

## Definition of Breaking and Entering

Criminal law is not my gig (at least not for the last couple of decades), but we had a recent incident in our neighborhood that has me curious.

Ex-girlfriend of a neighbor's son, probably high on something, pushed her way into neighbor's house (son tried to close door in her face and she pushed her way in), and once in, she spat on him and knocked a lot of stuff over until the police hauled her away.

So, the question I have is: is it breaking and entering if you push your way into a house when someone is actively trying to keep you out? Some other offense? Trespassing certainly applies, but it seems a pretty tame charge under the circumstances.

Possibly complicating factor: this happened during the daytime. My hazy recollection of the common law of breaking and entering was that it required entry at night for the purpose of committing some kind of felony.

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I'm not sure about Virginia's statutory law, but I think common law would classify it as breaking and entering (if memory serves, the "breaking" part was a very low bar, and opening an unlocked door was sufficient, as long as it was not wide open—so I would think that pushing your way in would also count).

As for the "not at night" part, I think you are confusing B&E with burglary. At common law, burglary was a felony that required entering a residence at night for purposes of committing a(nother) felony (which could have been robbery, rape, murder, arson, etc.).

My recollection is that B&E was something on the order of an "imperfect" burglary—if an act didn't satisfy one of the elements of burglary, it could still be B&E. So if it was not a residence, or not at night, or not for purposes of committing a felony, it could still be B&E.

Brian H. Cole, California

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Breaking and entering isn't usually a stand-alone crime, but rather an element of burglary as you suggested. Criminal trespass is the most likely charge, but some states have adopted new laws to specifically address home invasions which includes the situation you described. Regardless of how it is changed, this type of disturbance is frequently plead as disturbing the peace via plea agreement.

Duke Drouillard, Nebraska

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Not a VA lawyer, either, but I agree with Brian.

Once had a client who was high on PCP, walked into the neighbor's house across the street, took the family's breakfast - a BIG plate of creamed chipped beef, while the family was sitting at the breakfast table - back to his house and ate it before the cops arrived.

Not a burglary because it was daytime and the value of the breakfast didn't rise to a felony.

As I recall, he pleaded guilty to criminal trespass as a misdemeanor (no B&E in PA) AND he had to return the plate.

Russ Carmichael, Pennsylvania

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This is very state law dependent; I had a case where one woman (my client) was sitting in a car and her sister reached in thru the open car window and tried to grab her; she wound up being charged with assault and burglary of a vehicle for reaching in. Don't remember if she was convicted of it.

I'm seeing trespassing and assault at the least, don't know about B&E.

Ronald Jones, Florida

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The "actual" crime may be state law dependent. Not sure if that "fits" a B&E, but you have an assault and battery and possibly a home invasion as well.

Phil A. Taylor, Massachusetts

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Methinks you are confusing breaking and entering with common law burglary (breaking and entering the dwelling place of another at night for the purpose of committing a theft or other crime therein). I did just that in my initial consideration of the question.

I think this is a state specific question and you will need to go to the B&E statute and see if all of the elements of the crime are present if so, it is B&E, if not it is not.

John Martin Miles, Georgia

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My only thought is that if felonies were still punishable by death, we'd see a LOT fewer of them.

Oops, I forgot, no more law, only equity. Where's my binkie anyway?

Art Macomber, Idaho

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Interesting thought Art. As a general deterrent to committing felonies, it historically hasn't had a significant impact, but it is 100% effective at eliminating recidivism.

Duke Drouillard

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Duke, that's the most even-handed treatment of the topic I have ever seen.

Robert Thomas Hayes Link, California

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We have a variety of statutes to cover breaking and entering: Va. Code § 18.2-92. Breaking and entering dwelling house with intent to commit another misdemeanor.

If any person breaks and enters a dwelling house while said dwelling is occupied, either in the day or nighttime, with the intent to commit any misdemeanor except assault and battery or trespass, he shall be guilty of a Class 6 felony. However, if the person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

Va. Code § 18.2-91. Entering dwelling house, etc., with intent to commit larceny, assault and battery or other felony.

If any person commits any of the acts mentioned in § 18.2-90 <<http://law.lis.virginia.gov/vacode/18.2-90/>> with intent to commit larceny, or any felony other than murder, rape, robbery or arson in violation of §§ 18.2-77 <<http://law.lis.virginia.gov/vacode/18.2-77/>>,

18.2-79 <<http://law.lis.virginia.gov/vacode/18.2-79/>> or § 18.2-80 <<http://law.lis.virginia.gov/vacode/18.2-80/>>, or if any person commits any of the acts mentioned in § 18.2-89 <<http://law.lis.virginia.gov/vacode/18.2-89/>> or § 18.2-90 <<http://law.lis.virginia.gov/vacode/18.2-90/>> with intent to commit assault and battery, he shall be guilty of statutory burglary, punishable by confinement in a state correctional facility for not less than one or more than twenty years or, in the discretion of the jury or the court trying the case without a jury, be confined in jail for a period not exceeding twelve months or fined not more than \$2,500, either or both. However, if the person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

Va. Code § 18.2-89. Burglary; how punished.

If any person break and enter the dwelling house of another in the nighttime with intent to commit a felony or any larceny therein, he shall be guilty of burglary, punishable as a Class 3 felony; provided, however, that if such person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

**EVIDENCE ESTABLISHING BOTH ACTUAL AND CONSTRUCTIVE BREAKING AND ENTERING.**

--Where the prosecutrix in a case of breaking and entering with the intent to commit assault and battery testified that she opened her door only about one foot, and thus the defendant had to push the door open additionally in order to enter the apartment, and where she also stated that she expressly told the defendant to remain outside when she went to get him a glass of water, this

testimony established both an actual and a constructive breaking and entering by the defendant. Johnson v. Commonwealth, 221 Va.

872, 275 S.E.2d 592 (1981)

<[.FORCING VICTIM TO OPEN DOOR IS CONSTRUCTIVE BREAKING. --Given the lack of any qualifications, the phrase "to gain entry" in a jury instruction permitted the jury to find defendant guilty of burglary under Section](https://advance.lexis.com/document/?pdmfid=1000516&crd=15d7dc8c-fce5-43e4-bfeb-cdaa891b9d62&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5X99-N7S1-JFKM-61S3-00000-00&pdtocontentnodeidentifier=ACGAAFAACAAE&ecompr=vft_kkk&prid=e62ec4b5-b361-46f7-b54f-b424bd4fa988#></a></p></div><div data-bbox=)

18.2-92

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way of a constructive breaking if defendant forced the victim to open a door no less than if defendant had forced the door open. Lay v.

Commonwealth, 50 Va. App. 330, 649 S.E.2d 714, 2007 Va. App. LEXIS 326

(2007)

<[.Ryan Young, Virginia](https://advance.lexis.com/document/?pdmfid=1000516&crd=15d7dc8c-fce5-43e4-bfeb-cdaa891b9d62&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5X99-N7S1-JFKM-61S3-00000-00&pdtocontentnodeidentifier=ACGAAFAACAAE&ecompr=vft_kkk&prid=e62ec4b5-b361-46f7-b54f-b424bd4fa988#></a></p></div><div data-bbox=)

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Thanks! That Johnson v. Commonwealth case is particularly helpful. I thought the bar for the "breaking" part of B&E was pretty low.

Kevin Grierson, Virginia

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