

14-1410. Breaking and entering; essential elements.

For you to find the defendant guilty of breaking and entering [as charged in Count _____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered _____ (*identify lands, vehicle, or structure*) without permission; [the least intrusion constitutes an entry;]²

2. The entry was obtained by [fraud]³ [deception] [the breaking of _____⁴] [the dismantling of _____⁴]⁵;

3. The defendant knew the entry was without permission⁶;

~~[3.]~~ 4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use bracketed phrase if entry is in issue.

3. If the jury requests a definition of “fraud,” a dictionary definition of this term should be given.

4. Insert the property or device which was broken or dismantled in order to secure entry of the lands, vehicle, or structure. Example: “[by the breaking of a window].”

5. Use the applicable alternative.

6. See Committee commentary.

[Adopted, effective April 27, 1983; as amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

1 ~~[Committee commentary.—The territory of New Mexico passed New Mexico’s first~~
2 ~~“breaking and entering” statute in 1876 (Laws 1876, ch. 9, § 4) which was codified as § 1524 in~~
3 ~~the 1915 Code. This original statute dealt with unlawfully entering into an occupied home “by~~
4 ~~breaking or piercing the wall, or without breaking the same, climb upon any roof or in any other~~
5 ~~manner . . .” (1915 Code § 1524). This section remained exactly the same until its repeal in 1963~~
6 ~~(Laws 1963, ch. 303, § 30-1) except for a change in title from “Unlawfully entering house” to~~
7 ~~“Entering house without consent—Breaking with intent to enter.”~~

8 ~~Breaking and entering as a separate offense undoubtedly arose out of common law~~
9 ~~burglary. To constitute burglary at common law, the following elements had to have been proven:~~
10 ~~(1) breaking and; (2) entering of; (3) a dwelling house; (4) of another; (5) in the nighttime; (6) with~~
11 ~~intent to commit a felony therein. The requirements of breaking and entering have remained the~~
12 ~~same while dwelling house has been expanded to include “any vehicle, watercraft, aircraft,~~
13 ~~dwelling or other structure, movable or immovable” (30-16-3 NMSA 1978); the requirement that~~
14 ~~the act take place in the nighttime has been eliminated in most jurisdictions (New Mexico~~
15 ~~included), and; the intent to commit a felony has been changed in New Mexico to include “the~~
16 ~~intent to commit a felony or theft therein.” (30-16-3 NMSA 1978.)~~

17 ~~“Statutory burglary” is the term used to describe acts which are similar to, but do not~~
18 ~~include all the requirements of, common law burglary. Such legislative expansion of the common~~
19 ~~law crime of burglary was necessary because that social interest intended to be protected by~~
20 ~~common law burglary, i.e., privacy of one’s home and belongings, was not adequately protected~~
21 ~~by strict adherence to the common law burglary requirements.~~

22 ~~Common types of statutory burglary involve unlawful invasions which would be common~~
23 ~~law burglary except that they do not require one or more or any of the following: That the~~

1 ~~misconduct (1) occur during the nighttime, or (2) include a breaking, or (3) involve a dwelling or~~
2 ~~building within the curtilage, or (4) an intended crime which constitutes a felony or petty larceny.~~
3 ~~R. Perkins, Perkins on Criminal Law, 2nd Ed., Ch. 3, § 1H, pp. 215-16.~~

4 ~~New Mexico's breaking and entering statute is a type of statutory burglary. It requires no intent to~~
5 ~~commit a crime upon entering, only the breaking and entering need be shown. The doctrine of~~
6 ~~"breaking," however, appears to be more specific than when used in the context of burglary. In~~
7 ~~burglary, "the breaking need not involve force or violence. Thus, the opening of a door or window~~
8 ~~which was closed but not locked in any way was a sufficient breaking." LaFave & Scott, Criminal~~
9 ~~Law, Ch. 8, § 96, p. 708. The breaking and entering statute specifically requires "the breaking or~~
10 ~~dismantling of any part . . . or breaking or dismantling of any device used to secure the vehicle,~~
11 ~~watercraft, aircraft, dwelling or other structure." (30-14-8 NMSA 1978). To put it another way, if~~
12 ~~a person opens an unlocked door or window to enter a dwelling with the intent merely to go in and~~
13 ~~lie down, that person would be guilty of neither burglary nor breaking and entering. It would not~~
14 ~~be burglary since lying down does not constitute a felony or theft, and it would not be breaking~~
15 ~~and entering since the door was not locked and no breaking or dismantling occurred. In this~~
16 ~~instance, the individual would most likely be guilty of criminal trespass.~~

17 ~~As in burglary, though, the use of fraud or deception to gain entrance into the dwelling, aircraft,~~
18 ~~watercraft, vehicle, or other structure will be deemed constructive entry. The theory behind this is~~
19 ~~that there was actually no consent to enter given since the consent was based on fraud or deception.~~
20 ~~Also, the mere intrusion of a finger will constitute enough of an entry. LaFave & Scott, supra, p.~~
21 ~~710.~~

22 ~~It is unclear why the legislature failed to reenact a breaking and entering provision in the~~
23 ~~new Criminal Code adopted in 1963. Perhaps they surmised that if the crime committed did not~~

1 ~~meet all of the requirements of burglary (e.g., no intent to commit a felony or theft), then the~~
2 ~~criminal trespass statute (30-14-1 NMSA 1978) would be an adequate offense to charge. However,~~
3 ~~the 1980 case, *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980), pointed out the need for~~
4 ~~a law making it an offense to break and enter where there is no intent to commit a felony or theft,~~
5 ~~or where, because of some impairment, it was impossible for the defendant to form the requisite~~
6 ~~intent to commit a felony or theft.~~

7 ~~In *Ruiz*, the issue was whether the defense should have been allowed to introduce hospital~~
8 ~~records to support the defendant's contention that he had ingested PCP (phencyclidine, aka "angel~~
9 ~~dust") just prior to committing the alleged burglary. This introduction of evidence should have~~
10 ~~been allowed, said the court of appeals, because it was crucial to the defendant's "no intent"~~
11 ~~defense to the burglary charge. Intoxication may be shown to negate the specific intent required to~~
12 ~~prove burglary under 30-16-3 NMSA 1978. *State v. Gonzales*, 82 N.M. 388, 482 P.2d 252 (Ct.~~
13 ~~App. 1971). The question of actual intoxication, and further, whether such intoxication prevented~~
14 ~~the defendant from being able to form the specific intent required for burglary are for the jury to~~
15 ~~answer.~~

16 ~~In *Ruiz*, it was determined that an instruction on criminal trespass should have been given,~~
17 ~~since the court held that criminal trespass is a lesser included offense of burglary of a dwelling.~~
18 ~~See UJI 14-1401 through 14-1403 for criminal trespass instruction. (Criminal trespass is *not* a~~
19 ~~lesser included offense when the burglary is of a vehicle, watercraft or aircraft, since they are not~~
20 ~~real property within the meaning of Section 30-14-1 NMSA 1978). However, breaking and~~
21 ~~entering does encompass vehicles, watercraft and aircraft, so this instruction may be used as a~~
22 ~~lesser included offense of burglary, if intent is at issue. Furthermore, while criminal trespass is a~~

1 ~~misdemeanor offense, breaking and entering is a fourth degree felony with a more severe penalty~~
2 ~~than trespass.]~~

3 Committee commentary. — See NMSA 1978, § 30-14-8 (1981).

4 New Mexico’s breaking and entering statute is “grounded in common law burglary” and is
5 “a type of statutory burglary.” *State v. Holt*, 2016-NMSC-011, ¶ 15, 368 P.3d 409 (internal
6 quotation marks and citations omitted). It protects the “right to exclude” and “entry” constitutes
7 any penetration of the interior space, however slight. *Id.* ¶¶ 16-19 (holding putting one’s fingers
8 behind a window screen is an entry).

9 Although the statute uses the phrase “unauthorized entry,” this instruction’s use of “without
10 permission” is a longstanding, permissible variation. See *State v. Rubio*, 1999-NMCA-018, ¶¶ 4-
11 7, 126 N.M. 579, 973 P.2d 256.

12 Where entry is obtained by fraud, deceit, or pretense, the entry is unauthorized. See *State*
13 *v. Ortiz*, 1978-NMCA-074, ¶¶ 6, 13-15, 92 N.M. 166, 584 P.2d 1306 (upholding a burglary
14 conviction and the trial court’s instructing the jury that entry by fraud, deceit, or pretense
15 constitutes entry without authorization or permission). Where entry was made by fraud or deceit,
16 a similar instruction about lack of permission may be appropriate.

17 “[T]he mental state which accompanies the ‘without permission’ element of breaking and
18 entering is knowledge of the lack of permission.” *State v. Contreras*, 2007-NMCA-119, ¶ 17, 142
19 N.M. 518, 167 P.3d 966. The “knowledge” mens rea required is actual, subjective knowledge that
20 permission to enter has not been granted. See *State v. Ancira*, 2022-NMCA-053, ¶¶ 28-31, ____
21 P.3d ____ (concluding that failure of UJI 14-1410 NMRA to require the State to prove defendant’s
22 actual knowledge of lack of permission was an error but not fundamental error).

- 1 [As amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed
- 2 on or after December 31, 2022.]