

14-2229. Failure to appear; bail.

For you to find the defendant guilty of failure to appear as required by conditions of release [as charged in Count _____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of defendant*) was released pending [trial] [an appeal] [a probation revocation proceeding]² in a criminal action related to a [misdemeanor or petty misdemeanor] [felony]² offense on the condition that _____ (*name of defendant*) appear as required by the court;

2. _____ (*name of defendant*) failed to appear as required by the court;

3. The defendant's failure to appear was willful, without sufficient justification or excuse;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

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

2. Use applicable alternative.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.29 NMSA 1978; UJI 14-2229 SCRA; as amended, effective January 1, 1999; as amended by Supreme Court Order No. 22-8300-35, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — See [~~Section 31-3-9~~]NMSA 1978, § 31-3-9 (1999).

1 ~~[Section 31-3-9 NMSA 1978]~~Section 31-3-9,~~[supra]~~ provides that the defendant must
2 willfully fail to appear. The third element of this instruction was added in 1998 to comply with
3 *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66.

4 The pending charge or conviction on which the defendant was released controls the
5 statutory punishment for failure to appear. See § 31-3-9(A) (fourth degree felony), (B) (petty
6 misdemeanor). Whether the defendant was released in connection with a felony proceeding or a
7 misdemeanor or petty misdemeanor proceeding is an element for the jury to determine. See
8 *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any
9 fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a
10 jury, and proved beyond a reasonable doubt.”); see also *State v. Radosevich*, 2018-NMSC-028, ¶¶
11 29-30, 419 P.3d 176 (instructing the district court to sentence for tampering with evidence of an
12 indeterminate offense because the jury did not find beyond a reasonable doubt the level of the
13 underlying offense); *State v. Sanchez*, 2019-NMCA-006, ¶ 10, 458 P.3d 428 (“For a defendant to
14 be found guilty of felony escape from [a community custody release program] the state must show
15 that a felony charge led to the defendant’s commitment to the program.”).

16 The jury does not need to know the specific charge or conviction connected to the
17 defendant’s failure to appear. See *State v. Tave*, 1996-NMCA-056, ¶¶ 14-17, 122 N.M. 29, 919
18 P.2d 1094 (concluding that there was error in admission of the name and details of the prior felony
19 as proof of the charge of felon in possession of a firearm), overruled on other grounds by *State v.*
20 *Tollardo*, 2012-NMSC-008, 275 P.3d 110; *State v. Rackley*, 2000-NMCA-027, ¶¶ 18-19, 128 N.M.
21 761, 998 P.2d 1212 (“In an apparent effort to reduce the potential prejudicial impact of evidence
22 revealing the nature of his prior felonies [in a felon in possession of a firearm trial], [the d]efendant
23 stipulated to the fact of a prior, unidentified felony conviction.”).

- 1 [Amended November 12, 1998; as amended by Supreme Court Order No. 22-8300-035, effective
- 2 for all cases pending or filed on or after December 31, 2022.]