instructed that they may not convict the defendants of the burglary charge unless they find that such an entry occurred. Of course, if the government presents no evidence of such entry then the count will be dismissed.

CONCLUSION

For the reasons given above, defendants’ motion to dismiss the third count of the indictment and their motion to inspect the grand jury minutes are denied. The government’s request for a ruling on the charge to be given to the jury is granted. At trial, the jury will be instructed in the manner discussed above.
The PEOPLE of the State of New York, Respondent,
v.
Paul LEWOC, Appellant.

May 17, 1984.

Defendant was convicted before the County Court, Ulster County, Vogt, J., of burglary in the second degree, and he appealed. The Supreme Court, Appellate Division, held that: (1) in view of convincing evidence of entry, trial court properly declined to charge attempt as a lesser included offense; (2) fully enclosed porch with windows and walls of wooden construction running length of house, referred to by neighbors as an “addition” and functionally indistinguishable from rest of house, was an integral part of house so that entry therein, combined with other requisite statutory elements, would be sufficient to constitute burglary; and (3) evidence was sufficient to support finding that house which was not occupied during owners’ sojourn in Florida from January to mid-March nonetheless retained its character as a dwelling for purpose of burglary statute.

Affirmed.

Before MAHONEY, P.J., and MAIN, MIKOLL, YESAWICH and HARVEY, JJ.

Opinion

MEMORANDUM DECISION.

*927 Appeal from a judgment of the County Court of Ulster County, rendered May 12, 1982, upon a verdict convicting defendant of the crime of burglary in the second degree.

James Van Buren, having just entered his own driveway, observed an unfamiliar car containing two men in a parking lot across the street from the Kennedy residence; **934 the Kennedys were in Florida at the time. After watching the men share a cigarette and proceed into the woods behind the Kennedy house and then moments later hearing what appeared to be the sound of a door being kicked hard, Van Buren called *928 the police. At approximately 11:30 P.M. on February 2, 1981, defendant and his codefendant were arrested as they attempted to run from a rear door to the Kennedys’ porch into the wooded area. Following a joint trial, both were convicted of burglary in the second degree.

Defendant maintains that the trial court should have submitted to the jury the lesser included offense of attempted burglary in the second and third degrees. He also argues that the jury was improperly instructed that the Kennedys’ enclosed porch was an integral part of the building and that one months’ nonoccupancy did not necessarily cause the building to lose its character as a dwelling. We find no merit to any of defendant’s contentions.
An attempt may be charged only when a reasonable view of the evidence would support a finding that the defendant committed such lesser offense, but not the greater (CPL 300.50, subd. 1). Here, defendant and his codefendant were seen exiting the Kennedys’ kitchen door into the enclosed porch by Van Buren and were then seen leaving the porch by police officers. Additionally, a neighbor noticed flashlights inside the residence just prior to defendant’s apprehension and a police officer heard noises from within as he came around the side of the Kennedy house. Subsequent investigation disclosed a forced entry through the kitchen door and a household in disarray. Later that week, two lit, but dim, flashlights were discovered in the dining room by a neighbor-caretaker. Given the convincing evidence of entry, the trial court quite properly declined to charge attempt as a lesser included offense.

Nor can we find fault with the court’s conclusion that the fully enclosed porch, with windows and walls of wooden construction running the length of the Kennedy house, referred to by neighbors as an “addition” and which was functionally indistinguishable from the rest of the house, was an integral part of it and that entry therein, combined with the other requisite statutory elements, would be sufficient to constitute burglary (People v. King, 61 N.Y.2d 969, 475 N.Y.S.2d 275, 463 N.E.2d 616 [1984]).

Finally, not only did defendant fail to preserve the issue of the sufficiency of the trial court’s charge regarding nonoccupancy and whether the Kennedys’ sojourn in Florida from January to mid-March caused the building to lose its character as a dwelling, more importantly, whether their absence was temporary was an issue which was submitted to the jury and resolved in the People’s favor.

Judgment affirmed.
Defendant was convicted in the Supreme Court, New York County, Schlesinger, J., of burglary in the third degree, and defendant appealed. The Supreme Court, Appellate Division, held that: (1) the People did not prove that defendant was not licensed or privileged to enter the school at which the crime occurred, and (2) a studio within the school was not a “building” within the meaning of the burglary statute.

Conviction reversed, indictment dismissed.

Before CARRO, J.P., and ROSENBERGER, WALLACH and ASCH, JJ.

Opinion

MEMORANDUM DECISION.

Judgment of the Supreme Court, New York County (Alvin Schlesinger, J.), rendered March 14, 1989, convicting defendant, after trial by jury, of burglary in the third degree and sentencing him, as a predicate felon, to a prison term of from 2½ to 5 years, is unanimously reversed, on the law, and the indictment dismissed.

Defendant was charged and convicted of third degree burglary upon the theory that he unlawfully entered a building at the Parsons School of Design in Manhattan and stole a wallet containing $13 to $15 from the knapsack of a student, Paula Krauss. There was testimony that the security guard at the school asked defendant if he were a student and defendant said he was. The guard did not ask defendant for identification or to sign in. Complainant Krauss, who had been working on the fourth floor in her “studio”—a movable plywood stall, over which one “can see over the top”—left for a moment to go to the bathroom. When she returned, she noticed defendant in her studio and asked what he was looking for. Defendant told her he was looking for glue. When he discovered her knapsack, which she had placed in her cabinet, was missing, she chased defendant with some other students. The wallet was found on a second floor landing with the money missing. Defendant was observed by the security guard attempting to leave by the 14th Street exit, which was locked, and then, pushing past the guard, he left the school at the 13th Street exit, dropping the money.

Penal Law § 140.20 requires that the People prove as an essential element of third degree burglary that the defendant “enters [and] remains unlawfully” in the premises, and Penal Law §
140.00(5) provides, *inter alia*, that “[a] person ‘enters [and] remains unlawfully’ in or upon premises when he is not licensed or privileged to do so”. The evidence in this case was legally insufficient to establish that defendant had no license or privilege to enter the school and the People, therefore, failed in their burden of proving each and every element of the crime charged (*see, People v. Brown, 25 N.Y.2d 374, 377, 306 N.Y.S.2d 449, 254 N.E.2d 755*). … The prosecution presented no evidence that defendant was not a student and, therefore, that **539** he was not licensed or privileged to enter the school.

As noted, the testimony suggested that defendant told the security guard he was a student when he entered. While one student testified she did not think there were black male students in the Fine Arts Department, she thought there were black men in the Fashion Department. In addition, while another student testified he did not recognize defendant as a student, neither of these witnesses were shown to have a comprehensive knowledge of the entire student body. Neither the Registrar nor any other proper school official was called to testify as to whether defendant was enrolled in the school.

Finally, contrary to the contention of the People, Krauss’ studio was not a “building” within the meaning of Penal Law § 140.00(2). It had no door, was a temporary, movable structure, and was made of partitions that did not reach the ceiling (and, in fact, were capable of being seen over).
Synopsis

**Background:** Appellant appealed from order of the Family Court, Bronx County, Monica Drinane, J., which, upon a fact-finding determination by Alma Cordova, J., adjudicated appellant a juvenile delinquent.

**Opinion**

*360* Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 20, 2005, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination (Alma Cordova, J.) that appellant committed acts which, if committed by an adult, would constitute burglary in the third degree, criminal trespass in the third degree, and attempted petit larceny, and placed him in the custody of the Office of Children and Family Services for a period of 18 months, unanimously modified, on the law, to the extent of vacating the finding as to burglary in the third degree, dismissing that count of the petition and remanding for a new dispositional hearing, and otherwise affirmed, without costs.

The court’s finding as to criminal trespass and attempted petit larceny was based on legally sufficient evidence and was not against the weight of the evidence (**People v. Bleakley**, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 [1987]). The evidence established that, after being told to leave, appellant unlawfully remained upon real property that was enclosed by a fence. The evidence also supports the conclusion that appellant attempted to steal a bicycle.

However, the burglary finding was based on insufficient evidence because the fenced-in outdoor storage lot adjoining a store did not qualify as a “building” as defined by Penal Law § 140.00(2). There was no evidence to support a conclusion that this storage lot resembled, or was analogous to, the roofed vestibule or entranceway described in **People v. King**, 61 N.Y.2d 550, 555, 475 N.Y.S.2d 260, 463 N.E.2d 601 [1984].
Instructions for Memo #1 and Practice Assignments

Your client for Memo #1 is Chris Moran, who has been charged with second degree burglary. Your task is to write a memo addressing whether Moran “entered” a “building” for purposes of New York’s burglary statutes. (If she did not, then at most, she only attempted to commit burglary.) In doing so, you should rely on the materials I’ve given you, including the facts, the statute, and five appellate decisions. You should also review the relevant sections of the books, the sample memo, and the handouts I’ve given you on writing the various parts of a legal analysis. The format and substance of the memo should follow the sample memo and the formatting instructions in the Course Policies handout.

During the first weeks of class, you will write three practice paragraphs for your memo. I will give you time to work on these paragraphs in class, though you’re welcome to start on them before class. We will discuss and critique some of these paragraphs as a group in class. You won’t receive individual feedback from me, but I will give you individual feedback only on one.

Finally, though memo 1 is ungraded, the assignments are the foundation for graded work that you’ll do later in the semester. I’ve give you detailed feedback, and that feedback will be much more helpful to you if you do the best you can on the memo. (If you don’t, my comments will tell you things could have figured out without my help.)

Practice Assignment 1: Rule Statement Paragraph

Practice Assignment 1 is a rule statement paragraph for the memo – the “R” in a “CREAC” analysis. See paragraph 2 of the sample memo, and the handout on Drafting a Rule Statement.

Your paragraph should include: (1) the general rule (from the statute) for burglary; (2) the tests for both “entry” and “building”; and (3) a concise summary (from the cases) of the criteria a court will use to determine if a person entered a building.

Practice Assignment 2: Rule Explanation

Practice Assignment 2 is a rule explanation paragraph for the memo – the “E” in a “CREAC” analysis. See paragraphs 3 to 5 of the sample burglary memo, and the handout on Drafting the E in CREAC.

For this assignment, begin by choosing an important point about how the law works. This point should be clearly stated in the thesis sentence for your paragraph. Then, write a case illustration using any one of the cases as a primary illustration, with one additional case as a second example. Please see the handout on “Drafting the E in a CREAC” for more details and a sample.
**Practice Assignment 3: Rule Application**

Practice Assignment 3 is a rule application paragraph for the memo – the “A” in a “CREAC” analysis. *See paragraphs 7 through 10 of the sample burglary memo, and the handout on Drafting the A in CREAC.*

For this assignment, write a paragraph that uses *analogical reasoning* to make an important point about how the law applies to your client’s case. In other words, compare the facts of your case to the facts of one of the decided cases, and use the court’s reasoning to reach a conclusion about your case. As discussed in class and in the reading, the point of your comparison should be clearly stated in the thesis sentence: it isn’t enough to say that your client’s case is different from or similar to a decided case.

**Full Version of Memo #1**

Your final ungraded assignment for this problem is a complete informal memo, with an analysis in the CREAC format. Your memo will include revised versions of the three practice assignments, as well as additional paragraphs.

As in the sample, your memo should begin with a paragraph that (1) identifies your client and your client’s legal problem; (2) identifies the legal issues you will address; (3) states your conclusion on that issue (the “C” in “CREAC”); and (4) very briefly says something about the reasoning that supports your conclusion. *See paragraph 1 of the Sample memo & the handout on Drafting the Introduction for an Informal Memo.*

The introduction should be followed by your rule statement – a revised version of Practice Assignment 1.

Thereafter, write several paragraphs that use case illustrations to explain key points about how the rule works. This is the E section of the CREAC. *See paragraphs 3 through 5 of the sample memo.*

As in the sample memo, try to avoid simply writing a paragraph about each case. Instead, for each paragraph, write a strong thesis sentence that says something about how the rule works. If possible, use more than one case to support the point you’re making. Typically, you’ll have one longer example, and then one or two much shorter examples. (For some points, you’ll have only one case for support.) You should plan on using all four cases in some way, but you *do not* need a full case illustration for each of the cases.

Finally, tell the reader how the law you’ve just explained would apply to the facts of the client’s case. This is the A section of the CREAC. *See rule 7 through 10 of the sample memo.* In this section, you should use both *analogical reasoning* and *policy reasoning* to support your conclusion. Because the memo is relatively short, you do not need to end the CREAC with another conclusion.
In writing the application section, it will help to consider: (1) the strongest points in favor of each side; (2) the cases that best support each point; (3) the ways in which your client’s case is similar to or different from other cases; (4) the ways in which your conclusion is consistent with and supported by any public policies discussed in the cases. It would also help to begin the application section of the memo with a brief transition paragraph that includes a version of your conclusion (see paragraph 6 in the sample memo).

*Please submit your memo via the TWEN dropbox no later than 11:59 p.m. on Saturday, Sept. 23.*

There is no page limit for this assignment, but I anticipate that a well-written memo will be more than four pages (double spaced) and not more than roughly six pages. Please be sure that you include the required certificate of compliance. See the Course Policies document.

**Citations for the Practice Assignments and Memo #1**

You should cite to appropriate cases whenever a citation is needed, including direct quotes, and any sentence in which you’ve taken the facts, holding, reasoning, ideas or other material from a specific case or statute. For the practice assignments and Memo #1, it isn’t necessary to comply with the formal format for full case citations. (You’ll welcome to try if you wish.) Instead, you can simply do all citations in one of the two short formats given below.

In the examples below, pay careful attention to both the punctuation and spaces (or lack of spaces.)

**Cites to the Statute**

The first citation to the statute should be a full cite to the official version of the statute. For example, a citation to the definition of “building” would read as follows:

N.Y. Penal Law § 140.00[2].

For later citations, you can simply use the section number with a section symbol. Make sure you include the specific subsection you’re referring to.

§ 140.00[2].

**Cites to the Cases**

For case citations, follow the short format shown below *unless “id.” is appropriate.* In these short citations, you should replace the “XX” with the appropriate number(s) for the page or pages you’re citing. For instance, a cite to pages 554 and 555 of *People v. King* would look like this:

*King,* 71 N.Y.2d at 554-55.

Similarly, cites to the other cases would follow this format, with page numbers substituted for XX:
When to use “id.” ...

When to use “id.” ... “Id.” is short for “idem,” a Latin word meaning “the same.” If the immediately previous cite was to the same case (and only that case), use “id.” instead of the format shown above. Remember that “id.” is always in italics or underlined. (Match the style of the case names.) If you use underlining, be sure to underline the period in “id.”

If the page number is the same, use “Id.” by itself. But if the page number is different, you should include the word “at” and the new page number. For example, if you cite to page 554 of King, and the very next cite is to page 555 of King, the second cite would look like this:

\[ Id. \text{ at } 555. \]

To find the page numbers, look in the text of the case for bold numbers with an asterisk in front of them. For instance, here’s a paragraph from King:

Defendant makes two arguments that are founded on the factual predicate that he did not possess a tool for cutting the gate’s metal bars and widening the hole. Defendant urges that his conviction should be reversed because it was factually impossible for him to have introduced his entire body into the building area, which, he argues, is legally required for a burglary conviction. Thus, he contends that he could not have completed the crime of burglary. Alternatively, defendant asserts that the evidence was insufficient to establish attempted burglary because the vestibule is not a “building” within the meaning of the Penal Law, and he only had the means to put his arm through the gate *554 into the vestibule. Neither argument is persuasive. This court now affirms.

In this paragraph, “*554” marks the beginning of page 554. Thus, “through the gate” are the last three words on page 553, and “into the vestibule” are the first three words on page 554. If you see a bold number with TWO or THREE asterisks in front of it, those are the page numbers for a different legal reporter (a different set of books). You can ignore them.

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Eichman, 756 F. Supp. at XX.
Lewoc, 101 A.D.2d at XX.
Watson, 163 A.D.2d at XX.
In re Orneil F., 34 A.D.3d at XX.