

14-2228C. Escape; community custody release program; essential elements.¹

For you to find the defendant guilty of escape from a community custody release program [as charged in Count _____]², the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was charged with a [misdemeanor] [felony]³ offense⁴;
2. The defendant was not on probation or parole;⁴
3. The defendant was committed to a judicially approved community custody release program;
4. Under the procedures and conditions of the program, the defendant was required to _____ (*describe the program requirement(s) allegedly violated*);
5. The defendant [failed to comply] [attempted to avoid complying]³ with the requirement to _____ (*describe the program requirement*) [by _____ (*describe the substantial step toward attempting to escape*)]⁵;
6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction is to be used for escape from a community custody release program under NMSA 1978, Section 30-22-8.1 (1999). For escape from a county or municipal jail-initiated prisoner-release program established under NMSA 1978, Section 33-3-24 (1981), use UJI 14-2228A NMRA. For escape from a penitentiary inmate-release program established under NMSA 1978, Sections 33-2-43 to -47 (1969, as amended through 1980), use UJI 14-2228B NMRA.

1 2. Insert the count number if more than one count is charged.
2 3. Use the applicable alternative.
3 4. Essential element, but rarely at issue; *see* Committee commentary.
4 5. For attempts to escape, specify the act(s) allegedly constituting a substantial step
5 toward escape and give UJI 14-2801 NMRA following this instruction. For completed offenses,
6 UJI 14-141 NMRA must be given following this instruction.
7 [Adopted by Supreme Court Order No. 22-8300-033, effective for all cases pending or filed on or
8 after December 31, 2022.]

9 **Committee commentary.** — *See* NMSA 1978, § 30-22-8.1 (1999); *see also* NMSA 1978,
10 § 30-22-8 (1963) (escape from jail); NMSA 1978, § 33-2-46 (1980) (escape from a penitentiary
11 inmate release program); NMSA 1978, § 33-3-24 (1981) (jail operated prisoner release program).

12 The charge pending against the defendant placed in the community custody release
13 program controls the statutory punishment for escape from the program. *See* § 30-22-8.1(B), (C).
14 Because Section 30-22-8.1 does not specify the degree or punishment for misdemeanor or felony
15 escape, misdemeanor violations are punished as petty misdemeanors and felony violations are
16 punished as fourth-degree felonies. *See* NMSA 1978, § 31-18-13 (1993). The fact the defendant
17 faced a felony charge is an essential element of the offense. *State v. Sanchez*, 2019-NMCA-006, ¶
18 10, 458 P.3d 428 (“For a defendant to be found guilty of felony escape from [a community custody
19 release program] the state must show that a felony charge led to the defendant’s commitment to
20 the program.”). *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a
21 prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory
22 maximum must be submitted to a jury, and proved beyond a reasonable doubt.”); *see also State v.*
23 *Radosevich*, 2018-NMSC-028, ¶¶ 15-27, 419 P.3d 176 (applying *Apprendi* and holding that New

Mexico’s tampering with evidence statute cannot be constitutionally applied to impose greater punishment for committing tampering where the underlying crime is indeterminate than the punishment for committing tampering where the underlying crime is a misdemeanor).

The jury should not be told the nature of the predicate charge leading to the defendant’s placement in the community custody release program. *See State v. Tave*, 1996-NMCA-056, ¶¶ 13-18, 122 N.M. 29, 919 P.2d 1094 (concluding that the trial court erred in admitting, as proof of felon in possession charge, the name and details of the prior felony), *overruled on other grounds* by *State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110; *see also State v. Rackley*, 2000-NMCA-027, ¶ 19, 128 N.M. 761, 998 P.2d 1212 (“In an apparent effort to reduce the potential impact of evidence revealing the nature of his prior felonies [in a felon in possession trial], [the defendant stipulated to the fact of a prior, unidentified felony conviction.”).

The Committee believes the requirement that the defendant not be on probation or parole when placed in a community correction release program is jurisdictional; the enabling statute specifically “exclud[es] a person on probation or parole.” Section 30-22-8.1(A).

Section 30-22-8.1’s requirement that the defendant was “lawfully committed” appears in other escape statutes. Section 30-22-8 (escape from jail); NMSA 1978, § 30-22-9 (1963) (escape from penitentiary). Since adoption of corresponding UJI 14-2221 NMRA (escape from jail) and UJI 14-2222 NMRA (escape from the penitentiary, UJI 14-2228 NMRA (escape; inmate-release program, which has been withdrawn and reconfigured in response to *State v. Grubb*, 2020-NMCA-003, 455 P.3d 877, has used the term “committed.” The Committee believes that challenges to prima facie proof of lawful commitment are likely to be rare and that “committed” remains the appropriate term. *See Grubb*, 2020-NMCA-003, ¶ 19 (finding sufficient evidence for retrial where the state had presented a certified copy of an order revoking probation committing the defendant

1 to the penitentiary and granting the defendant furlough—from which the jury “could reasonably
2 conclude that [the d]efendant was committed to the [detention center] for transport to the
3 Department of Corrections” (internal quotation marks omitted)); *see also State v. Starr*, 1917-
4 NMSC-092, ¶¶ 15-16, 24 N.M. 180, 173 P. 674 (finding no error in admitting jail records and
5 commitments showing the prisoners charged with escape had been lawfully committed to the
6 county jail).

7 Unlike a jail prisoner release program under Section 33-3-24, a community custody release
8 program under Section 30-22-8.1 does not require formal adoption by the board of county
9 commissioners; it may simply be a set of defined procedures and conditions, “judicially approved”
10 on a case-by-case basis by the judge setting terms of release. *See State v. Duhon*, 2005-NMCA-
11 120, ¶ 11, 138 N.M. 466, 122 P.3d 50.

12 Escape from a community custody release program includes but is not limited to a day
13 detention or reporting program, an electronic monitoring program, or a community tracking
14 program. *See* § 30-22-8.1(A). The particular release program requirements imposed on the
15 defendant and the defendant’s alleged acts or omissions should be described in ordinary terms,
16 with sufficient specificity to preclude double jeopardy.

17 Section 30-22-8.1(A) does not contain an intent requirement: “Escape from a community
18 custody release program consists of a person . . . escaping or attempting to escape from the
19 community custody release program.” Absent explicit language negating a mental state, the
20 Legislature is presumed not to have intended strict liability. Criminal intent is presumed an
21 essential element, especially where the punishment is a third- or fourth-degree felony. *See State v.*
22 *Nozie*, 2009-NMSC-018, ¶¶ 25-26, 30, 146 N.M. 142, 207 P.3d 1119 (holding that third-degree
23 aggravated assault on a peace officer and fourth-degree battery on a peace officer require

knowledge that the victim was a peace officer); *see also State v. Valino*, 2012-NMCA-105, ¶¶ 15-16, 287 P.3d 372 (applying the *Nozie* requirement to battery on a health care worker where a misdemeanor battery charge is elevated to a fourth-degree felony). The Committee believes that this presumption against strict liability requires the jury to be instructed on general criminal intent using UJI 14-141 NMRA for completed escapes and attempt to commit a felony using UJI 14-2801 NMRA for attempts to escape.

Escape from a penitentiary inmate-release program requires that the prisoner “willfully” failed to return to confinement and also had “the intent not to return.” Section 33-2-46. Neither of these requirements appear in escape from the community custody release program. Section 30-22-8.1. Unlike escape from a penitentiary release program, the courts have not addressed whether the community custody release statute requires proving the defendant’s actions were without excuse or justification. *Cf. State v. Rosaire*, 1997-NMSC-034, ¶ 7, 123 N.M. 701, 945 P.2d 66 (finding that Section 33-2-46’s explicit requirement of willfully “denotes the doing of an act without just cause or lawful excuse” (internal quotation marks and citation omitted)).

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