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BURGLARY IN WYOMING

Theodore E. Lauer

I. INTRODUCTION

Burglary is an ancient, but not an honorable crime. Its origins lie in the ancient Anglo-Saxon crime of hamsocn or hamsoken, which was an attack upon, or a forcible entry into, a man's house. At the English common law, burglary was refined to encompass breaking and entering the dwelling of another in the night time, with intent to commit a felony therein. In recent centuries the definition of burglary has continued to change dramatically, so that modern burglary includes entry not only into homes, but into buildings and structures of nearly every kind, as well as vehicles.

Today burglary is a crime of greater interest outside academia than within. Following a period of relatively intense academic interest between 1950 and 1970, which coincided with the drafting of the Model Penal Code, little has been written about burglary in law reviews or other legal publications. Burglary statutes have undergone little change, and most courts have been confronted with few novel questions concerning the interpretation of those statutes.

In Wyoming, burglary has been recognized as a crime since the earliest territorial days, and continues in the final decade of the 20th century to be a crime of high incidence. Burglary is a matter of significant concern not only to law enforcement officers, prosecutors and defense counsel, and courts, but also to Wyoming's citizens who are the victims of burglary.

An examination of Wyoming Supreme Court decisions dealing with questions of burglary might give the impression that burglary is very much a growth industry in this state. Reported Wyoming decisions involving interpretation or application of burglary or closely related crimes of entry into buildings, by decade, reveal an increase which threatens to become exponential:

<table>
<thead>
<tr>
<th>Decade</th>
<th>Cases</th>
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</thead>
<tbody>
<tr>
<td>1870-1880</td>
<td>1</td>
</tr>
<tr>
<td>1881-1890</td>
<td>0</td>
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</table>

1. Professor of Law, University of Wyoming.
<table>
<thead>
<tr>
<th>Period</th>
<th>Number</th>
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<tbody>
<tr>
<td>1891-1900</td>
<td>1</td>
<td>1901-1910</td>
<td>1</td>
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<tr>
<td>1911-1920</td>
<td>0</td>
<td>1921-1930</td>
<td>2</td>
</tr>
<tr>
<td>1931-1940</td>
<td>0</td>
<td>1941-1950</td>
<td>0</td>
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<tr>
<td>1991-1996</td>
<td>29</td>
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</table>

These numbers point to the conclusion that burglary must be a crime of steadily increasing incidence in Wyoming. But before we speculate on why Wyoming was so singularly free of burglars during its first century of existence as a territory and state, a look beyond reported Wyoming Supreme Court decisions may be in order.

Elnora L. Frye’s 1990 *Atlas of Wyoming Outlaws at the Territorial Penitentiary*, covering the period from 1874 through 1903, gives information for each prisoner, including the prisoner’s crime. During the territorial period, which ended with statehood in 1890, twenty-eight prisoners were held because of burglary convictions. An additional thirty-nine Wyoming prisoners convicted of burglary were sent to the Illinois State Prison from 1882 until 1891. From 1890 until 1903, of nearly 700 prisoners sentenced to the Wyoming Penitentiary in Laramie, 139 were committed for the crime of burglary.

Thus burglary has always been a crime of relatively high frequency in Wyoming. The growth in appeals by convicted burglars is almost certainly a consequence of the creation of the public defender system, and of giving each convicted person the right to an appeal — an appeal at public expense if the defendant is indigent.

Wyoming’s burglary statute, while similar to the burglary statutes of many other states, is sufficiently different to guarantee that the jurisprudence of burglary in Wyoming is unique. Therefore, it is appropriate to study Wyoming burglary law as a separate body of law, even though it is necessarily related to the law of other states. Furthermore, the history of

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3. *Id.* at 275-301.
4. *Id.* at 119-240.
burglary law plays a significant role in the foundation of the present law, and in whatever development can be expected for the future. Accordingly, in studying Wyoming burglary law, it is appropriate to study the development and present condition of burglary law both within Wyoming and within the Anglo-American legal system.

This article briefly describes the historical background and present status of the crime of burglary, and then examines in greater detail the statutory history of burglary in Wyoming and the currently existing Wyoming law of burglary. Emphasis is placed upon problems of interpretation and procedure which may arise in burglary prosecutions.

II. BURGLARY AT COMMON LAW AND UNDER STATUTE

Burglary is a crime unique to the Anglo-American legal system, in that no comparable crime is found in modern European law. While other legal systems recognize forcible entry into dwellings as a crime, only the Anglo-American system defines as a separate and distinct crime the entry into the structure of another with intent to commit a felony or larceny therein. This result may be an accident of history, but it has set burglary apart as a crime unique in its peculiar jurisprudence.

The prevalent belief in the second half of the present century is that burglary originated as a kind of special inchoate offense, consisting of an attempt to commit a felony within a dwelling. As early law recognized no general crime of attempt, burglary was devised to cover acts of breaking and entering dwellings in an attempt to commit felony within. However, examination of the history of the law of burglary, as well as an understanding of societal sentiments, sheds serious doubt upon this theory of the development of burglary. The true basis of the law of burglary lies in the forcible invasion of a habitation. As Sir William Blackstone put it, burglary “has always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion of that right of habitation, which every individual might acquire even in a state of nature.” Blackstone surely had it right.

5. George P. Fletcher, Rethinking Criminal Law 125 (1978).
6. Thus the Comment to Model Penal Code § 221.1 declares: “The initial development of the offense of burglary, as well as much of the later expansion of the offense, probably resulted from an effort to compensate for defects of the traditional law of attempt.” MODEL PENAL CODE, § 221 cmt. 62-63 (1994). See also Peter W. Low & Calvin Jeffries, Jr., The Crime of Burglary under the Model Penal Code, 26 PRAC. LAW 33, 34-35 (1980); Fletcher, supra note 5, at 125. The notion has successfully crossed the Atlantic. R.A. Dugg, Criminal Attempts 131 (1996).
A. Burglary at Anglo-Saxon Law

At Anglo-Saxon law, attacks upon men’s dwellings were regarded as serious breaches of the king’s peace. Thus in the laws of Edmund, Vol. II, ch. 6, (ca. 942), it was ordained that a person who violated the King’s peace or attacked a man’s house “shall forfeit all that he possesses, and it shall be for the King to decide whether his life shall be preserved.9 The early law recognized that attacks upon houses constituted crimes of the most heinous kind, “for which no compensation can be paid.”9 Following the Norman Conquest, the provisions of Anglo-Saxon laws were generally continued by William I.10

A similar concept can be found in Scottish law, both early and modern. Hamesucken (hamsocn) was an attack upon a person in his home, which had been invaded with intent to make such an attack. In 1678, Sir George Mackenzie wrote in The Laws and Customes of Scotland, in Matters Criminal: “The invading a person in his own house, with us is called Hame-sucken, and is defined to be, when any person violently enters into another mans house without license, or contrary to the King’s peace, or seeks him, or assaults him there.”11 Mackenzie explained:

BY how much the person offended lives securely, by so much all invasions made upon that security are the more severely punishable; and therefore, seeing a man expects more security, and is least guarded against violence, whilst he lives peaceable at home, the Law punishes more severely injuries done him there then elsewhere; and it is very presumable, that no person would enter anothers house, with a designe to offend him, or would offend him there upon any accompt, except he who had very much malice and prejudice against him: For by injuries committed against a person in his own house, not only the publick peace, but even the Lawes of hospitality are offended.12

A century later, David Hume described “Hamesucken, or ‘the felonious seeking and invasion of a person in his dwelling-place or house,’” as a capital crime.13

9. See Laws of Canute II, in Robertson, supra note 8, at 207.
10. See generally (So-Called) Laws of William I, in Robertson, supra note 8, at 253.
11. SIR GEORGE MACKENZIE, THE LAWS AND CUSTOMES OF SCOTLAND, IN MATERS CRIMINAL 219 (1678).
12. Id. at 218.
13. 2 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING THE DESCRI-
B. Early Common Law Development

Bracton, written around 1270, refers to breaches of the king’s peace by “murderers, robbers and burglars, who commit their crimes by day and night, not only against those who journey from place to place, but even against those asleep in their beds.” Britton, written shortly after Bracton, referred to burglars: “[L]et inquiry also be made of burglars. Such we hold to be all those who feloniously in the time of peace break churches, or the houses of others, or the walls and gates of our cities or boroughs.”

In Andrew Horn’s The Mirror of Justices (ca. 1320), the crime of hamsoken is described as mortal sin, “committed not only by breaking a house but on those who are in their own houses with the intention of reposing therein in peace. The aforesaid assault must be made with intent to kill, rob or beat those within the house.” Horn added that where hamsoken was accompanied by theft, King Edward had ordered that the penalty was death only if twelve pence sterling or more was taken, relating this to mercy shown to poor persons “without power to buy or borrow” who stole food or clothing to preserve their lives.

Two centuries later, Sir Anthony Fitzherbert in The New Boke of Justices of the Peas (1538), declared in speaking of the duties of the justice of the peace:

10. Also they shall inquire of Burglaries. And Burglours are properly suche as feloniously in the tyme of peace breke any house, churche, walles, towers, or gates, for the which the offendour shal be hangyd, albeit that he carie naught away. But it behoveth that he have a felonious intent to robbe, kylle, or to do some other felony.

TION AND PUNISHMENT OF CRIMES 20 (1797). In the Criminal Procedure (Scotland) Act 1887, 50 & 51 Vict. ch. 35, § 56 (1887), hamesucken was removed from the list of capital offenses, and prosecution of hamesucken fell into disuse. At the present day, the fact that a house was broken into in order to commit a crime therein may result in an aggravation of the crime, so that theft by house-breaking becomes an aggravated theft, and assault upon an occupant of a house becomes an aggravated assault. GERALD H. GORDON, THE CRIMINAL LAW OF SCOTLAND 515-22, 818 (1978).


15. BRITTON 36 (Francis M. Nichols ed. 1901). By “time of peace” probably was meant the King’s Peace, under which wrongs were looked upon as offenses against the King. Originally the King’s Peace was personal and local, in that it was confined to the presence of the King. The King’s Peace ultimately expanded to include the entire kingdom, so that a crime committed at any time made the offender liable to pay a fine to the crown.


17. Id. at 141.

The law of burglary underwent further refinement during the 16th century, when the requirement was added that the crime be committed in the night time. In William Lambarde’s *Eirenarcha, or of the Office of the Justices of Peace*, “burghlarie” was described: “If any person have by night broken any house, tower, walles, or gates, and hath entred in with intent to do any robberie, murder, or other felonious act there.” In 1615, Ferdinando Pulton wrote that

Burglarie is, when one or more persons do in the time of peace breake a House, a Church, a Wall, a Tower, or Gatehouse in the night, with a felonious intent to robbe, kill a man, or commit some other Felonie, for the which Burglary the offender shall be hanged, though he take nothing away.

Pulton added that breaking without entry was not burglary, burglary could only be committed at night, and it did not matter whether persons were actually in the mansion house at the time of the breaking.

And so by the time of the Third Part of Sir Edward Coke’s *Institutes of the Laws of England* (1641), burglary had come to its common law fruition:

A BURGLAR (or the person that committeth burglary) is by the common law a felon, that in the night breaketh and entreteth in to a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.

C. Early English Legislation

Burglary did not remain in a pure common law form much beyond 1500. While text-writers continued to describe burglary in common law terms, with scant reference to statutes, at least until the time of William Hawkins in 1724, Parliament began in the reign of Henry VIII (1509-1547), to enact statutes affecting the law of burglary, as well as breaking and entering, and committing crimes within dwelling houses and other structures.

The early statutes largely took the form of denying benefit of clergy to burglars, housebreakers and robbers of the inhabitants of houses. In 1531, Parliament denied benefit of clergy to persons guilty of "robbing of any person or persons in their dwelling houses, or dwelling place, the owner or dweller in the same house, his wife, his children or servants then being within, and put in fear and dread by the same." The following year, Parliament provided that one who killed an "evil disposed person" attempting "burglarily to break mansion-houses" should not forfeit lands or chattels, but should be fully acquitted and discharged. The withdrawal of the benefit of clergy to persons who invaded houses, or tents or booths at a fair or market, when the inhabitants were present, continued across the 16th century. In 1576, in the reign of Elizabeth, the benefit of clergy was denied to any rapist or burglar; and in 1597 benefit of clergy was denied any person who stole goods valued at five shillings or more from dwellings or outhouses in the daytime, whether or not other persons were present therein.

The effect was not to expand the common law crime of burglary, but instead to recognize other forms of larceny from dwellings and other places, and to withdraw the benefit of clergy from such offenses. This legislative trend continued through the time of William and Mary, when benefit of clergy was withdrawn from persons who stole property valued at five shillings or more from "any shop, warehouse, coach-house or stable," by day or night, and without regard to whether there was a breaking of the structure or other persons were present.

The common law definition of burglary was, however, expanded in the reign of Queen Anne in 1713, by a statute which provided that a person who entered a mansion or dwelling house in the day or night without breaking, but with intent to commit a felony, and then broke out

23. Benefit of clergy originally permitted clergymen to escape punishment in the criminal courts, which turned them over to the church courts for disposition. Since punishment for a felony in the criminal courts was death while punishment in the church courts assumed milder forms such as doing penance, this definitely was a benefit for clergy. Since, with few exceptions, only clergy could read, the test of whether a person was entitled to benefit of clergy became the ability to read, usually a passage from the Bible. To prevent repeated use of the benefit of clergy, persons claiming clergy were branded, normally on the thumb but sometimes on the face.

24. 23 Hen. 8, ch. 1, § 3 (1531).
25. 24 Hen. 8, ch. 5 (1532).
26. See, e.g., 1 Edw. 6, ch. 12, § 10 (1547); 5 & 6 Edw. 6, ch. 9, §§ 2, 4 (1552).
27. 18 Eliz. ch. 7, § 1 (1576).
28. 39 Eliz. ch. 15, § 2 (1597).
29. 10 & 11 Will. 3, ch. 23, § 1 (1699). See also 3 & 4 W. & M. ch. 9, § 1 (1691), applying to persons taking goods from dwelling houses in which others were put in fear, or robbing dwelling houses in the daytime when other persons were present therein, or those who aided and abetted in such crimes.
in the night time, was guilty of burglary "in the same manner as if such person had broke and entred the said house in the night-time, with an intent to commit felony there." 30

The 18th century text-writers largely reiterated the common law definition of burglary as set down by Sir Edward Coke. In addition, both William Hawkins 31 and Matthew Hale 32 mentioned the statutes affecting larceny from dwelling houses and other places. Blackstone, writing in 1769, referred to Coke:

THE definition of a burglar, as given us by Sir Edward Coke, is, "he that by night breaketh and entreth into a mansion-house, with intent to commit a felony." In this definition there are four things to be considered; the time, the place, the manner, and the intent. 33

The time, of course, was in the night; the place was a dwelling house; the manner was breaking and entering; and the intent was to commit a felony therein. In considering the crime of larceny from the house, Blackstone cited the legislation, "the multiplicity of which acts are apt to create some confusion," and recognized four classes of "domestic aggravations" which depended upon the place of the taking and the amount taken. 34

At the beginning of the 19th century, Edward Hyde East, in A Treatise of the Pleas of the Crown, described burglary in great detail, citing common law decisions and the earlier text-writers, including Coke, Hale, Hawkins, and Blackstone. 35 East also included the statutes in his discussion of burglary — but only those such as 12 Ann. c. 7., which specifically related to burglary, 36 and 18 Eliz. c. 7., which denied benefit of clergy to burglars. 37 In his chapter on larceny and robbery, East covered the statutes on larceny from houses, booths or tents, and shops and warehouses. 38

30. 12 Anne 1, ch. 7, § 3 (1713).
31. William Hawkins, supra note 22, at 101-05. Hawkins outlines statutes which relate to larceny from dwelling houses and other structures. Id. at 91, 98. He also describes benefit of clergy at length. Id. at 337-66.
32. 1 Sir Matthew Hale Kut, A History of the Pleas of the Crown, at 547-66 (1736). Hale covers the varieties of larceny from dwelling houses and other places. Id. at 517-29.
33. 4 William Blackstone, Commentaries *224 (1769).
34. Id. at *240-41.
35. 2 Edward Hyde East, A Treatise of the Pleas of the Crown 481-523 (1806).
36. Id. at 489.
37. Id. at 523.
38. Id. at 623-46. A modern examination of these statutes is found in 1 Leon Radzinowicz, A History of English Criminal Law 41-49 (1948).
In the 18th and 19th centuries, Parliament continued to enact statutes affecting larceny from dwellings, shops, warehouses, and other structures. However, the contours of the law of burglary retained their common law shape. Even the reform acts of 1827, which repealed benefit of clergy for all offenses, kept the death penalty for burglary. Ten years later the punishment for burglary was lessened to transportation for life or not less than ten years, or to imprisonment for not more than three years — unless a breaking was with intent to murder and the intended victim was injured, for which the death penalty was retained.

D. Modern English Legislation

Burglary was finally codified by the Larceny Act 1916, which provided:

§ 25. Every person who in the night —
(1) breaks and enters the dwelling-house of another with intent to commit any felony therein; or
(2) breaks out of the dwelling-house of another, having —
(a) entered the said dwelling-house with intent to commit any felony therein; or
(b) committed any felony in the said dwelling-house;
shall be guilty of felony called burglary and on conviction thereof liable to penal servitude for life.

Larceny, no matter what the value of the property taken, was classified as a felony. Separate provisions covered housebreaking and larceny from dwellings and other structures. Thus the 1916 legislation did not effect any consolidation of the offenses relating to entry of dwelling houses and other structures.

39. See, e.g., 4 Geo. 3, ch. 37 (1764); 7 Will. 4 & 1 Vict. ch. 86 (1837); 24 & 25 Vict., ch. 96, § 57 (1861).
40. Some slight refinements occurred. Thus in 7 Will. 4 & 1 Vict., ch. 86, § 4 (1837), "night" was defined as commencing at 9 p.m. and ending at 6 a.m. on the succeeding day.
41. 7 & 8 Geo. 4, ch. 28, § 6 (1827) ( repealing benefit of clergy); 7 & 8 Geo. 4, ch. 29, § 11 (1827) (using the term "burglary" without definition, thereby incorporating the common law definition, and provided that "every Person convicted of Burglary shall suffer Death as a Felon; "). A statute which was retained declared that breaking out of a dwelling was burglary. 12 Anne stat. 1, ch. 7 (1713).
42. 7 Will. 4 & 1 Vict. ch. 86, §§ 2, 3 (1837).
43. 6 & 7 Geo. 5, ch. 50 (1916).
44. Id. § 2.
45. Id. §§ 13, 24, 26, 27, 28.
Consolidation was finally achieved in the Theft Act 1968. Section 9
provides that a person is guilty of burglary if "he enters any building or part
of a building as a trespasser and with intent to" steal or to inflict "on any
person therein any grievous bodily harm," to rape "any woman therein," or
to do "unlawful damage to the building or anything therein." Further, if a
person who has entered a building as a trespasser steals or attempts to steal
therein or inflicts or attempts to inflict grievous bodily harm on any person
therein, he is guilty of burglary. Burglary extends to inhabited vehicles or
vessels, and is punishable by imprisonment not to exceed fourteen years.
Aggravated burglary is committed when the offender "at the time has with
him any firearm or imitation firearm, any weapon of offense, or any explo-
sive." The maximum penalty is life imprisonment.

Thus the modern English law of burglary has abandoned the require-
ment that there be a breaking, and that the act occur in the night time.
Burglary can be committed not merely of dwelling houses, but buildings
of all sorts as well as vehicles and vessels which are inhabited. Further,
even if at the time of entry there is no intent to commit theft or to inflict
grievous bodily harm, burglary is committed if that intent is formulated
and acted upon after the unauthorized entry has been made. Possession of
a weapon results in burglary being elevated to aggravated burglary, with a
much more serious potential penalty. This development in the English law
of burglary has been paralleled by developments in the American law.

E. Burglary in America

The crime of burglary came to the American shore with the earliest
settlers. The Laws and Liberties of Massachusetts, published in 1648,
provided that:

if any person shall commit Burglarie by breaking up any dwelling
house, . . . such a person so offending shall for the first offence
be branded on the forehead with the letter (B) If he shall offend in
the same kinde the second time, he shall be branded as before and
also be severally whipped: and if he shall fall into the like offence
the third time he shall be put to death, as being incorrigible.

Burglary on the Lord's Day brought similar punishment, except that for
the first conviction the defendant would in addition lose one of his ears
and for the second punishment the other ear. 48

46. Theft Act of 1968, § 9 (Eng.).
47. Id. §10.
48. The Book of the General Laws and Libertyes Concerning the Inhabitants of
By the mid-19th century American legislation approximated common law burglary. The 1849 Virginia Code relied upon the common law definition:

§ 11. Any free person who shall be guilty of burglary, shall be confined in the penitentiary not less than five nor more than ten years. If a person break and enter the dwelling-house of another in the night time, with intent to commit larceny, he shall be deemed guilty of burglary, though the thing stolen or intended to be stolen be of less value than twenty dollars. 49

Other crimes provided variations on common law burglary:

§ 12. If a free person shall, in the night, enter without breaking or shall, in the day time, break and enter, a dwelling house or an out-house adjoining thereto and occupied therewith, or shall, in the night time, enter without breaking, or break and enter either in the day time or night time, any office, shop, storehouse, warehouse, banking-house, or other house, not adjoining to or occupied with a dwelling-house, or any ship or vessel within the jurisdiction of any county, with intent to commit murder, rape or robbery, he shall be confined in the penitentiary not less than three nor more than ten years. 50

Other American States expanded upon the common law in different ways. In Vermont, for example, there was no special punishment for entry without breaking, so that the classic requirement of breaking and entering in the night time remained, but the class of structures subject to burglary was expanded to include "any dwelling house, church, court house, town house, college, academy, school house, or any bank, ware house, office, shop, store, manufactory, mill, or any vessel or steamboat." 51

State laws on burglary and related crimes proliferated throughout the 19th century. Significant variations developed, some broader and others narrower than the common law definition. Some states retained the common law elements of dwelling house and in the night time; others broadened burglary to include structures of nearly all kinds, and embraced

49. VIRGINIA CODE of 1849, tit. 54, ch. 192, § 11.
50. ld., § 12.
51. VERMONT COMP. LAWS 1851, tit. 28, ch. 104, § 5.
entries made in both day and night. While many states required breaking as an element, a number required only an entry.  

F. The Model Penal Code and Modern Statutes

In 1962, the American Law Institute promulgated the Model Penal Code as a model for state criminal legislation. The Model Penal Code represented the current thought of the academics, judges and lawyers who drafted the Code, and has affected the content of state legislation enacted in the succeeding years. By 1984, criminal legislation in at least thirty-four states was influenced to some degree by Model Penal Code provisions.

Article 221 of the Code, which deals with burglary and other criminal intrusion, attempts to create a unitary offense of burglary, to avoid the multiplicity of burglary and breaking and entering statutes which constituted the prevailing pattern in the United States. Article 221 consists of definitions of the terms “occupied structure” and “night,” and sections on the crimes of burglary and criminal trespass. Section 221.1(1) provides:

A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

Under the Model Penal Code, burglary is a third degree felony, unless it is committed in the dwelling of another at night, or if in the course of committing the offense the actor purposely, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone, or is armed with explosives or a deadly weapon, in which case it is a second degree felony. Third degree felonies normally bear sentences of one to five years, with second degree sentences of one to ten years.

Burglary extends to buildings and occupied structures. Occupied structures are defined as “any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business

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52. For an analysis of the state statutes as they existed at mid-20th century, see Note, A Rationale of the Law of Burglary, 51 COLUM. L. REV. 1009 (1951).
55. Id. §§ 6.06(3), (2).
therein, whether or not a person is actually present." Buildings are not defined, but the Comment declares that "buildings are generally employed by human beings in ways that amount to occupancy." Structures and vehicles which do not meet these tests cannot be the subject of burglary. While entry of a dwelling in the night time no longer delimits the crime of burglary, such facts do make the crime more serious.

The requisite intent was broadened from felony, or felony or larceny, to "a crime." Under the Model Penal Code, a crime is an offense for which imprisonment can be imposed. The drafters concluded that no distinction should be drawn between felonies and misdemeanors, particularly because the Code had reduced to misdemeanors a number of crimes which formerly were felonies.

The Model Penal Code retains the traditional distinction between entries made with the intent to commit a crime, and those where the intent involves some other purpose or is unknown. Section 221.2 creates the crime of criminal trespass, which embraces unprivileged entry into a building or occupied structure, or a separately secured or occupied portion thereof, as well as trespass to lands, apart from structures. Trespass to lands is made criminal only if a person enters or remains in "any place" knowing he has no license or privilege to do so, and after receiving notice not to trespass.

As stated above, the Model Penal Code has influenced the criminal codes of many states. Wyoming's statutes on burglary and criminal entry owe a significant part of their substance and terminology to the Model Penal Code.

III. THE HISTORY OF WYOMING'S BURGLARY STATUTES

A. Wyoming Territorial Laws of 1869

Wyoming's earliest burglary statutes were enacted by the First Territorial Legislature in 1869. The Legislature adopted one statute on burglary, and a second statute embracing possession of burglar's tools and presence in a building with intent to steal.
The burglary statute is found in Chapter 3, Section 38 of the 1869 Territorial Laws. It dealt both with forcibly breaking and entering into a house or building, and with entry into a room or apartment from another within a house or building, with or without force. The 1869 burglary statute required the common law elements of breaking and entering (or entering without breaking, if the door or window were open), in the night time, with the intent to commit "murder, robbery, rape, mayhem, larceny, or other felony." It is unclear whether the appended words "or other felony" were intended to limit larceny to felony larceny only. Felony larceny, denoted "grand larceny" in the statute, required taking of property with a value of $25 or more, unless taken from the person of another or from the sleeping apartment of another in the night time.\(^\text{60}\) If the statute were so limited, not every entry with intent to steal constituted burglary.

A veritable laundry list of structures was included in the burglary statute: "any dwelling house, kitchen, office, shop, store house, ware house, malt house, stilling house, banking house, hotel, saloon, mill, pottery, factory, water craft, church or meeting house." The penalty for burglary was a term of one to ten years in the penitentiary.

Wyoming's original burglary statute differs little from statutes found in other American states in the last century.\(^\text{61}\) It represents an expansion of common law burglary typical of the time, and demonstrates the legislative tendency of that era to name at length the members of a class of things, rather than to use a generic description of the class itself.\(^\text{62}\)

The second 1869 statute, Chapter 3, Section 126, covered two acts: that of possessing burglar's tools, and that of being present in a building with intent to steal. The burglar tool portion of the statute made criminal the possession of "any pick lock, crow key, bit or other instrument or tool, with intent feloniously to break and enter into any dwelling house, store, warehouse, shop or other building containing valuable property." It is noteworthy that the intended acts differ substantially from those found in the burglary statute itself: there is no requirement that the breaking and entering be forcible or at night; and the list of structures is sharply restricted.

\(^{60}\) See id. § 43.

\(^{61}\) The author is not aware of the source of Wyoming's first burglary statute. Plainly the first Territorial Legislature did not create the criminal law anew, but borrowed from the statutes of one or more other states or territories. This is a project for future undertaking.

\(^{62}\) One problem with this legislative technique is that the statutory list can seldom be exhaustive, and cases will invariably arise involving things not specifically named, requiring judicial interpretation and a choice between application of the maxims ejusdem generis and expressio unius.
The second part of Section 126 provided for the punishment of any person found in "any dwelling house, store, warehouse, shop or other building containing valuable property . . . with intent to steal any goods and chattels." It was not necessary that the person entered by breaking, or that the entry have been without authority. Presence within a building containing goods, combined with the intent to steal, constituted the crime. A parallel can be seen with the earlier English statutes punishing theft within a dwelling.

The penalty for violation of section 126 was that "every person so offending shall, on conviction, be deemed a vagrant, and punished by confinement in the penitentary for a term not exceeding two years." The two-year term of punishment poses few difficulties; but what was it to "be deemed a vagrant"? The immediately preceding section\(^63\) provided that any able-bodied person lacking wherewithal, found wandering about, frequenting saloons or begging, might be determined to be a vagrant, and hired out to the highest bidder for a period not to exceed four months, unless a bond was posted to guarantee that for the next year the person would "betake himself to some honest employment for support." No hint is given whether a possessor of burglar tools, or person found inside a building with intent to steal, having been "deemed a vagrant," was to be hired out.

**B. Wyoming Compiled Territorial Laws of 1876**

The Compiled Laws of 1876 contain a slightly modified burglary statute, in that: (1) no longer is burglary limited to acts in the night time, and (2) the list of structures subject to burglary has been increased by adding after "church or meeting house" the phrase "railroad car, or any other close enclosure."\(^64\) The statute punishing possession of burglary tools with intent to break and enter, and also punishing presence in a structure with intent to steal, remained unchanged in 1876.\(^65\)

**C. Wyoming Territorial Laws of 1890**

The last session of the Wyoming Territorial Legislature, held early in 1890, amended the burglary statute by simplifying the language to provide that "[w]hoever, at any time, breaks and enters into" any listed structure "with intent to commit a felony, or with intent to steal property of any val-

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65. See id. § 126.
ue," would be punished by imprisonment of not more than fourteen years. The list of structures was modified: "dwelling house, kitchen, smoke-house, out-house, shop, office, store-house, warehouse, mill, distillery, brewery, pottery, factory, barn, stable, school-house, church, meeting-house, or building used for the purpose of religious worship, car factory, tool house, freight house, station house, depot, railroad car, court house or other public building, or other building whatsoever."66

A new section was added in 1890, entitled "Entering house to commit felony," and which provided that any person who entered any of the listed structures and attempted "to commit a felony or to steal property of any value" would be imprisoned not more than fourteen years. The list of structures was identical to that of the burglary statute.67 This statute departed substantially from the original conception of burglary to include any acts of felony or larceny attempted within a structure, no matter how the entry may have been effected. Literally applied, it would punish an invitee or social guest who attempted to steal or commit any felony within a structure. It was not necessary that the intent to commit the crime existed at the time of the entry. At the same time, the restriction to attempts leaves uncertain whether the statute would apply if the attempt were successful. Thus, if a person entered without intent and thereafter attempted but failed to steal goods of minor value — misdemeanor in amount — the punishment imposed could be Draconian, up to fourteen years in prison. But if the person entered without intent and succeeded in stealing the same goods, would the statute apply or would punishment be limited to that for the misdemeanor theft? In State v. Kusel,68 decided in 1923, the information originally charged violation of this section by entry of a bank for the purpose of committing robbery. As no attempt was charged, the Wyoming Supreme Court agreed that the information failed to charge a crime. The court held, however, through Justice Blume, that the district court had sufficient jurisdiction in the case to permit the State to amend the information to charge entry wherein the accused "armed with a deadly weapon, made a violent assault on Robert Lollier, Cashier of said bank and in possession of money, with intent, and by violence and by putting said Robert Lollier in fear, to take said money from him."69 The sufficiency of the information as amended was not challenged.

The 1890 Territorial Legislature left unchanged the statute relating to burglary tools and to presence in a structure with intent to steal. When

67. See id. § 38.
68. 213 P. 367 (1923).
69. Id. at 294.
Wyoming achieved statehood later in 1890, these Territorial statutes became the law of the state of Wyoming, under Article 21, Section 3 of the new Constitution.  

D. Wyoming Laws of 1897

In 1897 the Wyoming Legislature added a new burglary-type statute which punished persons who unlawfully broke and entered "any locked or sealed dwelling house, kitchen, smoke house, out-house, shop, office, storehouse, warehouse, church, meeting-house, or building used for the purpose of religious worship, car factory, tool house, freight house, station house, depot, railroad car, court house or other public building, or other building whatsoever." The breaking and entering of such a structure was sufficient; there was no further requirement of any particular intent at the time of entry, or of any unlawful activity once inside. The crime was a felony punishable by not more than ten years in the penitentiary. The list of structures in the 1897 statute appeared to be derived from the 1890 legislation, except that "mill, distillery, brewery, pottery, factory, barn, stable, school-house," were omitted, perhaps unintentionally, although arguably these would have been included in "or other building whatsoever."

E. Wyoming Revised Statutes of 1899

By the time of the publication of the 1899 Wyoming Revised Statutes, there were four criminal statutes in force relating to entry of structures:

(1) § 4977. Burglary. This section punished breaking and entering with intent to commit a felony or to commit larceny.

(2) § 4978. Entering House to Commit Felony. This section punished entering and attempting to commit a felony or to commit larceny.

(3) § 4979. Breaking into Locked or Sealed Building. This section punished breaking and entering a locked or sealed structure.

70. The Wyoming Constitution of 1890, Article 21, Section 3, provided:  
Sec. 3. Territorial laws become state laws. — All laws now in force in the Territory of Wyoming, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature.

Id.

71. Act of Feb. 8, 1897, ch. 6, § 1, 1897 Wyo. Sess. Laws.

72. This section originated in Wyo. Laws 1890, ch. 73, sec. 37.

73. This section originated in Wyo. Laws 1890, ch. 73, sec. 38.

74. This section originated in Wyo. Laws 1897, ch. 6, sec. 1.
(4) § 4980. Possession of Burglar's Tools. In addition to its coverage of burglar tools, this section punished being found, with intent to steal, in a structure containing valuable property. 75

All four statutes created felonies. Sections 4977 and 4978 were punishable by not more than fourteen years' imprisonment, while section 4979 had a maximum of ten years imprisonment, and section 4980 had a maximum of two years. Each of the four statutes had its own special use, since it applied to some factual situations different from those covered by the other three.

F. Wyoming Laws of 1905

In 1905, the Wyoming Legislature enacted a special statute to protect military property, which provided that breaking or entering in the day or night into "any building where military property of the state or of the United States is kept shall be deemed guilty of burglary and punished accordingly." 76 It should be noted that while this statute deemed violators guilty of burglary, presumably with a maximum punishment of fourteen years, it omitted one crucial element of burglary: the intent to commit a felony or to commit larceny. Furthermore, while burglary required breaking and entering, under this statute breaking or entering was sufficient. This statute was, however, short-lived, inasmuch as it was repealed in 1913. 77

G. Wyoming Laws of 1909

In 1909, the Wyoming Legislature enacted an additional burglary statute punishing breaking and entering of any building, whether inhabited or not, in the day or night, with intent to commit a felony, and using explosives to open or attempt to open "any vault, safe, or other secure place." 78 Violation brought punishment of imprisonment in the penitentiary for not more than twenty years.

In addition, the 1909 legislature amended the burglary statute, Wyoming Revised Statutes of 1899, section 4977, to add "sheep wagon, tent" to the list of structures which might be the subject of burglary. 79

75. This section originated in Wyo. Terr. Laws of 1869, ch. 3, sec. 126, and included provisions relating to burglar's tools. As printed in the enumeration of burglar's tools in the 1899 Wyoming Revised Statutes, however, what was a "crow key" in 1869 had become a "cow key" by 1899.
79. Act of Feb. 4, 1909 Ch. 4, § 1, 1909 Wyo. Sess. Laws. This amendment also changed "other building whatsoever" to "other buildings whatsoever."
H. Wyoming Laws of 1939

The Wyoming burglary laws remained unchanged for thirty years, until in 1939 the Wyoming Legislature amended the burglary statute to add "or attempts to break and enter" to "breaks and enters," and further to add "automobile or other motor vehicle" to the list of structures which might be burglarized.\(^{80}\) The maximum punishment remained unchanged at fourteen years.

I. Wyoming Laws of 1957

No further legislative changes occurred for eighteen years. In 1957, the Wyoming Legislature undertook a substantial revision of the statutes relating to burglary, burglary by explosives, and entering to commit a felony.\(^ {81}\) These statutes were combined into one new statute, which was codified as section 6-129, Wyoming Statutes of 1957. The new statute, which may have been derived from or influenced by the Wisconsin burglary statute,\(^ {82}\) represented a significant departure from earlier Wyoming burglary statutes:

§ 6-129. BURGLARY GENERALLY.

(A) Whoever, intentionally enters, or attempts to enter, any of the following places without the consent of the person in lawful possession and with intent to commit a felony therein may be imprisoned not more than fourteen (14) years:

1. Any building or dwelling; or
2. An enclosed railroad car; or
3. An enclosed portion of any automobile, vehicle, or aircraft; or
4. A locked enclosed cargo portion of a truck or trailer; or
5. A room within any of the above.

(B) Whoever violates subsection (A) under any of the following circumstances may be imprisoned not less than five (5) years nor more that fifty (50) years:

1. While armed with a dangerous weapon; or

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(2) While unarmed, but arms himself with a dangerous weapon while still in the burglarized enclosure; or
(3) While in the burglarized enclosure opens, or attempts to open, any depository by use of an explosive; or
(4) While in the burglarized enclosure commits a battery upon a person lawfully therein.

(C) For the purpose of this section, entry into a place during the time when it is open to the general public is with consent.

In 1957 the legislature also amended the section on breaking and entering a locked or sealed building, by adding "or attempts to unlawfully break and enter" and by deleting "kitchen, smoke house, out-house, shop" from the list of included structures. The punishment remained at a maximum of fourteen years in the penitentiary.

A further 1957 amendment was made to the burglar tool statute, which added to the list of tools "bolt cutters . . . , drill . . . , wrecking bar, screw drivers, sledge hammer, lifting device capable of pulling a safe combination dial, detonators and wire, punches, cold chisels, rail cutter, lock lifter, or nitroglycerine." The provision relating to being found in any of the named structures with intent to steal was retained. The maximum punishment for violation of the burglar tool statute was increased from two years to ten years in the penitentiary.

J. Wyoming Laws of 1973

In 1973, the Wyoming Legislature amended section 6-130, the statute punishing breaking into a locked or sealed building, by sharply reducing the punishment from a felony punishable by not more than fourteen years in the penitentiary, to a misdemeanor punishable by a maximum of six months in the county jail and a fine of $500.

83. Actually, the legislature displayed excessive zeal, adding the term twice, so that the statute read: "unlawfully breaks and enters, or attempts to unlawfully break and enter, or attempts to unlawfully break and enter," etc. Act of Feb. 20, 1957, ch. 185, § 3, 1957 Wyo. Sess. Laws (amending sec. 9-311, 1945 WYO. COMP. STAT.).

84. See id. § 4 (amending § 9-312 of 1945 WYO. COMP. STAT.).

85. While the Wyoming Legislature, which was evidently influenced by the Wisconsin burglary statute in the adoption of the new § 6-129, did not abandon Wyoming's traditional burglary tool formulation in favor of the Wisconsin model, its increase in the maximum punishment from two years to ten years did conform to the Wisconsin statute. WIS. STAT. ANN. § 943.12 (1958).

86. Act of Feb. 24, 1973, ch. 143, § 1, 1973 Wyo. Sess. Law (amending § 6-130 of Wyo. REV. STAT.). The amendment also added "cave or cavern" to the list of locked or sealed places for which punishment might be imposed if broken and entered. The superfluous "attempts to unlawfully break and enter" added in the 1957 laws was deleted.
The following year, in *State v. Stern*, the Wyoming Supreme Court struck down this statute on the ground that it was unconstitutionally vague because it did not distinguish between essentially innocent conduct and criminally culpable conduct. The State argued that the term "unlawfully" in the phrase "unlawfully breaks and enters" supplied the necessary scienter or evil mind, but the Supreme Court in an opinion by Justice McClintock, rejected this argument, ruling that the uncertainty of application of the statute meant "that men of common intelligence must necessarily grope as to the meaning and would have no understanding at all as to what acts were criminal." Justice McClintock was joined by Justices Guthrie and McEwan, while Chief Justice Parker and Justice McIntyre dissented without opinion. Perhaps there is a certain irony in the fact that for over seventy-five years this statute was in force as a felony in Wyoming, during which time only three appeals were taken from convictions under the statute and none raised any question of the statute's validity, yet the very next year after the statute was diminished to misdemeanor, it was struck down by the Supreme Court.

*K. Wyoming Criminal Code of 1982*

There were no further changes in the Wyoming statutes relating to burglary, unlawful entry or possession of burglar tools until the adoption of the Wyoming Criminal Code of 1982. Wyoming's new Criminal Code represented in some instances a thorough re-working of previous criminal statutes, often influenced strongly by the Model Penal Code and other contemporary criminal law reform proposals, while in others the Criminal Code merely reenacted the language of the old criminal statutes.

In the original Wyoming Criminal Code of 1982, as adopted by the 1982 Wyoming Legislature, the burglary statute provided:

§ 6-3-301. Burglary
(a) A person is guilty of burglary if, without authority, he enters or surreptitiously remains in a building, occupied structure or motorized vehicle, or separately secured or occupied portion thereof, with intent to commit larceny or a felony therein.

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88. Id. at 352.
89. Spiker v. State, 427 P.2d 858 (Wyo. 1967); Whiteley v. State, 418 P.2d 164 (Wyo. 1966); Fullmer v. Meacham, 387 P.2d 1007 (Wyo. 1964). The statute was also mentioned by Justice Blume in *State v. Kasel*, 213 P. 367 (1923), a case involving a prosecution under the cognate statute punishing entry of a building and attempting to commit a felony within.
(b) Burglary is a felony punishable by imprisonment for not more than fourteen (14) years, a fine of not more than fourteen thousand dollars ($14,000.00), or both, except as provided in this subsection. Burglary is a felony punishable by imprisonment for not less than five (5) years nor more than fifty (50) years, a fine of not more than fifty thousand dollars ($50,000.00), or both if, in the course of committing the offense, the actor:

(i) Is or becomes armed with or uses a deadly weapon;

(ii) Knowingly or recklessly inflicts bodily injury on anyone; or

(iii) Attempts to inflict bodily injury on anyone.

(c) A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the entry or for an attempt to commit that offense, unless the additional offense is a violent felony.90

Before the 1982 Criminal Code became effective on July 1, 1983, a further amendment of the burglary statute was effected by the 1973 Wyoming Legislature:

§ 6-3-301. Burglary.

(a) A person is guilty of burglary if, without authority, he enters or remains in a building, occupied structure or vehicle, or separately secured or occupied portion thereof, with intent to commit larceny or a felony therein.

(b) Except as provided in subsection (c) of this section, burglary is a felony punishable by imprisonment for not more than ten (10) years, a fine of not more than fourteen thousand dollars ($14,000.00), or both.

(c) Aggravated burglary is a felony punishable by imprisonment for not less than five (5) years nor more than twenty-five (25) years, a fine of not more than fifty thousand dollars ($50,000.00), or both, if, in the course of committing the crime of burglary, the person:

(i) Is or becomes armed with or uses a deadly weapon or a simulated deadly weapon;

(ii) Knowingly or recklessly inflicts bodily injury on anyone; or
(iii) Attempts to inflict bodily injury on anyone.

(d) As used in this section "in the course of committing the crime" includes the time during which an attempt to commit the crime or in which flight after the attempt or commission occurred.\(^9\)

In 1985, the burglary statute was amended to its present form:

§ 6-3-301. Burglary; aggravated burglary; penalties.

(a) A person is guilty of burglary if, without authority, he enters or remains in a building, occupied structure or vehicle, or separately secured or occupied portion thereof, with intent to commit larceny or a felony therein.

(b) Except as provided in subsection (c) of this section, burglary is a felony punishable by imprisonment for not more than ten (10) years, a fine of not more than ten thousand dollars ($10,000.00), or both.

(c) Aggravated burglary is a felony punishable by imprisonment for not less than five (5) years nor more than twenty-five (25) years, a fine of not more than fifty thousand dollars ($50,000.00), or both, if, in the course of committing the crime of burglary, the person:
   (i) Is or becomes armed with or uses a deadly weapon or a simulated deadly weapon;
   (ii) Knowingly or recklessly inflicts bodily injury on anyone; or
   (iii) Attempts to inflict bodily injury on anyone.

(d) As used in this section "in the course of committing the crime" includes the time during which an attempt to commit the crime or in which flight after the attempt or commission occurred.\(^9\)

The Wyoming Criminal Code of 1982 also enacted a new statute on criminal entry, making it a misdemeanor punishable by a maximum of six

months imprisonment and fine of $750 if a person “without authority . . . knowingly enters a building, occupied structure, motorized vehicle or cargo portion of a truck or trailer, or a separately secured or occupied portion of any of the above.”93 Four affirmative defenses were set forth: (i) mistake of fact or preservation of life or property in an emergency; (ii) the enclosure was abandoned; (iii) the enclosure was open to the public, and the actor complied with conditions for entry; and (iv) reasonable belief that the owner would have authorized entry.94 In 1983 the legislature changed “motorized vehicle” simply to “vehicle,” and made other minor editorial changes in this statute.95

The 1982 Criminal Code also contained a section on possession of burglar’s tools, making it a felony punishable by imprisonment for not more than three years or a fine not to exceed $3,000, if a person “possesses an explosive, tool, instrument or other article adapted, designed or commonly used for committing or facilitating the commission of an offense involving forcible entry into buildings or occupied structures with intent to use the article possessed in the commission of such an offense.”96 The provision found in earlier burglar tools statutes relating to presence in a structure with intent to steal therein was deleted. The 1983 legislature changed “offense” to “crime” in this statute, but made no other changes.

The 1982 Criminal Code also enacted a new section on burglary of coin machines, imposing high misdemeanor punishment of a maximum of one year in jail or fine of $1,000 if a person “breaks, opens or enters a coin machine with intent to commit larceny.”97 A coin machine was defined as a mechanical or electronic device or receptacle designed to receive a coin, bill or token, and in exchange to provide some property or service.98

IV. BURGLARY UNDER THE 1982 WYOMING CRIMINAL CODE

A. The Elements of Burglary

The elements of the crime of burglary in its present form are set forth in Wyoming Statute section 6-3-301(a):

94. Id.
97. Id.
98. Id.
A person is guilty of burglary if, without authority, he enters or remains in a building, occupied structure or vehicle, or separately secured or occupied portion thereof, with intent to commit larceny or a felony therein.

Thus the elements of burglary are that a person:

1. without authority
2. (a) enters or (b) remains in
3. (a) a building, or (b) occupied structure, or (c) vehicle, or (d) a separately secured or occupied portion of a building, occupied structure, or vehicle
4. with intent to commit (a) larceny or (b) a felony therein.

The greater part of these elements has been present in Wyoming burglary statutes since 1869. The Wyoming Supreme Court has been called upon to define and apply burglary elements in a number of cases, beginning with Territory v. Conley in 1880. To the extent that the language of the early statutes has been carried into today's burglary statute, decisions under prior law remain relevant today. In addition, the Wyoming Supreme Court has decided a number of cases under the present statute. While many questions of interpretation under the burglary statute have been resolved, a number remain undecided.

1. Without Authority

The first element is that the defendant must act without authority in entering or remaining in a building, occupied structure or vehicle, or separately secured or occupied portion thereof. The requirement that the defendant acted without authority is the modern counterpart to the common law element of "breaking." As "without authority" is an element of the crime, the burden is on the State to prove its existence beyond a reasonable doubt.

99. 2 Wyo. 331 (1880).
100. See, e.g., 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 8.13, at 466 (1986).
a. *What Is Authority?*

Authority to enter and remain in a building, occupied structure or vehicle may arise from the right of possession of that property, may be granted by the person who has that right to possession, may be created by judicial order, or may exist by operation of law. Thus an owner or tenant in possession of property may enter the property and remain therein, and may create in others the privilege to do the same, whether expressly or by implication, and may terminate that privilege. A court may, as by issuing a search warrant or an order of ejectment, permit persons to enter and remain in the property. A landlord may be authorized by law or by agreement to enter the property to inspect and make repairs. A fireman may be authorized to enter to extinguish a fire. The existence of any of these facts creates the authority to enter and remain. If none of these facts exists, a person who enters or remains will be said to do so without authority.

To the extent that "without authority" is the modern counterpart of the earlier element of "breaking," it is at once apparent that the common law element of breaking normally involved some degree of brute force, and instances of breaking were fairly graphic.101 The concept of authority, on the other hand, is by nature more abstract and full of subtleties, frequently depending not on physical facts but upon words or circumstances.

b. *Who May Give or Deny Authority?*

To prove that the defendant entered or remained without authority, the State must present evidence that the person lawfully empowered to grant such authority did not do so, or if the authority was given, that it was withdrawn. Usually the identity of this person can easily be known, and testimony can be presented that the person did not give the defendant authority to enter or remain. However, where multiple persons may lawfully grant such authority, must the State prove that none of these persons granted the authority? For example, when there are several family members living in a residence, must each of those persons affirm that no authority was given to the defendant? Or where the premises are not generally open to the public, as a factory, must the State prove that no person who might have authorized the defendant to enter the premises gave such authority?

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101. It is true that with the passage of time and the growing sophistication of criminals, the law came to recognize constructive breaking where fraud or deceit induced the occupant to act voluntarily to admit the intending burglar. Recognition of constructive breaking put the law on the path to the current formulation of "without authority."
The question of multiple persons in authority arose in *Beane v. State*,\(^{102}\) decided by the Wyoming Supreme Court in 1979. The warehouse manager of Wy-Mont Beverage Company testified he had not given Beane authority to enter. The court concluded that the manager was the person in lawful possession of the premises, and that his testimony was sufficient. In most burglary prosecutions, one witness — an adult family member, a manager, an agent — testifies that no authority to enter or remain was given to the defendant, and that has sufficed.\(^{103}\) While perhaps not entirely consistent with strict principles of proof, this is a practical solution. If the only evidence comes from the owner or manager, that evidence if believed by the jury should be sufficient to convict. If after the owner or manager testifies that no authority was given, the defendant offers evidence that authority was derived from some other source, then it should be incumbent upon the State to refute that evidence. But the State should not be required to prove a universal negative.

**c. Circumstantial Evidence of Lack of Authority**

It would seem that in certain cases circumstantial evidence of absence of authority to enter or remain would be sufficient. Thus, where the front door of a house is found smashed in, and the occupant is found within, robbed and beaten to death, a strong inference of lack of authority to enter may be drawn. Or where the window of a liquor store is broken and merchandise is missing, the same inference can be drawn.\(^{104}\) On the other hand, where the evidence of a forcible entry is absent, it may not be possible to draw the inference.

In *Longstreth v. State*,\(^{105}\) decided in 1992, the defendant had set fire to a vacant dwelling, by entering through an unlocked door before dawn and pouring an accelerant into holes in the wall. Longstreth was charged with burglary.\(^{106}\) The dwelling had been the subject of institutional loans

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103. In *Downs v. State*, 581 P.2d 610, 613 (Wyo. 1978), a prosecution for a night time burglary of a grain elevator, there was testimony that no one had been given permission to enter the elevator at night. In *Leppek v. State*, 636 P.2d 1117, 1120 (Wyo. 1981), both the store owner and an employee testified that persons other than employees were not allowed to go into the basement, where Leppek was found.
104. These are the facts of *Hawkes v. State*, 626 P.2d 1041, 1042 (Wyo. 1981), where the question of authority to enter was not raised.
106. *Id.* at 561. The State chose to prosecute Longstreth for burglary rather than arson because it feared that the jury would not find the vacant house to be an "occupied structure" as required by the first degree arson statute. See WYO. STAT. ANN. § 6-3-101(a) (Michie 1990). Nor was second degree arson a possibility, since there was no evidence to show that Longstreth had set fire to the house to collect insurance. See WYO. STAT. ANN. § 6-3-102(a) (Michie Supp. 1996). This left third degree arson, which has a maximum penalty of five years imprisonment. § 6-3-103. The State opted to
and foreclosures, and there was some uncertainty as to the owner at the time of the fire. The State presented no direct evidence that Longstreth's entry had been without authority. In Longstreth's appeal from his burglary conviction, the Wyoming Supreme Court held that the evidence was insufficient to sustain the conviction because there was no showing that the entry was without authority. The Court rejected the State's argument that the fact that Longstreth entered the house in the early morning and set it on fire raised the inference that the entry had been without authority. 107 The moral to Longstreth is that "without authority" is an element of burglary, which the State must prove beyond a reasonable doubt, and the Wyoming Supreme Court will be reluctant to permit this element to be found solely on the basis of circumstantial evidence. 108

d. Conditional, Limited or Withdrawn Authority

If the person in possession of the structure may deny authority to enter or remain in the premises, it follows that the person may place conditions on entering or remaining, including limiting the purposes or the length of stay, and once having granted authority may withdraw it.

Where entry without authority is the crucial element, the focus must be upon the moment of entry: did the person have authority at that instant? On the other hand, where the charge is that a person remained without authority, a different time frame must be applied, and a course of events may be considered. If the authority to enter is for a particular purpose, but the person remains for a different purpose, then authority can be said to be absent. For example, if a person is allowed to enter premises to use the restroom, but while inside steals property, can the fact of remaining in the premises intending to steal be without authority so as to subject the person to a charge of burglary? 109

charge burglary, with arson as the intended felony, because the maximum punishment for burglary is ten years. See WYO. STAT. ANN. § 6-3-301(b) (Michie 1988).

107. Longstreth, 832 P.2d at 564. The fact that the house had stood vacant for some time may have been a circumstantial counterindication to unauthorized entry, since owners of vacant houses that are sinking into dilapidation may be motivated to burn them. In other words, the case for a circumstantial finding of unauthorized entry would have been much stronger if the house had been currently occupied and in good condition.

108. Id. Longstreth did not escape unscathed. He was subsequently prosecuted and convicted for felony property destruction, and his appeal challenging his conviction on double jeopardy grounds was unsuccessful. Longstreth, 890 P.2d at 555.

109. In Starr v. State, 888 P.2d 1263-64 (Wyo. 1995), where burglary was not charged, the defendant, who was conducting a business in the parking lot, was permitted to enter a liquor store and pub to use the restroom. While inside to use the restroom, she entered an office through an open door and took money from a bank bag on the desk. Could her remaining in the building after the privileged purpose had been accomplished have constituted remaining in without authority with the intent to commit larceny — thereby subjecting her to prosecution for burglary?
Where authority to enter has been granted, the authority to remain in the premises may be withdrawn. If after the authority to remain has been withdrawn, the person remains with the intent to commit larceny or a felony, burglary will have been committed. Consider, for example, the facts of *Compton v. State*,110 a prosecution for burglary and attempted first degree sexual assault. The victim testified that she was awakened in the night when Compton sexually assaulted her after entering her home without authority. Compton contended that the victim had invited him to her home and had consented to the sexual activity. The jury convicted Compton of sexual assault, but acquitted him of burglary. Of course we do not know what prompted the jury’s verdict. Assuming, however, that in such a case the victim had authorized the defendant to enter her home, nevertheless, if when the defendant began to assault her sexually she had told him to leave, his remaining with the intent to continue his sexual assault would have been without authority and would have subjected him to liability for burglary.

**e. Buildings Open to the Public**

Certain buildings are regularly open to the public, such as retail stores, public libraries, city halls, and churches. During the time that such a building is open, can there be an entry or remaining in that is without authority?

Wyoming’s 1957 burglary statute provided that “entry into a place during the time when it is open to the general public is with consent.”111 Likewise the Model Penal Code provides that a person who enters a structure with intent to commit a crime therein is guilty of burglary, “unless the premises are at the time open to the public or the actor is licensed or privileged to enter.”112 The Wyoming criminal entry statute provides as an affirmative defense that the “enclosure was at the time open to the public and the person complied with all lawful conditions imposed on access to or remaining in the enclosure.”113 However, Wyoming’s present burglary statute contains no reference to structures open to the public.

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110. 931 P.2d 936, 938 (Wyo. 1997).
111. WYO. STAT. ANN. § 6-129(C) (Michie 1957): “For the purpose of this section, entry into a place during the time when it is open to the general public is with consent.” This language was applied in the decision in *Leppke v. State*, 636 P.2d 1117, 1119-20 (Wyo. 1981), where the defendant entered a drug store and purchased cigarettes, but then instead of leaving the store went down the stairs into the basement storeroom. The storeroom was held not to be a part of the premises open to the general public.
113. WYO. STAT. ANN. § 6-3-302(b)(iii) (Michie 1988).
Even in the absence of statutory language, it is evident that a person who is admitted to a particular place for purposes consistent with that admission enters with authority. A person who enters a retail store to purchase merchandise, or to compare prices or quality, during the time the store is open for business, does so by authority — express or implied — of the person who occupies the premises. But what of the person who enters for some different purpose? What of the person who enters not intending to shop, but to shoplift — i.e., to commit larceny therein? Or the person who enters the food store not seeking groceries, but instead with the intent to commit an aggravated assault upon the manager? In short, can the authority to enter be said to be conditioned upon or restricted to certain purposes consistent with the nature of the place or business?

The "remains in" element has some play here. Where a person enters a retail store intending to make a purchase, or to determine the price or availability of particular goods, the entry is with authority as is the person’s remaining in the store to accomplish those purposes. But what if, after entering, the person abandons the original purpose and conceives a new purpose for being in the store, e.g., the person determines to steal some of the merchandise? Does the authority to enter and remain survive the birth of the new intent to steal? Or can it be said that a person who remains in the store with the new purpose of committing larceny therein has lost the authority to be there — so that remaining with that intent becomes burglary?

For the purposes of the burglary statute the issue seems to be whether, if a place can be said to be open to members of the public, anyone who enters, for whatever purpose, will be determined to have entered or remained therein with authority. Certainly for crimes other than burglary, the fact that a person has authority to be present within the structure does not confer immunity from criminal conduct committed therein. It is only burglary which is frustrated. This result is arguably consistent with burglary’s purpose of assuring privacy and security in buildings and occupied structures. Where a building is open to the public, this expectation can be said not to be present. A counterargument can be made that the notion of "open to the public" is false, in that few if any structures are truly open to all persons for whatever purpose. Businesses and public buildings may be entered by persons who have legitimate purposes within — but the fact that a general invitation is extended to members of the public to enter for those purposes does not compel the conclusion that persons who enter for different purposes do so with authority. In place of a rigid differentiation between open to the public / not open to the public, common sense demands that distinctions be recognized between those entries which can be said to be authorized because connected with the
purpose for permitting entry. A rule that the consequence of authorized admission of one person is the authorized admission of all, does not commend itself to reason. The Wyoming Supreme Court has not addressed these questions. Other courts have reached divergent results.\textsuperscript{114}

\textit{f. Entry by Deception}

Where entry is gained by deception, as through misrepresentation of the purpose for being admitted to the structure, it is without authority. While the Wyoming Supreme Court has not addressed this question, decisions from other jurisdictions support the conclusion that no authority to enter is gained through fraud or deceit.\textsuperscript{115}

While some instances of deception justify prosecution for burglary — as where a person falsely represents himself to be a repairman and, having gained entry, sexually assaults the occupant of the premises — other cases are more controversial. Thus when the person whose sole purpose is shoplifting pretends to be a legitimate shopper, is that deception sufficient to provide a basis for a burglary conviction in addition to a larceny or shoplifting conviction? Or where the person admitted to the residence pretends not to be armed, when indeed he is armed and intends to shoot the persons within?\textsuperscript{116}

2. Enters or Remains In

\textit{a. Enters}

Entry has been an element of the crime of burglary since its inception many centuries ago. In most Wyoming burglary prosecutions, the fact of entry is evident, and any controversy turns on the other elements of the crime. In two cases, both decided prior to 1982, the question was presented whether an entry occurred. \textit{Lindsay v. State},\textsuperscript{117} was a felony-murder prosecution in which it was alleged that the killing occurred in the perpetration of, or attempt to perpetrate, a burglary of a vehicle.\textsuperscript{118}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{115} See, e.g., State v. Maxwell, 672 P.2d 590, 593-94 (Kan. 1983); State v. Pierce, 380 P.2d 725 (Utah 1963).
\item \textsuperscript{116} See, for example, \textit{Gabriel v. State}, 925 P.2d 234, 236-37 (Wyo. 1996), where entry to apartment was permitted because the occupant thought Gabriel did not have a gun. In fact, Gabriel had a gun and entered with intent to kill. Burglary was not charged in this case. However, would burglary have been a viable charge on the basis of entry without authority if Gabriel had merely hidden the gun? If he had lied about having it?
\item \textsuperscript{117} 317 P.2d 506, 511-12 (Wyo. 1957).
\item \textsuperscript{118} See id. at 510 (quoting § 9-201, WYO. COMP. STAT. (1945)) ("Whoever, . . . in the perpetration of, or attempt to perpetrate any . . . burglary . . . kills any human being, is guilty of murder in the first degree and shall suffer death.") The burglary statute covered both acts of breaking and entering and attempts to break and enter. See id. at 511 (quoting § 9-309, WYO. COMP. STAT.
\end{itemize}
\end{footnotesize}
vehicle involved was a pickup truck with a "box-like structure" on the back "which had a door in the rear, hinged at the top, and partly open." 

Lindsay, gun in hand and with intent to steal, stooped down under the rear hinged door; his back at least touched the door. He was confronted by a man inside, who shouted and turned toward Lindsay. Lindsay shot and killed the man. On appeal from a conviction of felony murder, Lindsay argued that the underlying burglary or attempted burglary had not been proved. The Wyoming Supreme Court concluded that within the meaning of the burglary statute, which encompassed both burglary and attempted burglary, there was at least an attempt to commit burglary. Therefore it was not necessary to decide whether Lindsay's act of stooping under the open door constituted an entry.

Subsequently, in *Mirich v. State*, where Mirich was found with his head and shoulders inside the broken window of a service station, the Supreme Court observed: "An unlawful entry is made by putting through the place broken a hand, the foot, or any instrument with which it is intended to commit a felony." The entry was held sufficient, and the burglary conviction was affirmed.

None of the more bizarre sorts of "entry" have appeared in reported Wyoming decisions, such as sending an animal into the structure, or thrusting some instrument inside. Nor has the question arisen as to whether firing a gun into a structure, with intent to wound or kill someone within, constitutes a sufficient actual or constructive entry.

b. *Remains in*

The "remains in" element first appeared in the 1982 Criminal Code. The defendant must, without authority, remain in a building, occupied structure or vehicle, or separately secured or occupied portion thereof, with the intent to commit larceny or a felony therein. Thus the element of "remains in" is an alternative to "enters."

The "remains in" element was involved in *Bigelow v. State*, an appeal from convictions of burglary and conspiracy to commit burglary. The evidence showed that Bigelow entered the Wonder Bar in Casper

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(1945) ("Whoever, at any time, breaks and enters, or attempts to break and enter, into any . . . automobile or other motor vehicle, . . . with intent to steal property of any value, is guilty of burglary.").

119. *Lindsay*, 317 P.2d at 507.
120. *Id.* at 512-13.
121. 593 P.2d 590 (Wyo. 1979).
122. *Id.* at 593 n.4.
during business hours, and bought drinks. He "left the main serving area acting as though he were going to the restroom, but continued on and instead went through the hatch door in the roof," and hid in a crawl space, waiting for the place to close so he could emerge and break into the safe. Bigelow raised no burglary issue on appeal, and the Supreme Court was not called upon to explicate "remains in."

The Bigelow case illustrates one common form of remaining in a structure without authority: the person who enters a store during regular business hours and then conceals himself, intending to wait until after hours and then commit larceny, stealing the goods and leaving the premises when no one else is present. A number of other applications, none of which have been passed upon by the Wyoming Supreme Court, suggest themselves:

(1) The employee who remains in the workplace after regular working hours, intending to commit larceny. The application of "remains in" to such an employee is stronger if the employee has clearly designated working times, than if the times of employment are flexible. The question is whether it can be shown that the employee has no authority to remain after working hours. It would be more difficult to apply these elements to a managerial employee who by definition may not have designated working times, and whose duties may authorize his presence at all times.

(2) The person who is authorized to enter for a particular purpose, who remains after the accomplishment of that purpose, with the intent to commit larceny or a felony. A repairman's authority to remain ends when the repairs are completed; the hotel maid's authority when linens and towels are replaced and the bed is made. If such a person remains and steals, burglary has been committed.

(3) Closely related is the situation where a person would be authorized to enter for a particular legitimate purpose, but upon gaining entry exhibits the purpose to commit larceny or a felony. Thus a person who enters an open church, where persons are authorized to enter to pray, and does not pray but instead rifles the donation box could be said to have remained in the church without authority intending to commit larceny. Concededly this is a more difficult case, since it will be necessary to rely upon the exhibited intent to commit larceny in order to establish the lack of authority to remain — based on the proposition that persons intending

125. Id. at 560.
126. This application of the "remains in" provision is redolent of the statute of 12 Anne stat. 1, ch. 7, § 3 (1713), which classified as burglary the act of entering a dwelling without breaking, but intending to commit a felony, and then breaking out in the night time.
to commit larceny therein are authorized neither to enter nor to remain in churches.

(4) The person who enters without authority, and who does not intend to commit larceny or a felony at the time of entry, but subsequently forms such intent. Such a person is not guilty of burglary because the required intent did not coincide with entry. However, when entry is made without authority, continued presence in the premises will almost always also be without authority. If during such unauthorized continued presence the person develops the intent to commit larceny or a felony therein, burglary will have been committed. If, for example, the person who entered without authority could not have known that the premises contained valuable property, it may be difficult to infer the existence of an intent to steal prior to time the property was discovered. But if the person is present in the structure without authority and then conceives the intent to steal, the "remains in" language makes the burglary statute applicable. Similar reasoning applies to the person who enters without authority and sexually attacks an occupant who is encountered, perhaps unexpectedly, within. While it may be argued that the intent to commit sexual assault did not exist at the time of entry, it would indeed be difficult to argue that such a person did not have the intent to commit sexual assault while remaining in the structure without authority.

(5) The person who enters with authority, but is directed to leave. Any remaining in the structure will be without authority, and the crime of burglary will be committed if the person develops the intent to commit larceny or a felony. The commission of, or attempt to commit, larceny or a felony within the structure will permit the inference that the intent to do so existed. An example would be the social visitor who quarrels with the host and is told to leave, but who stays instead and commits an aggravated assault upon the host.

The enactment of the "remains in" provision creates a number of interesting possibilities for extending the reach of the burglary statute.

3. Building, Occupied Structure or Vehicle

Burglary requires that a person enter or remain in "a building, occupied structure or vehicle, or separately secured or occupied portion thereof."\textsuperscript{127} Although some overlapping exists in these categories, the result is that practically every kind of structure can be the subject of burglary.

\textsuperscript{127} WYO. STAT. ANN. § 6-3-301(a) (Michie 1988).
a. Building

"Building" is not defined in the Wyoming Criminal Code.\(^\text{128}\) Black's Law Dictionary defines "building" as:

Structure designed for habitation, shelter, storage, trade, manufacture, religion, business, education, and the like. A structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof.\(^\text{129}\)

A building is thus a structure that is at least partially walled and probably roofed, intended to safeguard human beings and their activities and property. The focus is primarily on the purpose of the structure rather than its geometry or configuration.

The meaning to be given in the burglary statute to the word "building" or to a cognate term has been before the Wyoming Supreme Court on five occasions. In 1880 the earliest reported burglary case in Wyoming, Territory v. Conley,\(^\text{130}\) involved the question whether a railroad hand-car house was included within the phrase "or any other close enclosure" found in the Wyoming burglary statute. Chief Justice Sener, writing for the court, rejected the argument that a hand-car house did not fall within "or any other close structure."\(^\text{131}\) Justice Peck, although dissenting, agreed with the majority on that point, on the ground that the term "or any other close enclosure" was intended "to enlarge the class of . . . things specified in the preceding enumeration,"\(^\text{132}\) and therefore "it must so operate against a defendant, though a penal statute." Thus from the earliest days, the Wyoming Supreme Court gave an expansive interpretation to the list of structures which might be the subject of burglary.

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130. 2 Wyo. 331 (1880).

131. Id. at 334-35.

132. Id. at 338.
Subsequently, in *Ackerman v. State*, 133 decided in 1898, the issue whether breaking and entering a sheep wagon constituted burglary was raised but not decided by the court, inasmuch as the defendant was acquitted of the burglary charge and convicted of larceny. The Attorney General, J.A. Van Orsdel, argued that a sheep wagon fell within “other building whatsoever” or “any dwelling house” as found in the burglary statute. He contended that the “point to be considered in determining whether a felonious breaking constitutes burglary is not what kind of a habitation or close was entered, not its structure or appearance, not its location or permanency, but its use.” 134

In the 1951 decision in *State v. Crouse*, 135 the issue was whether a powerhouse was a building within the meaning of the burglary statute. The evidence showed that one end and two sides of the powerhouse had collapsed, and that the roof had fallen onto the machinery within. Justice Blume, writing for the Court, concluded that while a powerhouse may be a building, the collapsed powerhouse in question was not within “other buildings whatsoever” as found in the burglary statute. “It is quite apparent under this testimony,” wrote Justice Blume, “that the powerhouse in question had neither four walls nor a roof; it was not a building, but was merely a wreck.” 136 The opinion expressed the traditional view that a house or building must have walls on all sides and a roof. 137

The next Wyoming decision to deal with the meaning of “building” was *Ash v. State*, 138 decided in 1976 under the 1957 burglary statute. *Ash* involved the entry of an enclosure consisting of a wooden frame covered by plastic sheeting, standing on a cement floor and attached to an adjacent liquor store building. The Supreme Court, in an opinion by Chief Justice Guthrie, held that the structure was within the meaning of the term “any building” found in the burglary statute. 139 The court rejected Ash’s argument that walls and roof made of plastic sheeting were insufficient to constitute a building. To come within the statutory language it was only necessary that whatever materials are used in the structure “serve the basic purpose of enclosure. Particularly this is true in an ever-changing world in which new materials or methods of construction are part of progress.” 140

133. 54 P. 228, 229 (Wyo. 1898).
134. *Ackerman*, 54 P. at 229.
136. Id. at 485.
137. Id. at 484.
139. Id. at 227.
140. Id.
In 1995, the Wyoming Supreme Court decided *Smith v. State*,\textsuperscript{141} which presented the question whether a semitrailer with the wheels removed and without one or both back doors, used for storage on a construction site, was a building within the meaning of section 6-3-301(a). The evidence showed that Smith entered the semitrailer at night and stole items found therein. Smith entered a conditional plea of guilty, reserving the right to appeal on the question whether the semitrailer was a building. The Supreme Court held that the semitrailer was a building, approving the functional test of *Ash v. State*, that a building is a structure designed for the habitation of humans or animals or to shelter property. The fact that the structure was not completely enclosed by four walls and a roof did not defeat its purpose, and therefore "the semitrailer was not disqualified from its status as a building by the absence of its doors."\textsuperscript{142}

The conclusion to be drawn is that within the meaning of the burglary statute, a building is a structure designed to provide some measure of shelter for persons or their property. A building need not be secure, in the sense that it may be entered only by breaking the enclosure. Thus the conception of what may be the subject of burglary has changed significantly from the early common law, where the structure itself had to represent an effort to exclude others from the space within, by creating an enclosure which physically prevented entry unless the structure were "broken" in some fashion. The modern approach is tending toward the position that the function of structure is dual: to provide some measure of shelter from the elements, and to provide notice to others that a claim of privacy is being asserted for the space which is delineated or enclosed by the structure. The violation of this claim of privacy is coming to be recognized as the justification for the modern law of burglary.

\textit{b. Occupied structure}

"Occupied structure" is defined in Wyo. Stat. section 6-1-104(a)(v):

"Occupied structure" means a structure or vehicle whether or not a person is actually present:

(A) Where any person lives or carries on business or other calling;

(B) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation;

\textsuperscript{141} 902 P.2d 712, 714-16 (Wyo. 1995).
\textsuperscript{142} Id. at 716.
(C) Which is used for overnight accommodation of persons; or
(D) In which a person may reasonably be expected to be present.143

An “occupied structure” is therefore both more and less than a building. It is more than a building, in that its uses and purposes are specified; it is less, in that something which does not qualify as a building may be an “occupied structure” if it meets the stated tests. Thus a tent would not normally be considered a building, but if it is used as a place for persons to sleep it is an occupied structure. In this sense, a large cardboard box or packing crate used by an otherwise homeless person would qualify as an occupied structure, even during the daytime when its occupant was elsewhere.

c. Vehicle

“Vehicle” is defined in Wyo. Stat. section 6-1-104(a)(xi) as “any device by which persons or property may be moved, carried or transported over land, water or air.”144

The breadth of this definition means that not only common devices used in transportation such as automobiles, trucks, freight cars, boats and airplanes are included, but also other devices not normally thought of as vehicles: pipelines, conveyor belts, ski lifts, elevators. Even more esoteric forms of vehicles may be imagined. An electrical distribution system can be said to move, carry or transport electricity, which is a form of property. Would the transmission of information over wires or by radio or similar waves qualify? Information has been held to be property, within the meaning of the Wyoming Criminal Code.145

The Wyoming Supreme Court has not been called to decide whether the more esoteric devices that can transport persons and property are “vehicles” within the meaning of the Criminal Code. Given the statutory language, however, it is not unthinkable that a person who penetrated a pipeline with the intent to steal the oil or water or gas being transported could be found guilty of burglary. Greater problems are posed by taking electricity from power lines, or tapping phone lines and obtaining information; conceptually it seems difficult to “enter” or “remain in” a wire

used to transmit power or information. To date, however, only the more common forms of devices, generally self-propelled, have figured in Wyoming burglary prosecutions.

Automobiles have frequently been the subject of burglary convictions in Wyoming. In *Collins v. State,* decided in 1993, the defendant, charged with burglary of an automobile, made the novel argument that because the burglary statute used the language "occupied structure or vehicle," only a vehicle actually occupied by a person could be the subject of burglary. The Wyoming Supreme Court rejected the argument, both on the ground that under accepted rules of interpretation the term "occupied" modified only "structure," and not "vehicle"; and because the statutory definition of "occupied structure" referred to "a structure or vehicle whether or not a person is present." To require a person to be present would nullify this part of the definition.

Some vehicles, such as bicycles and motorcycles, do not seem capable of entry. However, even a bicycle may have a "separately secured portion" in the form of a saddlebag, pouch or box affixed to the bicycle, secured by a lock or other device, which may be entered without authority.

d. Separately secured or occupied portion thereof

Places which may be burglarized include buildings, occupied structures, vehicles, or a "separately secured or occupied portion thereof." The Wyoming Supreme Court has not been called upon to apply the "separately secured or occupied portion" language. This language was taken from the Model Penal Code section 221.1 which covers "a building or occupied structure, or separately secured or occupied portion thereof." The commentary to the Model Penal Code states that the "separately secured or occupied" language "takes care of the situation of apartment houses, office buildings, hotels, steamships with a series of private cabins, etc., where occupancy is by unit. It is the individual unit as well as the overall structure that must be safeguarded." If the Code's purpose was to protect secured subunits occupied by different persons, then the language should have been "separately secured and occupied." As writ-


147. 854 P.2d 688, 695 (Wyo. 1993). Collins was charged with entering a parked automobile and taking numerous items including cassette tapes. *Id.* at 691.

148. *Id.* at 696. *See WYO. STAT. ANN. § 6-1-104(a)(v) (Michie Supp. 1996).*


150. *MODEL PENAL CODE § 221.1 cmt. 3(b) at 73 (1980).*
ten, the Code creates two subclasses: portions which are "separately secured" and portions which are "separately occupied." Thus the Code extends to different portions of a building, occupied structure or vehicle which are occupied by a single person but are "separately secured." It also extends to portions which are separately occupied but not secured.

The use of "thereof" requires that the "separately secured or occupied portion" be some part of a building, occupied structure or vehicle. Consequently, the enclosures included within this provision must be an integral part of a building, occupied structure or vehicle. Thus a closet, cabinet or safe built into the structure of a building would be covered, but cabinets, chests, desks, furniture and other items not affixed to or part of the building would not.

Neither the Wyoming Criminal Code nor the Model Penal Code defines "secured." Does "secured" mean locked, or only separated by some sort of wall, partition or door? The law dictionaries say that "secure" means "not exposed to danger; safe; so strong, stable or firm as to insure safety;"151 general dictionaries include "[f]ree from danger or attack: a secure fortress . . . [f]irmly fastened: a secure lock."152 If the meaning of "secured" is that persons must be excluded by locks or walls, then the element of breaking has been restored to at least this part of the burglary statute, since the only way that a secure place could be entered would be through a breaking. On the other hand, courts could give "secured" a broader meaning, i.e., merely that some steps have been taken to set off the "separately secured portion" from the rest of the structure, but not requiring locks or other structural seals.

Under the statute, a "separately occupied portion" need not be secured. Need it be separately enclosed? Or would a store in which different portions are assigned to different vendors consist of "separately occupied portions"? Does "separately occupied" mean occupied by a different person than the rest, or that it can be occupied for a different purpose by the same occupant as the rest of the structure? The statute itself does not provide ready answers.

When a person who has entered a building with authority enters a separately secured or occupied portion thereof without authority, intending to commit larceny or a felony, burglary has been committed. The principal reason for the adoption of this provision is to protect separate

151. BLACK'S LAW DICTIONARY 1354 (6th ed. 1990). See also BALLENTINE'S LAW DICTIONARY 1154 (3d ed. 1969) ("Stable; unlikely to fail or fall. Free from worry. Not exposed to peril.").
enclosures within a larger building; the fact that a person is within the larger building with authority does not create an immunity when subenclosures are entered. A further question is presented when a person enters a building without authority intending to steal, and then once inside enters a separately secured or occupied portion thereof also intending to steal. Have two burglaries been committed?

The former Wyoming burglary statute included entry into any “building or dwelling” or a “room within any of the above.”\footnote{153 WYO. STAT. ANN. § 6-7-201 (Michie 1977).} \textit{Leppek v. State}\footnote{154 636 P.2d 1117, 1118 (Wyo. 1981).} was a prosecution under this provision. Leppek entered Skyline Drug through the back entrance and went through the freight room and into the retail area where he bought cigarettes. Leppek returned the way he had come, but instead of going out the back door, he went down the stairs into the basement storeroom, where he was found hiding by store employees.\footnote{155 Id. Leppek was “found kneeling behind a four-foot high counter with his head down.” The employee who found him asked Leppek “if he could help him,” and Leppek replied “boo” and laughed.} Leppek was convicted of unlawfully entering or attempting to enter “a room within a building or dwelling without the consent of the person in lawful possession and with the intent to steal.”\footnote{156 Id. at 1118.} The Wyoming Supreme Court affirmed, holding that there was sufficient evidence to convict, in that Leppek surreptitiously entered the darkened basement which was a place where he had no authority to enter.

Could Leppek have been convicted under the present burglary statute? While under the former law the basement storeroom was considered a “room” and subject to burglary, it did not appear to have been a “separately secured or occupied portion” of the drug store, as it was not separated from the remainder of the store by doors or other barriers. Only if the authority to enter given to store customers could be said to have been limited to the retail portion of the store, so that entry into the basement was without authority, would the present law have been violated.

The Commentary to the Model Penal Code seeks to make clear that where there is a separately secured or occupied portion of a structure, others who may lawfully reside or work elsewhere in the structure may be guilty of burglary if they enter that portion without authority.\footnote{157 MODEL PENAL CODE AND COMMENTARIES, Part II, vol. 2, 73 (1980).} Thus burglary might be committed by a child living at home, who breaks into his parents’ locked bedroom and steals their coin collection.\footnote{158 See, for example, Swackhammer v. State, 808 P.2d 219 (Wyo. 1991), where the son}
the unlocked bedroom of a sleeping guest and sexually assaults her, whether burglary has been committed might depend upon whether the bedroom can be described as "separately secured" if the door is not locked, or alternatively whether a bedroom occupied by a guest can be characterized as "separately occupied."

Vehicles present special problems under the "separately secured portion" language. Is the enclosed cargo portion of a truck, or a camper shell on the back of a pickup truck such a place? If so, the trunk of an automobile would also qualify. Similar considerations apply to the entry of a glove box within a vehicle. What about under the hood of a vehicle? While a tool box lying in the bed of a pickup truck would not be included, the fact that the box was affixed to the bed of the truck could satisfy the "thereof" provision in the statute.

e. Abandoned Structures

Model Penal Code section 221.1(1) provides that it "is an affirmative defense to prosecution for burglary that the building or structure was abandoned." Wyoming's burglary statute makes no reference to abandoned buildings or structures. The only reference in the Wyoming statutes is found in the criminal entry statute, where it is an affirmative defense that the "enclosure was abandoned." The question whether an implied exception to the burglary statute might be found if the building, occupied structure or vehicle was abandoned has not arisen in Wyoming. Whether a vacant dwelling could constitute an "occupied structure" was presented in Barnes v. State, a prosecution for first-degree arson. The first-degree arson statute requires maliciously starting a fire or causing an explosion with intent to destroy or damage an occupied structure. In Barnes, the occupants had moved out of the house and it was vacant when the fire was set. "They had abandoned the house with no intention of returning. The claim therefore, is that the house was unoccupied; ergo the crime

forced the door to his parents' bedroom and took coins. Only larceny, and not burglary, was charged. It is not clear from the facts of Swackhammer whether the son was living at home.

159. See, for example, Mitchell v. State, 865 P.2d 591 (Wyo. 1993), where the sleeping guest was a 10-year old girl. Second degree sexual assault was charged, but burglary was not charged.


161. See, for example, Christian v. State, 883 P.2d 376 (Wyo. 1994), where the hood of the vehicle was opened and the oil, radiator and other fluid caps were taken. Burglary was not charged in this case.

162. WY. STAT. ANN. § 6-3-302(b)(ii) (Michie 1988).

163. 858 P.2d 522 (Wyo. 1993).

was not first degree arson.” The Wyoming Supreme Court concluded that an occupied structure, i.e., one “in which a person may reasonably be expected to be present”:

is one that is intended to be occupied and usually and normally is occupied and would be perceived by any reasonable person to be an occupied structure, although unoccupied at the time. To hold otherwise would be to approve as second degree arson only the burning of all houses displaying “for rent” and “for sale” signs which often are unoccupied. We are comfortable holding that this was an occupied structure . . .

Abandonment would not appear to be a defense under the present Wyoming burglary statute. Only if abandonment were accompanied by sufficient decay so that the structure had ceased to be a building would application of the statute be defeated. This result may unexpectedly broaden the application of the statute. For example, if an adult were to take a person under eighteen years of age into an abandoned mobile home to engage there in sexual activities, not only would the felony of indecent liberties be committed, but burglary also.

4. Intent to Commit Larceny or a Felony Therein

Burglary consists of entering or remaining in “with intent to commit larceny or a felony therein.” However, it is not necessary that the intent to commit larceny or a felony be acted upon — whether by attempt or by completion of the intended crime. The existence of the intent, coupled with the unauthorized entry or remaining in is all that the statute requires.

a. What intent is necessary

At common law, as we have seen, the necessary intent was to commit a felony within the dwelling house. Since at common law all larceny was felonious, the intent to commit larceny was sufficient to constitute

165. Barnes, 858 P.2d at 535.
166. Id. at 536.
167. As in State v. Crouse, 237 P.2d 481 (Wyo. 1951), where the walls of the powerhouse had collapsed, causing the roof to fall in, it was no longer a building, but merely a wreck.
169. It is assumed that the entry, made with intent to commit a felony therein, was made without authority. A question is presented as to whether an abandoned mobile home has an owner, or whether there is any person who could give or withhold authority to enter. Are all persons authorized to enter abandoned structures? Or does “without authority” mean that if authority cannot be given, any entry must be without authority?
burglary. Under modern statutes, including that of Wyoming, only when larceny involves taking property valued at more than a specified amount is a felony committed. In Wyoming the sum is $500 or more. Partly because a high percentage of burglaries involve the intent to commit larceny, and partly because of the difficulty in proving that a person intended to steal property valued at $500 or more when the entry occurred, statutes commonly provide that any intent to commit larceny will suffice.

Presumably, by "larceny" is meant the crime defined in Wyo. Stat. sections 6-3-402(a) and (b), which includes what formerly was known as larceny, as well as larceny by bailee and embezzlement. Thus "larceny" under the Wyoming Criminal Code is broader than larceny at the common law. In addition, at common law larceny involved the taking and carrying away of the personal property of another, while under modern Wyoming law "property" means "anything of value, whether tangible or intangible, real or personal, public or private." On the other hand, the stealing of "any horse, mule, sheep, cattle, buffalo or swine" is not designated larceny, but instead is called "livestock rustling" under the Wyoming statute, and is presumably not included within "larceny" under the burglary statute. However, since all livestock rustling is a felony, without regard to the value of the animals taken, any entry with intent to steal such an animal will constitute burglary.

Any felony is sufficient to make its intended commission, coupled with unauthorized entry or remaining, burglary. At early common law, most felonies involved a measure of personal violence. With the modern proliferation of felonies, many nonviolent crimes qualify as the predicate felony. Thus, an unauthorized entry with intent to commit forgery would suffice to produce burglary — or an unauthorized entry with intent to commit a computer crime, including accessing "a computer, computer system or computer network" without authorization.

b. When intent must exist

At common law, when burglary was defined as breaking and entering with intent to commit a felony therein, the intent to commit the felony

170. WYO. STAT. ANN. § 6-3-402 (Michie 1988).
171. MODEL PENAL CODE § 221.1 provides that intent to commit "a crime" is sufficient to constitute burglary.
172. EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 108 (1797 ed.).
174. WYO. STAT. ANN. § 6-3-402(c)(Michie 1988).
175. WYO. STAT. ANN. § 6-3-502 (Michie 1988).
had to exist at the time of the breaking and entering. 176 Thus if the breaking and entering was effected without the necessary burglarious intent, there was no burglary — even if the intent to steal or commit a felony arose subsequently while the person was within the dwelling.

Under present Wyoming law, burglary has been broadened to include both entering with intent to commit larceny or a felony, and remaining in the structure with intent to commit a felony. Consequently, it is no longer necessary that the defendant have the larcenous or felonious intent at the moment of entry. If a person enters without authority and while remaining in the premises without authority conceives the necessary intent, or enters with authority and remains without authority and while so remaining conceives such intent, burglary has been committed. The requisite intent must exist either at the time of the unauthorized entry, or during the unauthorized remaining in the structure.

In *McDonald v. State,* 177 decided by the Wyoming Supreme Court in 1986, McDonald was convicted of aggravated burglary when he entered the victim’s apartment without authority, obtained a large kitchen knife, and awoke the victim and threatened her with the knife; in an ensuing struggle, the victim’s hand was cut. The State charged aggravated assault and battery as the underlying felony. On appeal, McDonald contended that the State had not proved that when he entered the apartment, he had intended to arm himself and attack the victim. The conviction was affirmed. However, neither the State nor the court gave consideration to the point that even if McDonald had not entered intending to commit aggravated assault and battery, the fact that he entered without authority and remained without authority, and during such remaining he armed himself and conceived the intent to injure the victim with the knife, would suffice to establish burglary.

c. **Proof of intent**

The requisite intent may be proved by direct or circumstantial evidence. Direct evidence may be difficult to acquire, except where the defendant has expressed his intention to others, and proof of intent may be made by their testimony. 178 In most cases, however, the defendant will not have spoken his intention, and therefore the necessary intent must be proved through circumstantial evidence of some kind.

176. 4 *William Blackstone, Commentaries* *227.*
178. See, for example, *Lauthern v. State,* 769 P.2d 350, 351 (Wyo. 1989), where as he broke into house the defendant shouted at the occupant, "I'm going to kill you. I'm going to kill you."
Circumstantial evidence of intent may be furnished by showing that the defendant had knowledge of what the structure contained. "Knowledge of what a structure contains, coupled with an attempt to enter it, supports a rational inference of intent to steal whatever is of value within the building."\(^\text{179}\) Further, "[t]he law is well settled and widespread that where one breaks into the property of another in the nighttime, an inference may be drawn that he did so with the intent to commit larceny."\(^\text{180}\)

It is also amply clear from Wyoming burglary decisions that the intention which the defendant possessed when he entered without authority may be inferred from what the defendant subsequently did when he was inside the premises.\(^\text{181}\) As explained above, while at common law it was necessary that the burglarious intent exist at the time of breaking and entering, under current Wyoming law the intent can exist at the time of unauthorized entry, or during the time of unauthorized remaining in. Thus the defendant's acts may be circumstantial evidence of his intent either when he entered, or when he remained in the premises. Accordingly, a defendant charged with burglary based on intent to commit sexual assault can no longer admit that he entered without authority, yet claim that he had no knowledge when he entered that a person was inside, and consequently could not have entertained the intent to commit sexual assault. If once inside he discovered a person within, and then formulated the intent to commit sexual assault, burglary would be established under the "remains in" provision.

The consequence is that under the present Wyoming statute, it should be sufficient proof of the requisite burglarious intent to establish that the defendant entered without authority or remained without authority, and while within committed larceny or a felony. Since the intent to commit the larceny or felony existed at the time when the larceny or felony was committed therein, the intent also existed while the defendant remained in the premises without authority.

\section*{d. Therein}

The intent must be to commit the larceny or felony "therein" — e.g., within the building, occupied structure or vehicle. Therefore one

\begin{footnotes}
\item[180] Id. See also Jennings v. State, 806 P.2d 1299, 1303 (Wyo. 1991) ("The fact that nothing was taken subsequent to the unlawful entry does not destroy the inference that the intent to steal existed at the time the entry was effected."); Mainville v. State, 607 P.2d 339 (Wyo. 1980).
\item[181] See, e.g., Roose v. State, 759 P.2d 478, 487 (Wyo. 1988) (evidence that Roose had broken into homes and stolen articles was sufficient to sustain burglary convictions); Sears v. State, 632 P.2d 946, 947 (Wyo. 1981). (17-year-old victim awoke "to find a man, naked from the waist down, standing beside her bed," who put a gag over her mouth and demanded sexual acts; a conviction of burglary with intent to commit third degree sexual assault was affirmed).
\end{footnotes}
who broke into one office in order to enable him to break into a second office and steal in the second office would not be guilty of burglary of the first office.\footnote{182}

e. Special problems of vehicles

A person commits burglary when he enters a vehicle to steal property found therein. The intent may be to steal property being transported by the vehicle, or ostensibly parts of the vehicle itself, such as stereo equipment or even the seats. But is it burglary to enter a vehicle intending to steal the vehicle? Would the theft of the vehicle itself constitute larceny committed therein? There are no Wyoming decisions on point. The paucity of such decisions may reveal a consensus that entering a vehicle to steal the vehicle is not burglary. There may be an irony in the fact that the crime of burglary protects the contents or even part of the vehicle itself but not the entire vehicle.\footnote{183} However, authoritative determination of this issue must await action by some prosecutor in charging a vehicle thief with burglary for entering or remaining in the vehicle with intent to steal it.

B. The Elements of Aggravated Burglary

Aggravated burglary is defined by Wyo. Stat. section 6-3-301(c), which provides:

\[(c)\text{ Aggravated burglary is a felony punishable by imprisonment for not less than five (5) years nor more than twenty-five (25) years, a fine of not more than fifty thousand dollars ($50,000.00), or both, if, in the course of committing the crime of burglary, the person:}\]

\[(i)\text{ Is or becomes armed with or uses a deadly weapon or a simulated deadly weapon;}\]

\[(ii)\text{ Knowingly or recklessly inflicts bodily injury on anyone; or}\]

\[(iii)\text{ Attempts to inflict bodily injury on anyone.}\footnote{184}\]

\footnote{182. See, for example, Brit v. State, 734 P.2d 980 (Wyo. 1987), where the defendant broke into one retail establishment, from which he broke into a second. Also in DeLeon v. State, 894 P.2d 608 (Wyo. 1995), the defendant first entered one store through the roof, from which he gained entrance to a hallway, where he cut a hole above the door and entered the burglarized premises.}

\footnote{183. See, however, Hall v. State, 911 P.2d 1364 (Wyo. 1996), where an automobile was the subject of the burglary, in that an auto shop where the vehicle was being rebuilt and stored was entered and the automobile was stolen.}

\footnote{184. Wyo. Stat. Ann. § 6-3-301(c) (Michie 1988).}
Subsection (d) provides that "in the course of committing the crime" includes "the time during which an attempt to commit the crime or in which flight after the attempt or commission occurred." \footnote{185} 

The elements of aggravated burglary are, in addition to the elements of burglary, that a person:

1. in the course of committing the crime of burglary
2. (a) is or becomes armed with or uses a deadly weapon or a simulated deadly weapon, or (b) knowingly or recklessly inflicts bodily injury on anyone, or (c) attempts to inflict bodily injury on anyone.

1. In the Course of Committing the Crime of Burglary

"In the course of committing the crime" includes "the time during which an attempt to commit the crime or in which flight after the attempt or commission occurred." \footnote{186} This language is taken from the Model Penal Code section 221.1(2): "An act shall be deemed 'in the course of committing' an offense if it occurs in an attempt to commit the offense or in flight after the attempt or commission."

This definition significantly expands the time frame in which a burglary may become aggravated. Thus aggravated burglary may occur from the time when a substantial step toward the commission of the crime of burglary is committed, until the actor ends any "flight" after the crime. While the point at which an attempt is committed is defined in the Criminal Code, \footnote{187} "flight" is not defined. The Comment to section 221.1 of the Model Penal Code adds the qualification that "in the course of committing the offense" ends "with the conclusion of immediate flight after the attempt or commission of the offense." \footnote{188} If this interpretation is to be followed, then "flight" will normally continue for a relatively short period of time, particularly when there is no pursuit.

\footnote{185}{Id. § 301 (d).}
\footnote{186}{Id.}
\footnote{187}{Wyo. STAT. ANN. § 6-1-301(a) (Michie 1988) provides in part that:} A person is guilty of an attempt to commit a crime if: (i) With the intent to commit the crime, he does any act which is a substantial step towards commission of the crime. A "substantial step" is conduct which is strongly corroborative of the firmness of the person's intention to complete the commission of the crime . . . .
\footnote{188}{MODEL PENAL CODE, Part II, vol. 2, at 81 (1980) (emphasis added).}
The "course of committing the crime" may terminate through the happening of other events. In Simonds v. State,\textsuperscript{189} Simonds was apprehended by the police chief in the course of burglarizing a bar. Simonds placed his hands on his head and immediately surrendered, without resistance. The police chief put defendant's arm behind his back, forced him against the bar, and told Simonds he was under arrest. The officer then reached over the bar for the telephone. A scuffle ensued, in which the police chief was knocked unconscious. The Wyoming Supreme Court concluded that the "course of committing the crime" ended when the arrest was made, so that the injuries inflicted on the policeman could not constitute aggravated burglary. "Therefore, whether an 'arrest' of appellant occurred, breaking the essential link between the two crimes, is critical in determining the continuity of the several elements of the crime which must be shown under the applicable statute."\textsuperscript{190}

The effect of extending aggravated burglary to the time during the course of committing the crime is to expand not only the reach of the burglary statute itself, but also its aggravating factors. Thus if a person who is armed takes a substantial step toward the commission of a burglary, aggravated burglary is committed. Similarly, if a person on the way to commit a burglary (or in the immediate aftermath of a burglary) drives recklessly and causes bodily injury to another, he has committed aggravated burglary, although he never got near the place intended to be entered and the injury was in no way connected with a burglary or attempted burglary. In short, one can be guilty of aggravated burglary without committing burglary.

2. Is or Becomes Armed With or Uses Deadly Weapon

Aggravated burglary may be committed when in the course of committing burglary, a person "[i]s or becomes armed with or uses a deadly weapon or simulated deadly weapon." Deadly weapon is defined in section 6-1-104(a)(iv): "'Deadly weapon' means but is not limited to a firearm, explosive or incendiary material, motorized vehicle, an animal or other device, instrument, material or substance, which in the manner it is used or is intended to be used is reasonably capable of producing death or serious bodily injury."\textsuperscript{191}

\textsuperscript{189} 762 P.2d 1189 (Wyo. 1988). This case also makes the point that aggravated burglary is defined as a "[v]iolent felony" in WYO. STAT. § 6-1-104(a)(xii) (Michie 1988) for purposes of invoking the habitual criminal statute, § 6-10-201(a) (Michie 1988), while burglary is not a violent felony. See also Rich v. State, 899 P.2d 1345 (Wyo. 1995).

\textsuperscript{190} Simonds, 762 P.2d at 1192.

\textsuperscript{191} WYOMING STAT. ANN. § 6-1-104(a)(iv) (Michie Supp. 1996).
The statute includes both being "armed with" and "use" of the deadly weapon. Whether being "armed with" requires something more than simple possession has not been definitively determined in Wyoming. "Uses" can include both using the weapon to harm or attempt to harm another, or to threaten another. Since deadly weapon includes explosives and incendiary material, such substances used or intended for use in order to effect entry or to open a safe or other protective device after entry would also serve to elevate the crime to aggravated burglary. Being armed with or using the deadly weapon need not occur during the burglary itself; it may also take place only during the attempt to commit the burglary, or in flight afterward.

The burglar can acquire the weapon at any time during the course of committing the crime. Thus the burglar need not carry the deadly weapon to the scene of the burglary; it is sufficient if he arms himself with a weapon found at the scene.\(^1^9\) In a number of Wyoming burglary prosecutions, convictions for aggravated burglary have been upheld where the defendant was armed with or used a deadly weapon in the course of committing the burglary.\(^1^9\)

Where the burglar enters and steals a deadly weapon, does he thereby become guilty of aggravated burglary by reason of having "armed" himself with the weapon when he took it? In Britt v. State,\(^1^9\) the defendant and two companions broke into the Frontier Gun Shop. Ten weapons and ammunition were taken, and thereafter one of Britt's companions took a loaded gun. The guns were not used in the burglary. Britt was convicted of aggravated burglary. On appeal he argued that he merely stole the guns, and did not "become armed with" them. The Wyoming Supreme Court equated possession of a gun with becoming armed with it:

Appellant seems to suggest that there is a meaningful distinction between possession of a deadly weapon and "armed with a deadly weapon." Under the circumstances of this case, however, there is no significant difference between being in possession and being armed.\(^1^9\)

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193. See, e.g., Wilkening v. State, 922 P.2d 1381 (Wyo. 1996); Smith v. State, 871 P.2d 186 (Wyo. 1994) (Smith was originally charged with aggravated burglary when he entered apartment armed with a gun and shot two people; the burglary charges were dismissed in plea bargain); Roderick v. State, 858 P.2d 538 (Wyo. 1993); Rodriguez v. State, 711 P.2d 410 (Wyo. 1985); Cook v. State, 710 P.2d 824 (Wyo. 1985).
195. Id. at 982.
In a footnote the court acknowledged that "under some circumstances . . . it might be appropriate to make a distinction between being in possession and being armed with a deadly weapon."\(^{196}\) But the court declined to give an advisory opinion by stating what those circumstances might be.

In reaching the conclusion that Britt had "become armed with" the guns that he stole, the court concluded that the legislature had intended to deter "both the use and the possession of a deadly weapon."\(^{197}\) A burglar with a gun "certainly tends to escalate a dangerous situation;" therefore the legislature "intended that any possession of a deadly weapon be discouraged."\(^{198}\)

Although the Wyoming Supreme Court did not describe the circumstances under which theft of a gun would not constitute becoming "armed with" the gun, it may be suggested that the theft of a dismantled gun, whose parts were in a box, might not constitute becoming "armed with" the gun. Thus the burglar would have a complete gun, but not an operable one, and not even anything which would resemble a gun or a simulated gun.

If by theft of a firearm one "becomes armed with" that firearm, can any distinction be drawn in the case of the theft of a simulated firearm? Inasmuch as the statute mentions both deadly weapons and simulated deadly weapons, it evinces legislative concern with the dangers which may arise from possession of what others may take to be a deadly weapon. Certainly a simulated deadly weapon can be used to threaten or menace others. The rationale of Britt extends to simulated firearms.

An animal may be a deadly weapon within the statutory definition. Does this mean that stealing a guard dog (a friendly Doberman or Rottweiler) in a burglary will escalate the crime to aggravated burglary?

3. Knowingly or Recklessly Inflicts Bodily Injury on Anyone

A second manner in which aggravated burglary may be committed is if during the course of committing burglary, the defendant "[k]nowingly or recklessly inflicts bodily injury on anyone."\(^{199}\) Bodily injury is defined

\(^{196}\) Id. at 982 n.1.

\(^{197}\) Id. at 982. In reaching its decision, the Wyoming Supreme Court cited with approval a New Mexico case, *State v. Luna*, 653 P.2d 1222 (N.M. 1982), which concluded that the New Mexico Legislature had intended to deter "both the stealing of guns and the use of firearms during the perpetration of a burglary." 734 P.2d at 982. The Arizona Supreme Court, on the other hand, has held that a *person does not "arm" himself merely by stealing a deadly weapon. See State v. Eastlack*, 883 P.2d 999 (Ariz. 1994) (en banc), and cases cited therein.

\(^{198}\) *Britt*, 734 P.2d at 982.

\(^{199}\) WYO. STAT. ANN. § 6-3-301(c)(ii) (Michie 1988). The use of "on anyone" would seem to include the burglar himself, as if he recklessly injured himself through misuse of some tool, or attempted to kill himself when apprehended. It is, however, unlikely that such a prosecution would
in section 6-1-104(a)(i): "'Bodily injury' means physical pain, illness or any impairment of physical condition." Aggravated burglary convictions have been upheld in Wyoming where the evidence showed that the defendant inflicted bodily injury on another person. Thus in *Johnson v. State*, Johnson broke into the victim's house. "The victim jumped out of bed, pushed appellant and ran toward the bathroom. Appellant grabbed the victim's arms, twisted them behind her back, and threw her face down onto the floor and proceeded to ravish her. Appellant then turned the victim over onto her back and again raped her." While it has not been determined whether sexual intrusion in and of itself constitutes bodily injury within the meaning of the statute, the evidence was that Johnson's attack on the victim produced physical pain.

4. Attempts to Inflict Bodily Injury on Anyone

The third way in which aggravated burglary can be committed is if the defendant, in the course of committing the crime of burglary, "[a]tempts to inflict bodily injury on anyone." This provision could well have been included in the previous subsection, which would have then read: "Knowingly inflicts or attempts to inflict, or recklessly inflicts, bodily injury on anyone." The Model Penal Code, section 221.1(2)(a), combines attempts and infliction of bodily injury in this manner.

V. PROSECUTING THE CRIME OF BURGLARY IN WYOMING

A. Charging Burglary

Prosecutions for burglary may be by information or by indictment. Both an information and an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." It is customary in many counties for crimes to be charged generally, in the language of the statute, without stating any details, and alleging all

occur.


202. Id. at 1284.

203. Id. at 1284-85. See also Wilkening v. State, 922 P.2d 1381 (Wyo. 1996) (aggravated burglary conviction could have been upheld on ground that Wilkening used a deadly weapon, or on ground that he injured the victim with the weapon); Lauthern v. State, 769 P.2d 350 (Wyo. 1989); McDonald v. State, 715 P.2d 209 (Wyo. 1986).

204. See W. R. CR. P. 3(b)(1) and 7(a).
of the variations by which burglary may be committed. Such an information will state that the defendant did, on or about a particular date, in the named county and in the State of Wyoming, "feloniously, knowingly and without authority enter and remain in a building, occupied structure or vehicle, or separately secured or occupied portion thereof with intent to commit a felony or larceny therein." Certainly this method of charging conveys the least possible amount of information to the defendant and to the court. 205 Thus the author has recently seen an information in two counts which charged two burglaries on the same day; both counts were purely in the language of the statute and were identical, without any reference to the place where the burglary was committed, or the identity of the occupant of the structure. In short, from the language of the information there was no way to tell which count referred to which burglary.

Where the information or indictment does not set forth facts sufficient to apprise the defendant of the specific crime charged, the defendant may move for a bill of particulars. Rule 7(c), Wyoming Rules of Criminal Procedure, authorizes bills of particulars for indictments. While the Criminal Rules do not contain any provision permitting bills of particulars in cases initiated by information rather than indictment, the Wyoming Supreme Court has held that bills of particulars are also available when an information has been filed. 206

While it would be better practice for the State to limit the allegations in the information to those which describe the manner in which and the purpose for which the burglary was committed, and to state particular facts relating to the crime, the courts have been reluctant to find any prejudice to defendants when only the statutory language is used. Given the availability of bills of particulars and the widespread prosecutorial practice of opening criminal files to defense counsel, while defendants may be inconvenienced, they probably are not substantially prejudiced by the lack of information and particularity in the information.

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205. The Wyoming Supreme Court has held that a criminal information is sufficient if charged in the words of the statute. Crouse v. State, 384 P.2d 321, 325 (Wyo. 1963). See also Vernier v. State, 909 P.2d 1344, 1351 (Wyo. 1996) (quoting Boyd v. State, 528 P.2d 287, 289 (Wyo. 1974)) ("[W]here the charge follows the statutory language and such language contains all that is essential to constitute the crime, the indictment is sufficient.") (alteration in original). The court has also declared that enough must be alleged to permit the defendant to understand the charge and to prepare his defense. Gonzales v. State, 551 P.2d 929 (Wyo. 1976).

Thus while in Territory v. Conley, 2 Wyo. 331 (1880), the court held that an indictment for burglary had to allege ownership of the premises allegedly burglarized, more recent Wyoming decisions have receded from that position.

All offenses arising out of a burglary episode may be joined in a single information. Thus a charge of burglary may be joined with a charge of larceny or felony which was committed in the burglary.²⁰⁷ Likewise, a charge of conspiracy to commit burglary may be joined with a charge of burglary.²⁰⁸

B. Proving Burglary

1. Sufficiency of the Evidence

The fact-finder must determine that each of the elements of the crime of burglary has been proved beyond a reasonable doubt. On appeal, when the sufficiency of the evidence is challenged, the Wyoming Supreme Court "must determine whether, after viewing the evidence and appropriate inferences in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime to have been proven beyond a reasonable doubt."²⁰⁹

In burglary prosecutions, much of the evidence will of necessity be circumstantial, both as to the defendant's intent and frequently as to whether it was the defendant who entered the structure and committed crimes therein.²¹⁰ Thus, unless the defendant has admitted his purpose for entering or remaining in the structure, any evidence of his intent at the time he entered or remained will rest on inferences and circumstances.

2. Circumstantial Evidence

a. Evidence of Intent

Where the accused has entered without authority and has committed a larceny or felony within the structure, a strong inference arises that the entry was with the intent to commit the particular crime which was in fact committed. In Dreiman v. State,²¹¹ where Dreiman conceded that he had entered the victim's home without authority, but challenged whether it had been proved that he entered with intent to commit larceny, the fact that once inside Dreiman had copied personal and private information concerning the victim, had taken photos, letters and a personal calendar as well as house and vehicle keys, was sufficient to support his intent. In

²¹⁰ Of course where a victim or other witness identifies the defendant, there is direct evidence of his identity. See, e.g., MacLard v. State, 718 P.2d 41 (Wyo. 1986) (accomplice identified defendant as burglar); Rodriguez v. State, 711 P.2d 410 (Wyo. 1985) (victim identified defendant).
Mirich v. State, the court observed that a “reasonable mind recognizes that people do not usually break into and enter the building of another under the shroud of darkness with innocent intent and that the most usual intent is to steal.” Mirich further recognized that “[k]nowledge of what a structure contains, coupled with an attempt to enter it, supports a rational inference of intent to steal whatever is of value within the building.”

The fact that the defendant has entered without authority and concealed himself in the building may also drive the inference that he intended to steal. Moreover, the “fact that nothing was taken subsequent to the unlawful entry does not destroy the inference that the intent to steal existed at the time the entry was effected.”

Evidence of the intent to commit other felonies at the time of entering or remaining arises from the fact that the defendant committed or attempted to commit those crimes. The Wyoming Supreme Court has seldom reversed a burglary conviction for lack of sufficient evidence of intent to commit larceny or a felony. In one such case, Bush v. State, the defendant took his brother and a friend, who had escaped from prison, to an acquaintance’s apartment, where he left them without authority and told them they could take food from the apartment. The evidence was held insufficient to prove that the defendant had intended to commit larceny or a felony within the apartment.

b. Evidence of Commission of Crime by Defendant

A second use of circumstantial evidence to prove burglary is to establish the element that it was the defendant who committed the burglary. Here, there is no direct evidence that the defendant was the person who entered or remained in the structure. While possession of goods stolen from the burglarized structure is by itself not sufficient evidence to sustain a conviction of burglary, possession combined with a small amount of corroborating evidence will suffice. Thus in Newell v. State,

212. 593 P.2d 590, 593 (Wyo. 1979).
213. Id.
214. Leppek v. State, 636 P.2d 1117 (Wyo. 1981). See also Dice v. State, 825 P.2d 379 (Wyo. 1992), where the defendant was found hiding in the rafters above the women’s restroom in Fran’s Starlite Lounge at 3 a.m. The lounge had been entered through a broken window.
where the defendant left Casper shortly after a drug store burglary and was found in Jackson with the property taken in the burglary, the fact of flight and an explanation which the jury could have found false was held sufficient additional evidence.219 In Cantrell v. State,220 tracks of three persons in the snow led from the burglarized Moose Lodge to Cantrell’s home, and a glass jar containing money which was taken from the lodge was found in a room Cantrell shared with two others. On the other hand, in King v. State,221 where the defendant was shown only to be in possession of property taken in burglaries, and to live in the general vicinity, the evidence was held insufficient to prove that defendant had committed the burglaries.

Possession of the property stolen in the burglary is not required where there is other sufficient evidence. Thus in Tageant v. State,222 where tracks led in the snow from the burglarized premises directly to defendant’s trailer, and tools found in the trailer bore paint chips similar to the paint at the burglarized premises, the fact that the cigarettes taken by the burglars were never found did not make the evidence insufficient.

The defendant may also leave some personal possessions behind, which serves to identify him — albeit circumstantially. In Johnson v. State,223 where the burglar entered and sexually assaulted the occupant, defendant’s eyeglasses were later found in the victim’s bedroom.

C. Defenses

1. Intoxication

Perhaps the most common defense raised in burglary cases, apart from a denial of being involved in the burglary, is that of intoxication. In Wyoming, self-induced intoxication is a defense to a criminal charge only to the extent that it may be offered to negate a specific intent which is an element of the crime.224 Burglary is a specific intent crime, in which the

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219. See also Cowell v. State, 719 P.2d 211 (Wyo. 1986), where possession of goods taken in burglary, plus an explanation which the jury could find false was held sufficient evidence to support conviction of burglary.
221. 718 P.2d 452 (Wyo. 1986).
224. WYO. STAT. ANN. § 6-1-202(a) provides:
   (a) Self-induced intoxication of the defendant is not a defense to a criminal charge except to the extent that in any prosecution evidence of self-induced intoxication of the defendant may be offered when it is relevant to negate the existence of a specific intent which is an element of the crime.
specific intent which must be proved is that at the time of entering or remaining in the structure, the accused intended to commit larceny or a felony therein.225

Not all states recognize the intoxication defense. Montana v. Egelhoff,226 decided by the United States Supreme Court in 1996, lists ten states in which the intoxication defense is not recognized, eight by statute. In the Egelhoff decision, the Supreme Court upheld against constitutional attack a Montana statute providing that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of" a criminal offense.227

The intoxication defense has frequently been asserted in Wyoming burglary prosecutions.228 As intoxication is a theory of defense, where there is evidence to support the defense, the trial court is required to instruct the jury thereon.229 However, the court is not required to give an instruction in the exact words requested by the defendant, so long as the defense is specifically and accurately presented to the jury.230

The trial court must, when the evidence justifies giving an instruction on intoxication, also give an instruction on a lesser included offense to which intoxication is not a defense, when requested by the defendant. In Keller v. State,231 where Keller was found at 4 a.m. inside White Eagle Motors, lying under a pickup truck, police officers testified that he appeared to have "passed out," and that they were unable to question him at the police station because he was "unresponsive and apparently unconscious." Keller claimed that he had been

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Section 6-1-202(b) goes on to provide that intoxication is self-induced if "caused by substances which the defendant knows or ought to know have the tendency to cause intoxication and which he knowingly and voluntarily introduced or allowed to be introduced into his body unless they were introduced pursuant to medical advice." WYO. STAT. ANN. § 6-1-202 (Michie 1988).

225. A crime is a specific intent crime if it requires that an act be done in order to effectuate some further intended act or result. Generally, statutes creating specific intent crimes contain the language "with intent to," for example, burglary requires entry without authority with intent to commit larceny or a felony; larceny requires that property be taken and carried away with the intent to deprive the owner. The only significant exception to inclusion of "with intent to" seems to be in first degree murder, where "purposely and with premeditated malice" has been held to mean that the actor must intend to kill the victim.

227. See also State v. Egelhoff, 900 P.2d 260 (Mont. 1995).
“pretty drunk.” At trial for burglary, Keller requested an instruction on the lesser included offense of criminal entry, which is not a specific intent crime, and therefore to which intoxication is not a defense. The trial court refused to give the lesser included offense, but did instruct that intoxication may be a defense to burglary. The Wyoming Supreme Court reversed Keller’s burglary conviction, holding that viewed in the light most favorable to the defendant there was evidence from which the jury might find that he was intoxicated, rendering him guilty of criminal entry at most, and therefore denial of the lesser included offense instruction was error.232

The question whether the defendant was so intoxicated that he could not form the specific intent to commit the crime is properly for the jury. However, where there is uncontroverted evidence from witnesses for both the State and the defendant that the defendant was unable because of intoxication to form the requisite intent, the trial court may withdraw the question from the jury and dismiss the burglary charge.233

2. Unconsciousness

Unconsciousness is recognized in Wyoming as an affirmative defense, where the defendant bears the burden to prove the elements necessary to establish the defense.234 As set out in Polston v. State, decided in 1984, the elements of the defense are: “(a) the actor must be a person with a healthy mind (b) who because of a concussion (c) resulting from a brain injury (d) that is a simple brain trauma with no permanent aftereffects (e) acts in a state of unconsciousness (f) in which his actions are devoid of criminal intent.”235

The defense of unconsciousness was raised in one reported Wyoming burglary prosecution, Settle v. State,236 decided in 1980. Settle tendered an instruction on unconsciousness, which the court gave to the jury; on appeal, he complained that the instruction was erroneous. The Wyoming Supreme Court concluded that any error in the instruction had been invited by the defendant, and could not be raised on appeal. The facts upon which the unconsciousness defense were based are not reported in the decision.

232. Id. at 380. See also Eatherton v. State, 761 P.2d 91 (Wyo. 1988).
236. 619 P.2d 387 (Wyo. 1980).
3. Mental Illness

The defense of mental illness or deficiency is found in the Wyoming statutes, sections 7-11-301 through 7-11-307. Prior to 1983, when the defense was raised, the burden was on the State to prove the defendant’s mental responsibility beyond a reasonable doubt. However, in 1983, in the aftermath of John Hinckley’s acquittal on the ground of insanity in the shooting of President Reagan, the Wyoming Legislature amended the statute to place the burden of proving by the greater weight of the evidence that by reason of mental illness or deficiency he lacked mental responsibility. In Lewis v. State, a prosecution for aggravated burglary committed before the 1983 amendment, but charged after its effective date, the defendant raised the defense of mental illness. An instruction under the new law, placing the burden of proving lack of mental responsibility on the defendant, was given and the jury rejected the defense and found Lewis guilty. On appeal, the Wyoming Supreme Court reversed on the ground that improperly instructing the jury on the burden of proof prejudiced the defendant.

4. Entrapment

The defense of entrapment was raised in the burglary prosecution in LaFleur v. State, where the defendant was apprehended by police as he burglarized the Westridge drugstore. LaFleur contended that the idea of burglary was not the product of the creative activity of the government, but LaFleur had a predisposition to commit the crime.

5. Mistake, Necessity, Duress

While the defenses of mistake, necessity and duress might be available in an appropriate burglary prosecution, no reported Wyoming decisions involve these defenses.

239. 709 P.2d 1278 (Wyo. 1985).
240. 1983 Wyo. Sess. Laws, ch. 179, § 2, provided that the amendment would apply to criminal complaints filed on or after July 1, 1983.
242. Id. at 314.
D. Instructing the Jury

1. Elements Instruction

The jury must be instructed on the necessary elements of the crime charged. In a burglary case, that instruction would include the following:

The elements of the crime of Burglary, as charged in this case, are:

1. On or about the ___ day of __________, 199_
2. In __________ County, Wyoming
3. The Defendant, __________
4. Without authority
5. [Entered] [Remained in] a [building] [occupied structure] [vehicle] [separately secured or occupied portion of a {building} {occupied structure} {vehicle}]
6. With intent to commit [larceny] [the felony of _____] therein.243

The appropriate terms within the brackets, which are charged in the information and supported by the evidence, should be included in the instruction. Other terms which are not charged, or are not supported by the evidence should not be included in the instruction.

This instruction could be structured to include the elements of the intended offense in Element 6. Thus if the intent to commit larceny were charged, Element 6 should include the elements of larceny, and might read: “With intent to steal, take and carry away the property of another with intent to deprive the owner or lawful possessor.”244 If the elements of the intended larceny or felony are not set out in this instruction, then they must be set out in another, accompanying instruction. However it is done, the jury must be fully instructed on the elements of the crime.

It is very important that only those alternative bracketed terms in the foregoing instruction which are supported by the evidence in the case be included in the instruction given to the jury. In too many instances, the elements instruction given to the jury simply restates the content of the information, setting forth, for example, that the defendant “entered or remained in a building, occupied structure or vehicle or separately secured or occupied portion thereof,” and “with intent to commit larceny or

244. The elements of the crime of larceny are set forth in WYO. STAT. ANN. § 6-3-402(a) (Michie 1988).
a felony therein." Such instructions are inadequate, and should lead to reversal of convictions. The instruction must conform to the crime as charged in the information, and must also conform to the evidence which has been introduced.

The problem is well illustrated by *Fife v. State*,\(^{245}\) where the information alleged that Fife had committed aggravated burglary with the intent to steal or with the intent to commit aggravated assault and battery with a dangerous weapon. The jury was instructed that Fife could be convicted if it found that he had entered with either intent. The jury returned a general verdict of guilty of aggravated burglary. The trial court then determined in a post-trial motion that there was not sufficient evidence offered that Fife had entered with intent to commit aggravated assault and battery. On appeal, the Wyoming Supreme Court held that there was no way of knowing from the general verdict whether the jury had found that Fife's intent had been to steal rather than to commit aggravated assault and battery. Since the verdict might have rested on a jury finding of aggravated assault and battery, for which the trial court had determined there was insufficient evidence, the verdict could not stand. As the Supreme Court stated:

If both theories of intent submitted to the jury were sufficiently supported by the evidence, we could uphold the general verdict on the aggravated burglary charge \ldots However, there was insufficient evidence as a matter of law to support the intent to assault element. We cannot uphold a general jury verdict when one of the alternate theories upon which the jury could have relied is in error \ldots If one of the alternate theories submitted to the jury is unsupported by substantial evidence, the general verdict must be set aside unless the court can ascertain that the verdict was founded on a theory supported by substantial evidence \ldots The intent to commit aggravated assault and battery with a dangerous weapon element of the aggravated battery charge was unsupported by substantial evidence and we cannot say with certainty that the jury based its conviction on the intent to steal.\(^{246}\)

Thus under *Fife*, an elements instruction in the general language of the burglary statute, stating "with intent to commit larceny or a felony therein" when there was no evidence to support a finding of intent to commit larceny, would be reversible error. Likewise, if the State is relying upon


\(^{246}\) Id. at 568 (citations omitted).
intent to commit some felony therein, that felony must be specifically stated. Thus if intent to commit sexual assault is relied upon, the instruction must say so. It is not proper to give the jury a roaming commission to pick out which undefined and unspecified felony it might think the evidence supports.

If aggravated burglary is charged, then the elements instruction must conform to the elements of that crime as charged and as supported by the evidence.

2. Definitions

The jury instructions must include definitions of those terms used in the instructions which are defined in the Criminal Code or have a specialized meaning which is different from the common meaning of those terms. Thus the jury should be instructed as to the meaning of "occupied structure" and "vehicle," which are defined in the Criminal Code.247

3. Specific Intent Instruction

Burglary is a specific intent crime, in that the act of entering or remaining in without authority must be done with the intent to accomplish some further end, in this case the commission of larceny or a felony within the structure. It has been traditional in Wyoming to offer an instruction on specific intent, in terms such as:

The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the state must prove that the defendant knowingly did an act which the law forbids, specifically intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

An act or a failure to act is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.248

With all due respect, it is impossible to see how a jury could avoid being confused by an instruction of this nature. The solution is to include as an element of the crime that the act must be committed with the intent to accomplish some further crime or end, and to abandon any separate instruction on specific intent as unnecessary. This is the approach taken by the 1996 Wyoming Pattern Criminal Jury Instructions, and it is consistent with the present law in most other states.

4. Theory of Defense

A criminal defendant has the right to have his theory of defense, if he has one, presented to the jury. A theory of defense is based on some evidence in the case which tends to establish that a recognized legal defense is available to the defendant. When there is evidence from which the jury could find the existence of the defense, then the jury is entitled to an instruction on that defense. Recognized theories of defense include mental illness, intoxication, unconsciousness, self-defense, mistake, duress, necessity, and entrapment. A simple denial by the defendant that he committed the crime is not a recognized theory of defense. When there is evidence to support a theory of defense, the defendant is entitled to have the jury instructed on that theory, and failure to do so constitutes prejudicial error.249

5. Lesser Included Offense Instructions

Where the evidence would support a jury finding that the defendant did not commit the greater offense, but did commit a lesser offense whose elements are all included within the greater offense, either the State or the defendant will be entitled to a jury instruction on the lesser included offense.250 In burglary cases, the lesser included offense most likely to be appropriate is the criminal entry, which shares elements with burglary except for the element of intent to commit larceny or a felony within the premises.

6. Inconsistent Verdicts

There is no requirement that jury verdicts be wholly consistent. Thus where two defendants were apprehended within a building, and the jury convicted one of burglary and the other of the lesser offense of criminal trespass, there was no error, particularly since the evidence regarding both defendants was not identical.251 Nor when the jury acquit-

250. See, for example, State v. Keffer, 860 P.2d 1118, 1134 (Wyo. 1993), and particularly Justice Cardine’s pithy concurrence at 1140.
ted the defendant of attempted sexual assault, but convicted him of burglary with intent to commit sexual assault, was there any inconsistency; one can intend a crime without attempting it. 252

E. Punishment for Burglary


Burglary is punishable by imprisonment for not more than ten years, a fine of not more than $10,000, or both. 253 Aggravated burglary is punishable by imprisonment for not less than five nor more than twenty-five years, a fine of not more than $50,000, or both. 254 In both burglary and aggravated burglary, the trial court must fix a minimum and a maximum term in the sentence. The minimum term can be no more than ninety percent of the maximum term. 255

2. Judicial Discretion

The trial court has discretion to sentence the defendant to any term authorized by law. Sentences to the maximum allowable under the statute have been upheld. In Duffy v. State, 256 which arose before the minimum term was limited to ninety percent of the maximum term, a sentence for aggravated burglary of 24 years, 11 months and 29 days to 25 years was upheld. And in Roose v. State, 257 also prior to the limitation of the minimum term, a sentence for burglary of 9 years, 11 months and 29 days to 10 years was affirmed. As stated in Roose, the Wyoming Supreme Court “will not set aside a sentence which is within the legislatively mandated minimum and maximum terms in the absence of a demonstration of a clear abuse of discretion.” 258

3. Merger and Double Jeopardy

In Lauthern v. State, 259 where the defendant was convicted of both aggravated burglary and aggravated assault and battery, the argument was made that the two offenses merged, so that he could not be punished for both. The Wyoming Supreme Court concluded that the offenses were separate under the Blockburger test, in that each had an element which the

253. WYO. STAT. ANN. § 6-3-301(b) (Michie 1988).
254. Id. § 6-3-301(c).
256. 730 P.2d 754, 758, 761 (Wyo. 1986).
258. Id. at 579.
other did not, and that the legislature had intended to create separate offenses and punishments.\textsuperscript{261}

In \textit{Longstreth v. State},\textsuperscript{262} where the defendant had been acquitted of burglary, but was subsequently prosecuted for and convicted of felony property destruction of the same property on the same occasion, a double jeopardy contention was rejected because under the statutory elements test the crimes were separate and distinct.\textsuperscript{263}

On the other hand, where an aggravated burglary in which a killing occurred was used as the predicate for felony murder, the Wyoming Supreme Court held that multiple punishments for felony murder and the underlying felony are impermissible.\textsuperscript{264}

\section*{F. Similar and Lesser Offenses}

Wyoming recognizes a number of crimes which are related or subsidiary to burglary.

\subsection*{1. Attempted Burglary}

If with intent to commit burglary, a person takes a substantial step toward the accomplishment of that goal, the crime of attempted burglary has been committed. The punishment for attempted burglary is the same as for burglary.\textsuperscript{265}

\subsection*{2. Conspiracy to Commit Burglary}

If one or more persons agree to commit burglary, and one or more of them commits an overt act toward the accomplishment of the crime, a conspiracy to commit burglary has occurred.\textsuperscript{266} The punishment for conspiracy to commit burglary is the same as for the completed crime of burglary.\textsuperscript{267} A person may be convicted of both conspiracy to commit burglary and burglary, if the elements of both crimes are satisfied, and the person may be punished by consecutive sentences.

\begin{itemize}
\item \textsuperscript{260} See Blockburger v. United States, 284 U.S. 299, 304 (1932).
\item \textsuperscript{261} See also Wright v. State, 718 P.2d 35, 37 (Wyo. 1986).
\item \textsuperscript{262} 890 P.2d 551, 554 (Wyo. 1995).
\item \textsuperscript{263} Wyoming has no rule which requires that all crimes arising out of a single act or episode be charged in a single prosecution. \textit{Compare Model Penal Code} § 1.07(2) (1985).
\item \textsuperscript{264} Roderick v. State, 858 P.2d 538, 552 (Wyo. 1993).
\item \textsuperscript{265} Wyo. Stat. Ann. §§ 6-1-301(a), 6-1-304 (Michie 1988).
\end{itemize}
3. Criminal Entry

Criminal entry occurs when a person, without authority, "knowingly enters a building, occupied structure, vehicle or cargo portion a truck or trailer, or a separately secured or occupied portion of those enclosures." Four affirmative defenses to criminal entry are specified: (i) entry was made because of mistake of fact or to preserve life or property in an emergency; (ii) the enclosure was abandoned; (iii) the enclosure was open to the public and the defendant complied with all lawful conditions imposed on access to or remaining in the enclosure; and (iv) the defendant reasonably believed that the owner would have authorized him to enter. Criminal entry is a misdemeanor, punishable by imprisonment for six months and fine of $750. Criminal entry is a lesser included offense of burglary, in that while there is entry without authority, there is no intent to commit larceny or a felony therein.

4. Criminal Trespass

Simple trespass to land or premises was not criminal at the common law. However, trespass has been a crime in Wyoming at least since 1890. Trespass under the Criminal Code requires entry or remaining on or in the land or premises of another (a) knowing it is without authority, or (b) after having been notified to depart or not to trespass. Notice may be given personally or by posting signs. Criminal trespass is a misdemeanor, and punishable by imprisonment for not more than six months and fine of $750.

5. Breaking, Entering or Opening Coin Machine

A person who breaks, opens or enters a coin machine with intent to commit larceny is guilty of a misdemeanor. A coin machine is "a mechanical or electronic device or receptacle" designed to receive a coin, bill or token in exchange for some property or service.

268. Id. § 6-3-302(a). An earlier version of this statute was held unconstitutional in State v. Stern, 526 P.2d 344, 351-52 (Wyo. 1974), as not sufficiently differentiating between innocent and criminally culpable conduct.
269. WYO. STAT. ANN. § 6-3-302(b) (Michie 1988).
270. GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 915 (2d ed. 1983).
272. WYO. STAT. ANN. § 6-3-303 (Michie 1988).
273. Id. § 6-3-305.
This section was intended to make a minor burglary crime out of breaking into coin machines — which in the contemplation of the legislature were probably cigarette, newspaper, soft drink and candy machines, as well as change-making machines in laundries and elsewhere. The definition would also include gasoline pumps which operate automatically on a credit card or other device. The machine may be broken into to steal the merchandise contents of the machine or to steal the money which has accumulated there. It is unclear whether an automatic teller machine (ATM) is a coin machine within the meaning of this section.275

6. Forcible Entry or Detainer

The statute entitled “forcible entry or detainer” provides that a person is guilty of a misdemeanor punishable only by fine “if he violently takes or keeps possession of land without authority of law.”276 On first sight, this statute is puzzling, because while it appears to describe acts involving violence in keeping another from possession of land to which that other is entitled, the punishment is minuscule. It seems to contemplate armed bands seizing the lands of others and then retaining possession by threats or force.

However, an understanding of this statute requires knowledge of its common law background,277 and of the fact that in modern law it is employed as a criminal adjunct to civil remedies to recover land, particularly from tenants who have held over after the expiration of their term.

7. Possession of Burglar’s Tools

The crime of possession of burglar’s tools is unquestionably a preparatory offense. Under section 6-3-304(a), a person who possesses “an explosive, tool, instrument or other article adapted, designed or commonly used for committing or facilitating the commission of a crime involving forcible entry into buildings or occupied structures with intent to use the article possessed in the commission of such a crime” is guilty of a felony punishable by up to three years imprisonment.278

The crime lies not in the nature of the tools themselves, since many ordinary tools are commonly used to facilitate entry into a structure —

275. Of course an automatic teller machine which is an integral part of a building could be considered a separately secured portion thereof, making persons who broke into ATMs subject to prosecution for burglary.
screwdrivers, hammers, crowbars, and so forth. The statute would also include keys, including master keys.

The burglar tool statute is most useful in prosecuting persons who are believed to be engaged in a plan of burglary, but where no sufficient acts have occurred to identify the intended place to be entered, so that no crime of attempted burglary or burglary can be proved. In addition, a person who is apprehended in the course of a determinable burglary, who possesses such tools, can also be charged with possession of burglar's tools. It thus would become a kind of aggravating circumstance, which would permit imposition of additional punishment.

Possession of what appear to be burglar's tools may also give probable cause for searches and arrests. There are no Wyoming decisions under the burglar tools statute.

VI. CONCLUSION

In conclusion, the crime of burglary as recognized and applied in Wyoming is substantially broader than its common-law ancestor. While the Wyoming Supreme Court has been called upon to decide a significant number of cases involving burglary, a number of issues remain undecided. No doubt the passage of time will see at least some of these questions resolved. The Supreme Court has liberally interpreted the burglary statute, in recognition of the high value that society places on privacy and security in homes, businesses and vehicles.