Materials for Memo # 1

LEGAL ANALYSIS,
WRITING,
& RESEARCH

FALL 2019

Professor
Stephen Paskey

Facts for Class Discussion – People v. Hoffman

Your client, Chris Hoffman, has been charged with second degree burglary under N.Y. Penal Law § 140.25. Hoffman admits she tried to open the windows of a house with the intent of stealing a coin collection, and that she stole a package from the front porch. The issue is whether Hoffman "entered" the house. If she did, Hoffman committed second degree burglary. If she did not, then Hoffman 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.

On the morning of August 11, 2019, Lee Martel left home and drove to work. At noon, Tara Cole, who lives across the street, came home for lunch. Through a window, Cole saw a person identified as Hoffman wearing jeans, a t-shirt, a green backpack, and black gloves. Hoffman had a screwdriver in one hand and seemed to be prying a window open. Cole called the police.

As Cole watched, Hoffman went to a different window and tried to pry it open. She could not. Hoffman then walked to the front, opened the screen door, and tried the door handle. As she did, a package fell from between the doors and onto the porch. Hoffman picked up the package; got into a Red Kia, drove one block; parked in front of a small store; and went inside.

By this time, officer Tim Foreman had arrived. Foreman approached Hoffman as she was leaving the store with cigarettes. Foreman asked if she owned the Kia, and Hoffman said she did not. When asked what she was doing, Hoffman said she was waiting for a friend.

Through a dispatcher, Foreman confirmed that Hoffman matched the description reported by Cole, and that Hoffman owned the Kia. When Foreman tried to speak to Hoffman again, Hoffman ran. Foreman chased Hoffman, tackled her, and arrested her. Foreman searched Hoffman's pants pocket and found a pair of black gloves and a screwdriver with a bent blade.

From the Honda, police recovered the package and the backpack. The package was from Amazon.com and contained three CDs worth $40. UPS records show the package was delivered to the house one hour before the arrest. In the backpack, police found a pry bar, a hammer, and a magazine article about a collection of rare Roman coins that Martel keeps at home.

Police found pry marks on two windows that probably were made by a screwdriver. The marks show the screwdriver's tip was inserted into the space between the windows and the base of the window frames, which are 1-1/2 inches thick. The windows were locked, and it isn't clear if the screwdriver was inserted *entirely* under the frame, or only partway beneath it.

Cole identified Hoffman as the woman she saw. Video from a security camera on Martel's porch shows a person who is clearly Hoffman opening the screen door, trying the door handle, and picking up the package.

Below are excerpts from New York's burglary statutes. Did Hoffman enter the house, either by prying the windows or reaching inside the screen door? Why or why not?

Excerpts from the N.Y. Penal Law

§ 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.

Facts for Memo # 1 – People v. Fisher

Date: August 13, 2019
To: Student Intern
From: Esther Williams, Asst. District Attorney, Ontario County
Re: Possible burglary charges against Randy Fisher

Because you've dealt with entry into a building under New York's burglary statutes, I'd like you to evaluate a potential burglary prosecution.

Randy Fisher, a 22-year-old college dropout, has been charged with larceny in connection with theft of a kayak from a cottage south of Geneva. The DA wants to make an example of the kid, and would like to charge him with second-degree burglary. There's a question, though, as to whether Fisher entered a building. Here's what we know:

Emily Peters owns a lakefront cottage. Tim Yates lives across the street. At 11 pm on Sunday, August 11, Yates heard his dogs barking. In the light of a street lamp, he saw someone in a black coat and blue hat get into a white Subaru Outback parked in Peters's driveway. The car then drove north with a red kayak strapped to the roof. Yates knew that Peters owns a red kayak and was out of town. Suspecting theft, he called the police.

At 11:21 pm, officers stopped Fisher for failing to signal a turn. He was wearing a black coat and blue hat, and was driving a white Subaru Outback with a red kayak on the roof. The officers heard a radio report about the kayak and detained Fisher. After Yates identified the kayak and the Subaru, Fisher was arrested for theft. A search of the car found a life vest and a cherry kayak paddle.

Peters identified the kayak, life vest, and paddle as items taken from the crawl space. Peters uses the space to store things, including the kayak and supplies for her charcoal grill. She is certain she left the life vest and paddle in the cockpit of the kayak, but cannot conclusively say the kayak was *entirely* in the crawl space.

The crawl space is three feet high in the rear where it faces the lake. It is fully enclosed by a wooden "skirt" except for a four-foot-wide opening in the rear. Peters has an insulated plywood hatch, which can be locked and is used to fully enclose the space. The hatch is intended in part to prevent water pipes under the cottage from freezing during the winter. During the summer Peters often leaves the hatch open and unlocked.

The morning after the incident, officers searched the ground behind the cottage and found a black left-handed glove, which matched a right-handed glove in Fisher's jacket when he was arrested. Officers also found boot prints behind the cottage that match the boots

Fisher was wearing, and they observed skid marks on the ground, where it appeared that a kayak had been dragged from the crawl space.

We can prove Fisher stole the kayak, paddle, and life vest from the crawl space. We cannot prove that Fisher stuck any part of his body inside the crawl space to do so: it's possible the bow of the kayak was sticking outside the crawl space, and that he grabbed the handle on the bow and dragged it.

To convict Fisher of second degree burglary, we must persuade a court that the crawl space was part of the cottage, and that grabbing it amounted to entering the crawl space. Please read the following cases and write a memo evaluating those issues.

61 N.Y.2d 550
Court of Appeals of New York.

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 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. ***553** 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.

Defendant makes two arguments 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" … 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; *Commonwealth v. Lewis,* 346 Mass. 373, 191 N.E.2d 753; *State v. Pigques,* 310 S.W.2d 942, 945 [Mo.]; 3 Wharton's Criminal Law § 332). Under the former Penal 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). 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). 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). 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). 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*; State v. Pigques,* 310 S.W.2d 942, 945 [Mo.]).

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 A.D.2d 923, 924).

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, HOFFMAN, SIMONS and KAYE, JJ., concur.

756 F. Supp. 143
United States District Court,
S.D. New York.

UNITED STATES of America
v.
Shawn Del EICHMAN and Joseph P. Urgo, Jr., Defendants.

No. 90 Cr. 735 (LBS). | Feb. 1, 1991.

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 ***145** in New York City. Count three of the indictment, brought pursuant to the Assimilative Crimes Act, 18 U.S.C. § 13 (1988), charges the defendants with burglary in the third degree in violation of N.Y. Penal Law § 140.20 (McKinney 1988). Presently before this Court ar 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 motions to dismiss and 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 burglary.

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; (2) reckless endangerment, in violation of 18 U.S.C. §§ 7, 13 (1988) and N.Y. Penal Law § 120.20; 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.). ***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 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 defendants can be convicted of burglary under New York law if the government does not 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" to be guilty of third degree burglary. N.Y. Penal Law § 140.20. In defining unlawful entry, the Penal Law focuses on the requirement of unlawfulness … 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 (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.

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. …

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. The government reads that part as standing for the proposition that the element of entering is satisfied [if] the defendant goes into "an area of or related to a building to which the public has been or can be denied access." … 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 is correct, the appropriate starting point is the common law of burglary since … the element of entry still retains its common law meaning in New York. *See King,* 61 N.Y.2d at 555. 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. 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 (14th ed. 1980); 4 W. Blackstone, *Commentaries on the Laws of England* 227 (1988). 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 (N.Y. 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 (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.

101 A.D.2d 927
Supreme Court, Appellate Division, Third Department, New York.

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. 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; 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 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.

Judgment affirmed.

141 A.D.2d 760
Supreme Court, Appellate Division, Second Department, New York.

The PEOPLE, etc., Respondent,
v.
Maurice GREEN, Appellant.

June 20, 1988.

Defendant was convicted in the Supreme Court, Kings County, of second-degree burglary, third-degree robbery, and fourth-degree criminal mischief. Defendant appealed. Affirmed.

Before BRACKEN, J.P., and KUNZEMAN, RUBIN and SPATT, JJ.

Opinion

MEMORANDUM BY THE COURT.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Deeley, J.), rendered May 2, 1984, convicting him of burglary in the second degree, robbery in the third degree and criminal mischief in the fourth degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The evidence adduced at trial establishes that on July 22, 1983, at approximately 6:30 A.M., the defendant forcibly took property from the victim, after he had unlawfully entered into the garage of her residence at 1208 Eastern Parkway, Brooklyn, New York. On appeal, the defendant argues that since the evidence reveals that there was no interconnecting doorway between the victim's garage and her house, the garage ***761** was not part of a "dwelling", so that the People failed to prove an essential element of burglary in the second degree (Penal Law § 140.25[2]; § 140.00[3]).

The defendant did not raise this specific argument either at the time of his motion to dismiss at the close of the People's case or at the time of his motion to dismiss at the close of the trial. This argument was, however, raised at the time of sentencing. Assuming, without necessarily deciding, that the issue is, under these circumstances, reviewable as a matter of law (*but see, People v. Bynum,* 70 N.Y.2d 858; *People v. Gomez,* 67 N.Y.2d 843; *People v. Dekle,* 56 N.Y.2d 835; *People v. Stahl,* 53 N.Y.2d 1048; *People v. Cardona,* 136 A.D.2d 556; *People v. Patel,* 132 A.D.2d 498, we conclude that the defendant's argument is without merit.

Pursuant to the definition of the term "building" contained in the Penal Law § 140.00(2), the victim's garage, which was located under her house, must be considered part of the main building. Penal Law § 140.00(2), provides that "where a building consists of two or more units separately secured or occupied, each unit shall be deemed * * * a part of the main building". In accordance with this definition, we have previously held that an attached garage may be considered as part of the main house and thus as part of a "dwelling" within the meaning of Penal Law § 140.25(2) (*see, People v. Stevenson,* 116 A.D.2d 756, 757).

We are not persuaded by the argument that *People v. Stevenson* should not be considered controlling because, in that case, the garage in question was linked to the main residence by an interconnecting door. Other courts, interpreting similar statutes, have rejected such a distinction and have held that an attached garage, even without an interconnecting door, constitutes part of the main dwelling (*see e.g., People v. Moreno,* 158 Cal.App.3d 109; *Burgett v. State,* 161 Ind.App. 157 [basement which was not directly accessible from living area held part of dwelling]; *see also, Jones v. State,* 690 S.W.2d 318 [Tex.App]; *White v. State,* 630 S.W.2d 340 [Tex.App.]; *People v. Coutu,* 171 Cal.App.3d 192). Since the garage in the present case was structurally part of a building which was used for overnight lodging of various persons, it must be considered as part of a dwelling (*see also, People v. Ivory,* 99 A.D.2d 154, 156 [hallway in apartment building constitutes dwelling]).

Turning to the defendant's remaining contentions, we find ***762** that the defendant's argument concerning the alleged repugnancy of the jury's verdict has not been preserved for appellate review (*see, People v. Satloff,* 56 N.Y.2d 745, 746), and is, in any event, meritless (*see, People v. Tucker,* 55 N.Y.2d 1). There is also no merit to the defendant's contention that he was improperly sentenced as a second felony offender (*see, People v. Depeyster,* 115 A.D.2d 613; *People v. Sirianni,* 89 A.D.2d 775).

The defendant's remaining contentions are found to be equally meritless.

163 A.D.2d 253
Supreme Court, Appellate Division, First Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Thomas WATSON, Defendant–Appellant.

July 19, 1990.

Defendant was convicted in the Supreme Court, New York County, Schlesinger, J., of burglary in the third degree, and defendant appealed. 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 ***254** 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 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). … The prosecution presented no evidence that defendant was not a student and, therefore, that he was not licensed or privileged to enter the school.

As noted, the testimony suggested 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, neither of these witnesses were shown to have a comprehensive knowledge of the entire student body. Neither the Registrar nor any other school official was called to testify as to whether defendant was enrolled.

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).

Reversed.

125 Misc.2d 9
Supreme Court, Kings County, New York,
Criminal Term.

The PEOPLE of the State of New York
v.
Kevin WILLIAMS, Defendant.

July 13, 1984.

Prior to conviction of attempted burglary in the third degree, criminal mischief in the fourth degree, and possession of burglar's tools, defendant moved to dismiss attempted burglary count. Verdict modified.

DECISION

MICHAEL R. JUVILER, Acting Justice.

This is a motion for a trial order of dismissal, dismissing the first count of the indictment, which alleges attempted burglary in the second degree. …

The issue is whether the trial evidence was legally sufficient to establish the element of the crime of attempted burglary in the third degree that the place the defendant attempted to enter, a maintenance room entered from an inside hallway, was a "building." The Court finds that it was not, for the reasons stated later in this opinion. ***10** … Accordingly, I modify the verdict on the first count to reduce it to a verdict of guilty of attempted trespass.

The issue of law regarding the meaning of the term "building" in the definition of burglary has arisen in this case through an error which caused the wrong charge to be returned by the Grand Jury in the first count. As the trial prosecutor with admirable professionalism conceded, the first

count of the indictment mistakenly charged the defendant with having "attempted" to enter the "dwelling" of the complainant, George Greenidge. …

The evidence at the trial, however, established that it was one room, described by Greenidge at trial as a maintenance ***11** room, about 10 x 12 or 8 x 12 feet in size, containing tools and materials used in his maintenance of 1036 Bedford Avenue. The complainant described the building 1036 Bedford Avenue as a three-family dwelling house with a store on the first floor. On the second floor across the hall from the locked door in question was an occupied apartment. Greenidge testified that he did not know the defendant or give him permission to enter 1036 Bedford Avenue or the maintenance room, or to damage the door and lock to that room. …

As the People conceded, because the maintenance room was not an apartment "dwelling," the highest charge … that arguably could be submitted to the jury was attempted burglary in the third degree, as an attempt to enter a "building," consisting of the maintenance room. The jury found the defendant guilty of that charge, but the trial evidence was not legally sufficient to establish that the room was a "building."

"Building" is defined in Penal Law 140.00(2) as follows:

> "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 enclosed motor ***12** truck, or an enclosed 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.*" (emphasis added.)

The District Attorney's excellent memorandum in opposition to the defendant's motion shows that this definition may be interpreted to deem the maintenance room a separate "building," as a "separately secured" unit of the whole building. However, the provision must be construed more narrowly. On its face, its first sentence modifies the second, thereby narrowing the term "unit." The first sentence excludes the maintenance room. The room was not used for "overnight lodging of persons"; therefore, to be a "building" it must have been a "structure" that was "used by persons for carrying on business *therein* " (emphasis added). While the maintenance room was used to help the complainant carry on the business of 1036 Bedford Avenue, the trial evidence showed that that business was carried on outside of the maintenance room. Greenidge described his having taken tools from the room on the eve of the crime to use in the store downstairs. But there was no evidence that the business of the overall building was carried on *inside* the room. In the law of burglary, "therein" means what it says: inside the room that is entered. See *People v. Haupt,* 218 A.D. 251, 253, 218 N.Y.S. 210 (3d Dept.1926).

Nor is the maintenance room the kind of "unit" referred to in the second sentence of 140.00(2). That sentence is qualified by the first sentence, which excludes the maintenance room. Moreover, the "units" referred to in the second sentence are the independent units that make up a multiple-unit building, such as the three apartments and the store in Greenidge's building. This is apparent from the language of the second sentence and its common-law history, which it

codifies. (See McKinney's Penal L. sec. 140.00, Practice Commentaries; *People v. Haupt, supra.*

The evidence here contrasts with the evidence in *People v. Pringle,* 96 A.D.2d 873 (2d Dept. 1983), a case relied on by the People, in which the Court found that a nurses' station in a prison was a "building." In *Pringle,* not only was the nurses' station separately secured and used for storing drugs, facts similar ***13** to those here, but the nurses worked in it to dispense medications to the inmates through a window. It was, said the Court, "an independent unit, providing an essential work area."

But here, there is no evidence that Greenidge or anyone else worked inside the room to conduct the "business" of 1036 Bedford Avenue, or that the room was an "independent unit" of the kind contemplated in *Pringle.*

This case more closely resembles *People v. O'Keefe,* 80 A.D.2d 923 (2d Dept. 1981). The question there was whether a locked meter closet in a basement apartment was a separate "building," as alleged in a charge of criminal trespass in the third degree. The closet held a metal cabinet used to store jewelry and materials used elsewhere in the basement. Although, as here, the locked area was "separately secured," and was used to store materials used elsewhere in the overall building, those facts alone were insufficient to make the place a "building."

In *People v. Sevigny,* 121 Misc. 2d 580 (Sup. Ct. Queens Co. 1983), the Court found an above-ground mausoleum to be a building. The Court reasoned that a "structure" for storing corpses should have no less protection than a shed for storing tools. Be that as it may (compare *People v. Richards,* 108 N.Y. 137), the maintenance room was not a separate "structure" as that term is used in Penal Law 140.00(2). While a mausoleum, a tool shed, and a nurses' dispensary are "independent" structures, the second floor room at 1036 Bedford Avenue is not the same kind of "independent" structure having its own distinct business separate from any other structure.

***14** The People aptly note that "it would promote justice and effect the objects of the law to uphold a conviction for the very type of conduct sought to be prevented by the Legislature," namely, this defendant's conduct. Unfortunately, the defendant was not appropriately charged with that conduct in the first count.

For these reasons, the Court is constrained to modify the verdict of guilty of attempted burglary in the third degree by reducing it to the only lesser included offense that does not have a "building" as an element, attempted trespass.

113 Misc.2d 852, 449 N.Y.S.2d 923

The People of the State of New York, Plaintiff,
v.
Peter Tragni et al., Defendants

Supreme Court, Trial Term, New York County

OPINION OF THE COURT

Sheldon S. Levy, J.

Is drilling a hole through an outside wall of a building an entry within the meaning of the burglary statutes, or is it merely evidence of a breaking and an attempt to enter? ***853**

No New York court appears to have been confronted with even a similar instrumentality problem in the law of burglary … and this decision, accordingly, is one of first impression.

The seven defendants on trial and two others -- colloquially known as "The Gang That Couldn't Drill Straight" -- were indicted, *inter alia*, for crimes of burglary in the third degree (first count) and attempted burglary in the third degree (second count), while acting in concert.

The charge is that, on January 26, 1981, at about 4:30 a.m., the two members of the group, not now on trial, drilled one hole through and one hole partially through the exterior storefront wall of the China Jade Company jewelry store on Canal Street in Manhattan. The holes were apparently purposefully placed on each side of a 3,000-pound safe, located directly within the premises and adjacent to the exterior wall.

Defendants Tragni and Barrios, long-time private garbage truck drivers in the Chinatown area, positioned their respective vehicles in front of the jewelry store and revved their motors in an attempt to shield the activity from public view and to mask the sounds of the drilling operation.

Defendant Mazzocchi acted as lookout, while the four remaining defendants (all helpers on the garbage trucks, and ultimately acquitted) stood on the sidewalk nearby.

The People theorized that, once the holes were drilled, something would be inserted through the openings and slipped around the safe so that it could be pulled through the wall and removed.

The defendants were aware that the Fifth Precinct station house of the New York City Police Department was around the corner. The defendants were not aware, however, that their activities were being continually monitored by members of that precinct's anticrime unit, who apprehended all defendants when drilling of the second hole was abruptly terminated (probably because the defendants were alerted by a police radio communication).

()At the conclusion of the People's opening statement, all defendants moved to dismiss the burglary count for ***854** legal insufficiency. The defendants argued that, since no defendant

physically entered the building at any time, there could be no completed burglary. The People responded that at least one drill bit broke through the wall into the air space of the premises and that the entry contemplated by the burglary statutes was accomplished at that point. In the view of this court, neither contention has merit ….

Section 140.20 of the Penal Law … reads as follows: "A person is guilty of burglary in the third degree when he knowingly enters* * * unlawfully in a building with intent to commit a crime therein." The essence of this statute is unlawful and knowing entry with intent to commit some crime in the premises. To find guilt, all elements of a crime must be proven beyond a reasonable doubt, but entry is the active element that surely must be adequately demonstrated.

At common law, an entry was a key component of the crime of burglary. A breaking was another element of the crime, but a relatively insignificant one … Until 1967, however, the statutory law of New York tracked both of these elements …. Thereafter, the requirement for a breaking was eliminated (Penal Law, §§ 140.20-140.30). …

Nevertheless, when the breaking element for the crime of burglary was removed from the revised Penal Law, the Legislature deleted not only the definition of the word "break", but also the detailed delineation of the word "enter". The defining of the phrase "enter or remain unlawfully", which was appended to the present Penal Law at that time …was neither a substitute for nor a definition of the entry element of burglary. Instead, it was merely a particularized exposition of the "*unlawful*" aspect of the crime. Accordingly, ***855** there presently remains no direct legislative guidance as to the meaning of the all-important word "enter".

Moreover, no specific legislative history or drafters' commentary reveals the reason for the obviously purposeful and simultaneous elimination of both the breaking and entering definitions, although the entry element is surely elevated in stature under the Penal Law revision.

Previously, the definitional language had carefully, but restrictively, explained that "[e]nter" includes "the entrance of the offender into such building or apartment, or the insertion therein of any part of his body or of any instrument or weapon held in his hand, and used, or intended to be used, to threaten or intimidate the inmates, or to detach or remove property" (former Penal Law, § 400). In the view of this court, the revisers became fully cognizant of the limiting nature of this language, particularly as it pertained to and seemingly confined the instrumentality rule to potential crimes of larceny (i.e., "any instrument* * * used, or intended to be used* * * *to detach or remove property*"; emphasis added).

Understandably, they were concerned that the retention of such a definition might serve to free, from warranted burglary charges, persons intending, by the use of some instrument, object or weapon, such crimes as murder, assault and arson. …

Accordingly, the revisers opted for a total elimination of any -- in their view -- restrictive definition of the element of entry. However, if their actual aim in this regard was to permit the courts to fashion the meaning of entry on a case-by-case basis, then they were plainly misguided. Such a lack of predictability in a criminal statute can present a marked impediment to the prosecution in both evidence gathering and presentation and to the defense in attempting to guard

against unknown or unanticipated proofs. The ***856** true balance of justice would be sadly lacking were the Legislature to relegate its duties to the courts.

Instead, it must be assumed that the drafters had no such unseemly motive and that what they really envisioned was an adoption by the courts of common- law, common-usage and common-sense definitions of both bodily and instrumental entry.

However, no persuasive support appears for a claim that the legislative deletion of the prior entry explanation signaled any such radical departures from previously accepted definitional standards as either the defendants or the People suggest.

… [A] careful perusal of the varied statutes and judicial pronouncements of sister States on the subject of breaking and/or entering reveals a hodgepodge of legal platitudes, of confusing technicalities, of erroneous common-law recollections and of strained statutory interpretations which merely buttress the adage that "hard cases make bad law." Nevertheless, there at least emerges a ***857** consensus of opinion concerning common standards, which is supported by leading writers and commentators in the criminal law field.

Initially, and obviously, full bodily entry within a building is sufficient to prove the entering element. Moreover, the penetration of air space in the premises by any portion of the body, whether by a hand, foot, finger, head or shoulder, is equally adequate ….

Accordingly, a hand reaching inside an open window to unlatch a lock; a foot kicking in a door panel; a finger groping for a ring through a hole; or a head peering inside an open door to see if the way is clear, are all examples of the act of entry. When any part of the body passes the threshold, an entry is accomplished, no matter how slight the invasion or the reason therefor. With a bodily intrusion, it makes no difference whether it was intended actually to effect a crime within the premises or whether it was intended merely to aid in gaining entrance, by a breaking or otherwise, so that a crime could be committed therein.

The instrumentality criterion of burglary, however, is different. When some instrument is used in connection with a criminal purpose in a building, it is absolutely essential -- for an entry to take place -- that the instrument or weapon employed is one actually being used, or intended to be used, to commit a crime within.

Therefore, the splintering of a door with a bullet intended to kill or to injure someone inside … the cracking of a storefront window with a fishing pole, which can then be used to hook onto [an] .. object therein; the shattering of a wall with a magnetized iron ball intended thereafter to attract and to steal metal objects in the premises; and the breaking of a pane of glass with a wooden torch, which can then be tossed inside to ignite combustible material, are all examples of the employment of an instrument or weapon to accomplish some crime in a building.

Moreover, even an object which only makes a hole can be an instrumentality of entry where it is punched into a granary wall or an oil tank to permit the contents to flow ***858** out (see, e.g., *Walker v State*, 63 Ala 49; *State v Crawford*, 8 ND 539; *Bass v State*, 126 Tex Cr Rep 170).

However, the use of a weapon or instrument solely to create or enlarge an opening or to facilitate an entrance into a building, cannot be designated an entering into the building or an entry within the commonly accepted legal definition. At most, such an instrumental utilization would constitute a breaking.

Accordingly, no entry is effected when a bullet or rock is used merely to smash a lock or break open a window; a plastic credit card is slipped into a crevice to disengage a door spring; an antitank rocket is propelled only to make an opening in a wall; a crowbar is manipulated to pry open a door; or a glass cutter and adhesive are employed to remove a window pane. In point of fact, these are illustrations of a breaking, and not of an entry.

Although the Legislature, in the enactment of the revised Penal Law, has failed thus far to make any official or explicit statement concerning the perimeters of an entry under the burglary statutes, a fair, predictable and workable definition, which accords with common custom, usual explanation and practical judgment, may be stated as follows:

Any penetration of air space in a building -- no matter how slight -- by a person; by any part of his body; or by any instrument or weapon being used, or intended to be used, in the commission of a crime, constitutes an entering.

Applying these guidelines and the proposed definition to the case at bar, it is manifest that, as a matter of law and logic, the People will never be able to prove the element of entry from the stated facts and all reasonably drawn inferences.

No defendant was observed at any time inside the jewelry store. No part of the body of any defendant was seen within the building. Nor could any such occurrence be inferred from any evidence to be adduced.

Moreover, the drills and drill bits, employed by the two persons acting in concert with the defendants on trial to make holes in the storefront and to penetrate the air space therein, were instruments to be used solely for the purpose of effecting a break in the premises. Since the position of the holes on each side of the 3,000-pound safe demonstrated a future intention to pass something through these openings to effect a removal of the safe, it is perfectly plain that the drills and bits alone could serve no such purpose.

The intrusion of these instruments, therefore, even into the interior air space of the building, is not the entry contemplated by the statutes. Since a prime element of the crime will be missing in the proof, the burglary count is not legally sustainable.

***860**

According, the motion of all defendants to dismiss for legal insufficiency the count of burglary in the third degree is, in all respects, granted.