No. COA 22 - 268 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

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 )

 v. ) **From Mecklenburg**

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XAVIER JAMEL UNDERWOOD )

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DEFENDANT-APPELLANT’S BRIEF

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**INDEX**

TABLE OF CASES AND AUTHORITIES v

QUESTIONS PRESENTED 1

PROCEDURAL HISTORY 2

GROUNDS FOR APPELLATE REVIEW 3

STATEMENT OF THE FACTS 3

A. A Man And A Woman Arguing In The Middle Of The Street Were Shot By Two Men Driving By Who Were Allowed To Plead To Manslaughter 3

B. The Shooters And Their Associates Threatened Mr Underwood And His Family From The Time Of The Shooting Through Mr. Phillips’s Trial 5

ARGUMENT 7

**I. DENYING DEFENDANT AN INSTRUCTION ON DURESS BECAUSE HE DID NOT SELF-SURRENDER WHEN GANG MEMBERS CONTINUED TO THREATEN HIS LIFE IF HE TURNED-IN THE SHOOTERS VIOLATED DEFENDANT’S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL** 7

A. Xavier Underwood Had A Reasonable Fear That The Two Men Who Had Just Randomly Fired A Volley Of Shots At An Unarmed Couple Would Turn The Guns To Shoot Him If He Did Not Cooperate 9

1. A Duress Instruction Requires Evidence Of A Well-Grounded Apprehension Of Death Or Serious Bodily Harm 10

2. Substantial Evidence Showed Mr. Underwood Had A Reasonable Apprehension Of Death Or Serious Bodily Harm When The Two Passengers Shot An Unarmed Couple For No Known Reason 11

B. Requiring A Defendant To Self-Surrender In Order To Preserve His Right To A Defense Violates His Constitutional Rights Against Self-Incrimination And To Put On A Defense 16

1. Requiring A Defendant To Surrender And Confess In Order To Preserve The Affirmative Defense Of Duress Violates The Constitutional Right Against Self-Incrimination 16

2. *Henderson’s* Requirement To Surrender Was Based On Inapplicable Case Law Dealing With Prison Escapees, Whose Voluntary Return To Custody Does Not Implicate The Fifth Amendment 18

3. Mr. Underwood Never Reached A Place Of Safety As There Was No Break In The Continuity Of Coercion 19

C. Refusing To Instruct The Jurors On Duress Was Grossly Prejudicial 21

**II. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTIONS TO DISMISS THE CHARGE OF ACCESSORY AFTER THE FACT WHEN THE STATE ADMITTED IT COULD NOT OBTAIN A CONVICTION AGAINST THE PRINCIPALS** 24

A. The State Admitted It Could Not Convince A Jury To Convict The Principals Of First-Degree Murder 26

B. If The Named Principal Is Acquitted, A Defendant May Not Be Convicted Of Accessory After The Fact 28

CONCLUSION 31

CERTIFICATE OF SERVICE AND FILING 32

CERTIFICATE OF COMPLIANCE 32

**TABLE OF AUTHORITIES**

Cases

*Jackson v. Virginia*, 443 U.S. 307 (1979) 30

*Schmerber v. California*, 384 U.S. 757 (1966) 17

*Simmons v. United States*, 390 U.S. 377 (1968) 17

*State v. Arnold*, 329 N.C. 128 (1991) 30

*State v. Canady*, 355 N.C. 242 (2002) 18

*State v. Davis*, 325 N.C. 693 (1989) (2019) 29

*State v. Diaz*, 372 N.C. 493 (2019) 17

*State v. Earnhardt*, 307 N.C. 62 (1982) 30

*State v. Edwards*, 239 N.C. App. 391 (2015) 9

*State v. Etheridge*, 319 N.C. 34 (1987) 26

*State v. Farmer*, 138 N.C. App. 127 (2000) 11

*State v. Foster*, 235 N.C. App. 365 (2014) 18

*State v. Futrell*, 112 N.C. App. 651 (1993) 28

*State v. Harris*, 222 N.C. App. 585 (2012) 28

*State v. Henderson*, 64 N.C. App. 536 (1983) passim

*State v. Jordan*, 162 N.C. App. 308 (2004) 29

*State v. Kearns*, 27 N.C. App. 354 (1975) 10

*State v. Kemmerlin*, 356 N.C. 446 (2002) 17

*State v. Lawrence*, 365 N.C. 506 (2012) 23

*State v. McGee*, 197 N.C. App. 366 (2009) 29

*State v. Miller*, 258 N.C. App. 325 (2018) 11

*State v. Osorio*, 196 N.C. App. 458 (2009) 9

*State v. Robey*, 91 N.C. App. 198 (1988) 25, 29

*State v. Rose*, 323 N.C. 455 (1988) 11

*State v. Shuler*, 378 N.C. 337 2021-NCCSC-15 17

*State v. Smarr*, 146 N.C. App. 44 (2001) 10, 11

*State v. Smith*, 186 N.C.App. 57 (2007) 25

*State v. Watts*, 60 N.C. App. 191 (1982) 19

*State v. White*, 340 N.C. 264 (1995) 17

*State v. Williams*, 362 N.C. 628 (2008) 26

*United States v. Bailey*, 444 U.S. 394 (1980) 19

*Washington v. Texas*, 388 U.S. 14 (1967) 18

Statutes

N.C.G.S. § 7A-27(b) 3

N.C.G.S. § 8-54 8, 16

N.C.G.S. § 14-7 2, 29

N.C.G.S. § 15A-905(c)(b) 9

N.C.G.S. § 15A-1443(b) 23, 30

N.C.G.S. § 15A-1444(a) 3

Rules

Rule 4(a) N.C.R.App.P 3

Constitutional Provisions

N.C. Const. art. 1, § 19 passim

N.C. Const. art. 1, § 23 passim

N.C. Const. Art. I, § 35 8, 25, 30

U.S. Const. Amend. V passim

U.S. Const. Amend. XIV passim

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DEFENDANT-APPELLANT’S BRIEF

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**QUESTIONS PRESENTED**

1. **WHETHER COMPELLING A DEFENDANT TO CHOOSE BETWEEN HIS RIGHT AGAINST SELF-INCRIMINATION AND HIS RIGHT TO AN AFFIRMATIVE DEFENSE VIOLATES FEDERAL AND STATE CONSTITUTIONAL PROTECTIONS?**
2. **WHETHER A DEFENDANT MAY BE CONVICTED OF ACCESSORY AFTER THE FACT TO FIRST-DEGREE MURDER WHEN THE STATE ADMITS IT ALLOWED THE PRINCIPALS TO PLEAD TO MANSLAUGHTER AFTER A JURY TRIAL FOR ONE OF THE PRINCIPALS RESULTED IN A HUNG JURY AND ITS CASE AGAINST THE OTHER PRINCIPAL WAS WEAKER?**

**PROCEDURAL HISTORY**

 On August 21, 2017, Xavier Underwood was indicted on one count of accessory after the fact to a felony under N.C.G.S. 14-7. The case came on for trial at the September 14, 2021 Session of the Mecklenburg County Superior Court, the Honorable Louis Trosch presiding. On September 24, 2021. the jury found Mr. Underwood guilty of accessory after the fact to first degree murder.

 The court found the defendant to be a prior record level II based on two sentencing points, The court found as mitigators that Mr. Underwood committed the offense under some duress, which was insufficient to constitute a defense, but significantly reduced the defendant’s culpability. The court also found as mitigators that the defendant supports his family, the defendant has a support system in the community and the defendant has a positive employment history. The court sentenced Mr. Underwood in the mitigated range for a Class C offense to 59 to 83 months in custody.

 The defendant entered Notice of Appeal in open court. (Tp. 1115)

**GROUNDS FOR APPELLATE REVIEW**

 This is an appeal of right pursuant to the provisions of N.C. Gen. Stats. §§ 7A-27(b) and 15A-1444(a) and Rule 4(a) N.C.R.App.P. from final judgments of conviction by a defendant who pled not guilty and was found guilty of non-capital crimes.

**STATEMENT OF THE FACTS**

 Xavier Underwood sold marijuana. On the evening of June 23, 2016, he received a call and planned to meet with a customer. Zhaymilik Phillips and Jordan Ardrey asked to ride along with Mr. Underwood. As they drove down Tuckasseegee Road, Mr. Phillips and Mr. Ardrey opened fire on a man and a woman who had been arguing in the middle of the street, killing the man and wounding the woman. Mr. Phillips and Mr. Ardrey were arrested and charged with first degree murder. After Mr. Phillip’s jury hung, both he and Mr. Ardrey were given pleas to voluntary manslaughter. Mr. Underwood went to trial on the charge of accessory after the fact to first degree murder.

A. A Man And A Woman Arguing In The Middle Of The Street Were Shot By Two Men Driving By Who Were Allowed To Plead To Manslaughter

 Tammy Hunter, a detective with the Charlotte-Mecklenburg Police Department, responded to a shooting with victims at the 2800 block of Tuckaseegee Road at 12:24 a.m. on June 24, 2016. (Tp. 635) Tony Russell and Quaysean Lane were arguing in the middle of the street when a car drove down the road and opened fire. (Tp. 938) Tony Russell was shot and killed with a 22-caliber bullet that penetrated his lung and heart. (Tp. 846) Quaysean Lane was shot in the right thigh. (Tpp. 679-680) Four long-rifle 22-caliber cartridge cases were recovered at the scene. The autopsy revealed Mr. Russell had been shot with a 22-caliber bullet. Eleven nine-millimeter cartridge cases were recovered. (Tpp. 859, 864) DNA from a 22-caliber magazine recovered at the scene was entered in CODIS, resulting in a match with the DNA profile of Zhaymilik Phillips. (Tpp. 637, 667) A witness gave a statement to officers on April 13, 2017. On April 14, 2017, the two co-defendants were arrested. (Tpp. 686-687) The State gathered conflicting stories about the shooting. No motive was established. (Tp. 1101)

 On August 8, 2017, Detective Bryan Overman obtained a warrant for the arrest of Mr. Underwood based on witness statements and phone records. (Tpp. 687, 695, 706) Information from witnesses indicated Mr. Underwood was driving the car but did not participate in the shooting. (Tp. 711) When questioned, Mr. Underwood explained after customers called, he would drive to various addresses to deliver the weed. (Tpp. 788-789) On the night of the shooting Mr. Phillips and Mr. Ardrey asked to ride with him to a sale. As the two men had called him before to get a ride, he was not surprised when they called that night. (Tp. 792) Mr. Phillips sat in the front passenger seat. Mr. Ardrey sat in the back seat. (Tp. 796) As he drove past the couple arguing in the road, Mr. Underwood heard the two passengers in his car opening fire. He accelerated and drove off. (Tp. 789) Mr. Underwood told the detectives he feared being around the two men after the shooting and felt threatened. The detective thought Mr. Underwood meant that he still felt threatened at the time of the interview. (Tp. 793)

 At sentencing, the court asked the prosecutor what sentences the two shooters had received. The assistant district attorney explained that Mr. Phillips plead guilty to manslaughter and was guilty of possession of a firearm by a felon. He received 72 months minimum to 99 months maximum for the voluntary manslaughter, and 19 to 32 months for the firearm by a felon to be served concurrently. (Tp. 1099) Mr. Ardrey plead guilty to voluntary manslaughter and received 59 to 83 months. Both sentences were in the presumptive range. (Tp. 1100) The State had taken Mr. Phillips to trial. The jury split eight to four. After the jury hung, the plea deals were offered. (Tp. 1096)

B. The Shooters And Their Associates Threatened Mr Underwood And His Family From The Time Of The Shooting Through Mr. Phillips’s Trial

 Xavier Underwood was 21 at the time of the incident, living with his mother and sister in South Charlotte. (Tp. 932) He met Mr. Ardrey and Mr. Phillips in 2016 through a mutual friend. They bought marijuana from him. (Tp. 935) On the evening of June 23, 2016, Mr. Ardrey and Mr. Phillips called to set up a buy. When Mr. Underwood met them, he was headed to the Tuckaseegee area to sell weed. The two men asked for a ride. (Tp. 937)

 As Mr. Underwood drove down Tuckaseegee Road, he saw Mr. Russell and Ms. Lane in the middle of the street arguing. He slowed down to avoid hitting them. As the car approached the couple, Mr. Phillips rolled down the window and started firing. Later that night, Mr. Underwood drove back to Tuckaseegee Road to find out if anyone had been seriously hurt, but by the time he drove back there the area was roped off. (Tpp. 982-983)

 Mr. Underwood was frightened and scared. When he heard the shots, he wanted to get out of there. He felt threatened. He was terrified because he had never been in a similar situation. (Tpp. 939-940) He knew the two men were members of the Avalon Crips. (Tp. 958) He did not go to the police because the Crips knew where his mother and grandfather lived. (Tp. 963) After the incident he kept in touch with the two men because they kept asking if he were going to go to the police. He had to play along with them, because he was still getting threats on his life, his mother’s and his grandfather’s. (Tpp. 976, 978) Mr. Underwood knew the men had killed Mr. Russell and he could be next. (Tp. 979) He was afraid to be seen with the police because he knew the men and what they were capable of doing. (Tpp. 980-981) After Mr. Underwood had been brought into the police station to make statements, Mr. Ardrey and Mr. Phillips learned of his cooperation. The police were not able to stop the gang members from continuing to threaten him. (Tp. 987)

 Mr. Underwood did not go to the police because gang members were threatening his life and his family. The threats continued until Mr. Phillips’s trial in July. Mr. Underwood was subpoenaed for the Phillips trial. He wanted to testify for the State. He came to the courthouse and sat in the corridor from 9:30 a.m to 5:00 p.m. Four men approached Mr. Underwood in the corridor while he waited to be called to testify. They told him they knew he was not going to rat, because if he did they had something for him. (Tpp.951-952)

**ARGUMENT**

I. **DENYING DEFENDANT AN INSTRUCTION ON DURESS BECAUSE HE DID NOT SELF-SURRENDER WHEN GANG MEMBERS CONTINUED TO THREATEN HIS LIFE IF HE TURNED-IN THE SHOOTERS VIOLATED DEFENDANT’S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL**

 Xavier Underwood had good cause to fear for his own life after the two passengers riding in his car opened fire on an unarmed couple arguing in the middle of the street. The fear did not end that night, as the shooters were members of a violent gang. The two shooters and fellow gang members continued to threaten him if he “ratted”. Mr. Underwood was arrested a little over a year after the shooting on a charge of accessory after the fact for first degree murder. Witnesses told law enforcement Mr. Underwood may have been the driver, but he was not one of the shooters. He served notice of a defense of duress and presented substantial evidence of the threats and his fear of death, but during the charge conference the trial court sustained the State’s objection to an instruction on duress. The court based this decision on its interpretation of two cases which contain as a requirement for a duress instruction that an individual self-surrender to law enforcement. This requirement is not generally present in other opinions which discuss duress and is based on inapplicable case law dealing with prison escapees. Requiring a defendant to surrender to preserve his right to an affirmative defense of duress, violates the constitutional and statutory right against compelled self-incrimination. U.S. Const. Amends. V and XIV; N.C. Const. Art. I, Sec. 23; N.C.G.S. § 8-54. Denying Mr. Underwood an instruction on duress when he had provided sufficient evidence to prove to the jury’s satisfaction that he had a reasonable fear that he would suffer immediate death or serious bodily injury violated his constitutional rights to not be compelled to self-incriminate, due process and a fair trial. U.S. Const. Amends. V and XIV; N.C. Const. Art. I, Secs. 19, 23 and 35.

standard of review

 “[T]he trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466 (2009). Thus, the question of whether a defendant is entitled to a jury instruction on the defense of duress presents a question of law and is reviewed *de novo*. *State v. Edwards*, 239 N.C. App. 391, 393 (2015).

**discussion**

A. Xavier Underwood Had A Reasonable Fear That The Two Men Who Had Just Randomly Fired A Volley Of Shots At An Unarmed Couple Would Turn Their Guns To Shoot Him If He Did Not Cooperate

 Defendant filed a notice of the defense of duress pretrial pursuant to N.C.G.S. § 15A-905(c)(b) as follows:

DURESS: the passengers in the Defendant’s vehicle were heavily armed. The Defendant acted under duress in taking the passengers to the location, returning, and not contacting law enforcement.

(Rp. 26) During the charge conference when the court began to discuss where in the jury instructions it should put the duress instruction, the State objected. (Tp. 1002) The State asserted that case law requires a defendant to confess to law enforcement to preserve the right to the affirmative defense of duress. (Tpp. 1002-1003) Defendant responded that the State’s cases assumed the defendant had reached a place of safety, but this was not possible for Mr. Underwood as it is well-documented that many homicides in Charlotte involve retaliation for people who cooperate with the police. (Tp. 1007) Mr. Underwood was under threat for his safety from the time of the shooting through the date of his arrest. (Tp. 1016) Defense counsel noted the State’s cases were outliers as other cases on duress do not require self-surrender. (Tp. 1008) The court agreed with the State and refused to instruct the jury on the affirmative defense of duress. (Tp. 1020)

1. A Duress Instruction Requires Evidence Of A Well-Grounded Apprehension Of Death Or Serious Bodily Harm

The trial court erred by denying Defendant’s request for an instruction on the affirmative defense of duress to the charge of accessory after the fact to first degree murder where there was substantial evidence to support such instruction. Duress is a defense to a criminal charge when duress is “present, imminent or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done.” *State v. Kearns*, 27 N.C. App. 354, 357 (1975). The evidence must show the defendant did not have a reasonable opportunity to avoid commission of the crime without undue exposure to risk of death or serious bodily harm, *State v. Smarr*, 146 N.C. App. 44, 55 (2001).

The elements of duress have been stated as follows: “[i]n order to successfully invoke the duress defense, a defendant would have to show that his ‘actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act.’ Furthermore, a defense of duress ‘cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm.”

*State v. Miller*, 258 N.C. App. 325, 329 (2018), quoting *Smarr*, at 146 N.C. App. 44, 54-55 (2001). “Any defense raised by the evidence is a substantial feature of the case, and as such an instruction is required.” *Smarr* at 54. A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence. *State v. Rose*, 323 N.C. 455, 458 (1988). When the trial court fails to give a requested instruction, the defendant on appeal “must show that substantial evidence supported the omitted instruction and that the instruction was correct as a matter of law.” *State v. Farmer*, 138 N.C. App. 127, 133 (2000).

2. Substantial Evidence Showed Mr. Underwood Had A Reasonable Apprehension Of Death Or Serious Bodily Harm When The Two Passengers Shot An Unarmed Couple For No Known Reason

 The State presented no evidence that Xavier Underwood had any warning of what Mr. Phillips and Mr. Ardrey would do that night. It is unreasonable to posit that Mr. Phillips and Mr. Ardrey had planned to shoot the victims, as how would they know that the couple would be standing arguing in the middle of Tuckaseegee Road shortly after midnight on June 24. When asked by the court for a motive for the shooting, the State responded that no reason for the shooting had been established. (Tp. 1101) Without any evidence that the shooters knew the victims would be standing in the middle of the street and without any evidence showing that the shooters had a reason to fire a volley of bullets at the victims, it cannot be found that Mr. Underwood had prior knowledge that the two passengers would randomly shoot at unarmed individuals.

Once the shooting had begun, Mr. Underwood had no choice but to keep driving. Any attempt to order the two shooters out of his car or just stop driving, when the two had just randomly opened fire at an unarmed couple, would most likely have resulted in his own death. Mr. Underwood testified to his justifiable fear of death:

Q. What did you do personally when you heard the gun shots?

A. I was frightened. I was scared. I wanted to get up out of there.

Q. And from the actions of Joc and Savage, did you, yourself, feel threatened?

A. Yes, sir, very much.

(Tp. 939) In response to the prosecutor’s questions on cross-examination, Mr. Underwood explained after the shooting, the shooters and members of their gang continued to threaten him:

Q. And on June the 30th of 2016, Mr. Ardrey says to you, just asking, bro. Checking on all my brothers. He was checking on you, right?

A. Yes, sir. And I was trying to keep my distance.

Q But you kept talking to him.

A. Yes, sir. Again, I got threatened afterwards, after the fact, so I still had to play along because they was asking me if I’m going to go to the police or not.

(Tp. 976)

Q So from at least May of 2017, you knew that the police wanted to talk to you, didn’t you.

A. Yes, sir, I did. But I didn’t want to be involved with the police. Like I said, I was trying to play it off and play cordial. Like I said, I was still getting threats on my life, my mother’s, and my granddad’s.

Q. But that was your choice. You chose to do that, right? You chose not to go talk to them?

A. Yes, sir. They would have known if I did.

Q. They went to your mom’s place?

A. Yes, sir.

Q. They went to your dad’s place?

A. My grandfather, yes, they know the address.

Q. They tried to catch up with you at the courthouse?

A. Yes, sir, their associates did.

(Tp. 978) Asked why he wouldn’t have felt safe if he went to the police with his mother, his grandfather or a lawyer, Mr. Underwood explained: “I stayed trying to keep everything cool because I knew what they were capable of.” (Tp. 979)

Q. Were you still trying to clear your name when you told them that you never went down to Tuckaseegee?

A. Yes, sir. I was frightened for my life. I was really scared. I didn’t want to come forward. I didn’t want to have any activity with the police or any dealings with the police. Like I said, I know these dudes and what they’re capable of.

Q. You weren’t trying to clear your name when you denied driving a white Crown Vic at first when they talked to you, right?

A. No, sir. Like I told you, I was threatened for my life. I was afraid to. They was in custody and their associates were still coming around sending me threats.

(Tpp. 980-981).

 On re-direct, Mr. Underwood confirmed he had reason to fear the associates of the shooters up until the time of his trial:

Q. And, Mr. Underwood, after you gave those statements to the police, did both Joc and Savage become aware that you had given those statements to the police?

A. Yes, sir.

Q. Were the police able to stop those threats being made to you?

A. No, sir, not at all.

(Tp. 988) When he was subpoenaed to testify at the trial of Mr. Phillips, Mr. Underwood was threatened by gang members as he sat in the corridor waiting to be called.

Q. (MR. BACH) Mr. Underwood, just to go back where we were before that you were under subpoena in July for Mr. Phillips’s trial, and you were mostly seated outside this courtroom; is that right?

A. Yes, sir.

Q. And approximately how many people approached you that were friends of Mr. Phillips?

A. Four individuals.

Q. And did any of those individuals speak to you?

A. Yes, sir.

Q. What did they say to you?

MR. COLE: Objection to what they said.

THE COURT: I’ll admit it only for the purpose of how it caused Mr. Underwood to react and not the truth of the matter asserted. You can answer the question.

THE WITNESS: Yes, sir. They said, “I know you’re not going to rat, is you? If you do, we got something for you.”

(Tp. 952) The individuals followed Mr. Underwood’s sister out to the parking lot. The court sustained the State’s objection to Mr. Underwood testifying to what the individuals said to his sister. (Tpp. 952-953)

 Defendant presented substantial evidence that he acted under duress. Mr. Underwood had no way of knowing the two men would open fire on an unarmed couple, as it seems to have been a motiveless crime. Once he heard the volley of shots he had a reasonable fear that he would suffer immediate death or serious bodily injury if he did not keep driving. Any attempt to order the shooters out of the car would have resulted in his death. He had no reasonable opportunity to avoid doing the act of driving the shooters, as he had no prior knowledge of what the two men would do.

B. Requiring A Defendant To Self-Surrender In Order To Preserve His Right To A Defense Violates His Constitutional Rights Against Self-Incrimination And To Put On A Defense

 Defendant noticed an affirmative defense of duress pre-trial. (Rp. 26). Pursuant to the State’s argument, the trial court ruled an instruction on duress would not be given because Mr. Underwood had not self-surrendered. (Tp. 1023) This requirement to confess to preserve the affirmative defense of duress was added in a 1983 case which found “once the crime was committed under duress and the defendant was out from under Bradley’s coercive influence, the defendant was under a duty to surrender himself and the stolen goods to the police.” *State v. Henderson*, 64 N.C. App. 536, 540 (1983). Requiring a defendant to confess violates the constitutional and statutory right that a defendant not be compelled to be a witness against himself. U.S. Const. Amends. V and XIV; N.C. Const. Art. I, Sec. 23; N.C.G.S. § 8-54. Applying the unconstitutional requirement to the instant case also fails because Mr. Underwood was never “out from under” the threats from the shooters and their fellow gang members.

1. Requiring A Defendant To Surrender And Confess In Order To Preserve The Affirmative Defense Of Duress Violates The Constitutional Right Against Self-Incrimination

 The Fifth Amendment guarantees that an individual shall not “be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V “[T]he privilege protects an accused . . . from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.” *Schmerber v. California*, 384 U.S. 757, 761 (1966); also see, *State v. Kemmerlin*, 356 N.C. 446, 481 (2002) (“A criminal defendant may not be compelled to testify . . .” Our Supreme Court has held that noticing the defense of duress does not forfeit the defendant’s right against self-incrimination: “We hold that when defendant gave pre-trial notice of her intent to invoke an affirmative defense under statute, she does not give up her Fifth Amendment right to remain silent. . .” *State v. Shuler*, 378 N.C. 337, 341, 2021-NCCSC-15. Requiring a defendant to give up his constitutional right against self-incrimination to preserve the defense of duress is contrary to our Supreme Court’s holding in *Shuler*.

 Our Supreme Court in *State v. White*, 340 N.C. 264 (1995) held a defendant cannot be compelled to choose between two constitutional rights:

A defendant cannot be required to surrender one constitutional right in order to assert another. *Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247, 1259 (1968). A criminal defendant has a constitutional privilege against compulsory self-incrimination. U.S. Const. amends. V, XIV; N.C. Const. art. 1, § 23.

*Id*. at 274, see also, *State v. Diaz*, 372 N.C. 493, 503 (2019) (A defendant cannot be required to surrender one constitutional right to assert another). Thus, a defendant cannot be required to confess to law enforcement contrary to the Fifth Amendment in order to be allowed to present his affirmative defense at trial. “[A] defendant has a constitutional right to confront his accusers and witnesses against him, including the right to prepare and present a defense.” *State v. Canady*, 355 N.C. 242, 253 (2002). “[T]he refusal to instruct the jury concerning an affirmative defense is a harsh sanction that implicates defendant’s fundamental right to present a defense at trial.” *State v. Foster*, 235 N.C. App. 365, 382 (2014); also see, *Washington v. Texas*, 388 U.S. 14, 19 (1967) (The right to present a defense is a fundamental element of due process of law.) Requiring a defendant to confess to law enforcement to preserve his right to present a full defense and have the jury consider his evidence, would force the defendant to surrender one constitutional right to assert another contrary to *Simmons*, *White* and *Foster*.

2. *Henderson’s* Requirement To Surrender Was Based On Inapplicable Case Law Dealing With Prison Escapees, Whose Return To Custody Does Not Implicate The Fifth Amendment

The *Henderson* opinion cited to a United States Supreme Court case in support of its addition to the requirements for a duress instruction that the defendant must surrender and confess once he has reached safety. The federal case concerned a prison break-out. The Supreme Court held: “in order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure. . .” *United States v. Bailey*, 444 U.S. 394, 412 (1980) (emphasis added). An attempt to escape from jail is not applicable to the instant case, because there is no question of the right against self-incrimination when an individual who has been convicted and sentenced to prison does not voluntarily return to custody. *Henderson* also cited to a North Carolina case dealing with a prison escapee, *State v. Watts*, 60 N.C. App. 191 (1982). In *Watts*, the defendant had escaped from a prison in New Hanover because of a well-founded fear that he would suffer injury and possibly death at the hands of a Department of Correction officer who worked in the prison. The *Watts* opinion cited to *Bailey* for its holding that an escaped inmate must voluntarily return to custody. *Id*. at 194. Thus, both the federal and the state cases dealt with an escapee returning to custody, not an individual confessing to a crime. As they dealt with convicted prisoners escaping from confinement, neither *Bailey* nor *Watts* implicated the Fifth Amendment protection against self-incrimination. The *Henderson* opinion failed to consider the difference between the constitutional protections afforded pre-trial to a defendant and the non-existent right of an escaped prisoner to remain out of custody.

3. Mr. Underwood Never Reached A Place Of Safety As There Was No Break In The Continuity Of Coercion

 *State v. Henderson* did not deal with a case: 1) in which while riding in the defendant’s car the perpetrators randomly filed a volley of shots at unarmed individuals, demonstrating their willingness to shoot to kill; and 2) the shooters were members of a gang which continued threatening Mr. Underwood and from whom he could not be protected by the police. Instead, the facts in *Henderson* showed that the defendant owed money to a young man and told him he would repay the debt. As Henderson rode in a car with the co-defendants, he learned he and another young man, Robert Shaw, had been chosen to rob a jewelry store. The co-defendants supplied Henderson and Shaw with weapons and a pillowcase for the jewelry. Henderson and the other man were dropped off at the mall. They did not complete the robbery because the store clerk screamed. The other gang members had not accompanied Henderson and Shaw into the mall. This Court found that as Shaw and Henderson went into the mall armed and without escort they were not under duress at the time they demanded the clerk turn over jewelry. “This break in the continuity of the coercion is fatal to the defense because it is evident that the defendant and Shaw had more than a reasonable opportunity to avoid the act without risking death or serious bodily harm.” *Id*. at 540. In the instant case, there was no break in the coercion from the time of the shooting until Mr. Underwood’s arrest. Xavier Underwood had no way “to avoid the act without risking death or serious injury,” as the crime with which he was charged—accessory after the fact—was based on his decision to keep driving the car after the shots were fired. As his two passengers had just opened a volley of fire on an unarmed couple for no discernible reason, the chances that he would have escaped death or serious bodily injury if he refused their orders are slim to non-existent.

C. Refusing To Instruct The Jurors On Duress Was Grossly Prejudicial

As Mr. Underwood told the jurors he drove the two men away from the shooting, he had confessed to one of the elements of accessory after the fact—that he gave personal assistance to the principal to aid in the principal escaping detection. At the time of his testimony, he believed the jury would be instructed on the affirmative defense of duress. Throughout the trial the court understood that an instruction on duress would be given. It was not until the court began considering where to place the duress instruction in the jury charge that the State objected to the charge. Removing this defense from the jury’s consideration only after both the State and the Defense had rested was grossly prejudicial. At a minimum, to comport with due process the State should have raised its objection pre-trial. Neither North Carolina case law in general on duress nor the pattern jury instruction contains the requirement of self-surrender, leaving defense counsel unprepared to counter the State’s argument and show that the added requirement in *Henderson* of self-surrender is unconstitutional.

The importance to Mr. Underwood’s defense of the duress instruction was underscored by the State’s closing argument. The prosecutor found it so critical to his case that he opened his argument on the lack of duress:

 MR. COLE: But guess what, ladies and gentlemen? He doesn’t get the defense of duress. You’re not going to hear Judge Trosch tell you that that’s one of the options for him.

 He tried to change his story to fit duress but it didn’t fit, and so under the law, he doesn’t get it.

MR. BACH: Objection.

THE COURT: Overruled.

MR. COLE: He doesn’t get it. So remember when we asked you to promise that you would hold the other jurors accountable. If somebody says, “Hey, you know, they talked about duress in the beginning, maybe this was duress.” No. That’s off the table.

(Tpp. 1027-1028) After Defendant’s objection was overruled, the prosecutor re-emphasized to the jury that they could not consider duress:

MR. COLE: Let me say it again. Duress is off the table. You cannot consider it. It will not be one of the things that you are instructed about. So please do what we asked you to do, hold those other jurors accountable. If they start talking about duress, you shut that down. You promised you would. Every one of you did that.

(Tpp. 1029-1030) The prosecutor added the jurors should not believe Defendant’s testimony other than his admission that he drove the. (Tp. 1030) It is manifest that the State understood the critical importance of an instruction on duress.

 Failure to give the jury instruction based on the requirement that the defendant self-incriminate to preserve his constitutional right to present an affirmative defense is constitutional error. As Defendant had confessed in his testimony to the element of accessory after the fact that he gave personal assistance to the principal to aid in his escaping detection, robbing him of an instruction on duress only after all the evidence had been presented was grossly prejudicial. The jury should have been allowed to weigh the evidence and decide whether Defendant had met the burden of proving he had acted under duress. “A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.” The burden is on the State. N.C.G.S. § 15A-1443. Given the critical importance of the affirmative defense of duress to Mr. Underwood’s case, depriving him of the jury instruction cannot be found to have been harmless beyond a reasonable doubt.

 If this Court should find defense counsel needed to renew his objection to the court’s decision to not instruct the jury on duress, Defendant raises the issue as plain error. Under the plain error standard this Court must examine the entire record and determine if the alleged error had a probable impact on the jury’s finding of guilt. *State v. Lawrence*, 365 N.C. 506, 516-17 (2012). As Mr. Underwood testified and told the jury he drove the shooters away from the scene, his only defense was duress. Without the duress instruction the jury could not find him to be not guilty. If the jury had been instructed on duress, it would have found that a driver placed in the situation of his passengers firing a volley of shots at an unarmed couple for no reason would fear for his own life and that this fear would remain unabated as long as the shooters and their gang associates continued to threaten his life. The court’s decision to not instruct on duress was based on case law that violates the constitutional right of defendants to not be compelled to self-incriminate. Violation of this bedrock constitutional right is a “fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot be done.” Id. at 516-17. Mr. Underwood must be granted a new trial.

II. **THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTIONS TO DISMISS THE CHARGE OF ACCESSORY AFTER THE FACT WHEN THE STATE ADMITTED IT COULD NOT OBTAIN A CONVICTION AGAINST THE PRINCIPALS**

 The State called Zhaymilik Phillips’s case for trial on July 12, 2021. The jury hung and a mistrial declared. After failing to obtain a conviction on first degree murder, the State offered both Mr. Phillips and Mr. Ardrey pleas to voluntary manslaughter. Both co-defendants plead guilty to voluntary manslaughter. Responding to questions from the trial court, the State explained that after the hung jury, it realized it would not get a conviction for first degree murder for either principal. It offered pleas as an alternative to risking the principals receiving no punishment. According to the State’s answers to the court, if they had re-tried Mr. Phillips he might well have been acquitted. As Mr. Underwood was charged with accessory after the fact to first-degree murder, the admission by the State that it could not prove the co-defendants’ guilt beyond a reasonable doubt to a jury is tantamount to an acquittal, as one jury hung and the State decided a conviction could not be obtained. If the named principal is acquitted, then the accessory after the fact must be acquitted. *State v. Robey*, 91 N.C. App. 198, 208 (1988). As the State could not convince a jury to convict the principals of first-degree murder, the trial court should have dismissed the charge of accessory after the fact. Defendant made motions to dismiss at the end of the State’s evidence and at the end of all of the evidence, based in part on insufficient evidence of first-degree murder. (Tpp. 913, 995) Denying the motions to dismiss violated Defendant's constitutional rights to due process, a fair trial and equal protection of the law. U.S. Const. Amends. V and XIV. N.C. Const. Art. I, Secs. 19 and 35. Defendant’s conviction must be vacated.

standard of review

 This Court reviews the trial court’s denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 67 (2007). When conducting *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-633, (2008). The evidence is viewed in the light most favorable to the state, giving the state the benefit of every reasonable inference. *State v. Etheridge*, 319 N.C. 34, 47 (1987).

**discussion**

A. The State Admitted It Could Not Convince A Jury To Convict The Principals Of First-Degree Murder

 Defense counsel motioned to dismiss the charge of accessory after the fact to first-degree murder at the end of the State’s evidence based on insufficient evidence on the issue of premeditation and deliberation as to the principals. (Tp. 911) The court denied the motion and the Defendant’s renewed motion at the end of all of the evidence. (Tpp. 913, 995) A properly made motion to dismiss for insufficiency of the evidence under Appellate Rule 10(a)(3) “preserves all insufficiency of the evidence issues for appellate review.” *State v. Golder*, 374 N.C. 238, 246 (2020).

The State admitted to the court that it had been unable to obtain a verdict of guilty from a jury on the principals.

So as we went into this trial, with the cases falling apart around us, we persevered. The jury in that case was able to reach a partial verdict, but they weren’t able to reach a verdict on the murder. The split was eight to four. . . . So much of a trial depends on how things pan out, and we did not think we would be as lucky the next time, especially without Mr. Underwood. So as so often happens, we had to make an offer that made us feel sick and [Mr. Phillips] was allowed to plead voluntary manslaughter, not because that’s what it was, but because we were afraid that he would walk free.

(Tpp. 1096-1097). Thus, the State admitted that in its decision-making it found the hung jury to indicate a re-trial would result in an acquittal.

Because Mr. Underwood refused to testify at Phillips’s trial after he was threatened by gang members in the courthouse corridor, the State blamed its inability to obtain guilty verdicts on Mr. Underwood. But the State’s laying the blame on Mr. Underwood is belied by the fact that it had sufficient evidence to arrest Mr. Phillips and Mr. Ardrey before Mr. Underwood was even interviewed[[1]](#footnote-1), based on statements from another witness and DNA evidence tying Mr. Phillips to the shooting. One witness was John Wesley Graham who told detectives that Zhaymilik Phillips was one of the suspects. (Tp. 685)

Q. Was the confirmation from the DNA of Zhaymilik Phillips consistent with what Tran3 [sic] Wesley Graham told detectives about the murder of Tony Russell, that is that Zhaymilik Phillips was one of the suspects?

A. That’s correct.

Q. So at the time of the arrest of Mr. Phillips and Mr. Ardrey you had a witness and a DNA match; is that correct?

A. That’s right.

(Tp. 686) The detective explained that Mr. Graham’s statement was “pretty detailed.” (Tp. 705) Mr. Graham had been injured in an accident, but he testified at Mr. Phillips’s trial and his recorded detailed statement was introduced into evidence. (Tp. 1093) Given the fact that the State had a witness and DNA evidence, while its case may have been stronger if Mr. Underwood had testified, his failure to testify cannot be found to be the only reason the jury in Mr. Phillip’s case could not reach a verdict. It is not clear why the jury in Mr. Phillip’s case did not reach a guilty verdict as juries in other cases have found DNA evidence to be sufficient to reach a unanimous verdict. See e.g., *State v. Futrell*, 112 N.C. App. 651, 668 (1993); *State v. Harris*, 222 N.C. App. 585, 587 (2012). As the State admitted that even with a witness and a DNA match it had been unable to obtain a guilty verdict on Mr. Phillips, the State failed to present sufficient evidence to withstand a motion to dismiss in Mr. Underwood’s case.

B. If The Named Principal Is Acquitted, A Defendant May Not Be Convicted Of Accessory After The Fact

 To prove a defendant is guilty of accessory after the fact, the State must prove: (1) the principal committed the underlying felony, (2) defendant gave personal assistance to the principal to aid in his escaping detection, arrest, or punishment, and (3) defendant knew the principal committed the felony. *State v. Jordan*, 162 N.C. App. 308, 32 (2004). N.C.G.S. § 14-7 does not permit the conviction of an accessory after the fact of a felony committed by a named principal if that principal is acquitted. *State v. Robey*, 91 N.C. App. 198, 208 (1988) If the principal pleads guilty to a lesser included offense, the defendant may be convicted of being an accessory. *State v. McGee*, 197 N.C. App. 366, 367 (2009).

 The circumstances in the instant case are closer to the acquittal in *Robey* than to the guilty plea in *McGee*. The State took Mr. Phillips to trial but was not able to convince a jury to find Mr. Phillips guilty even though it had DNA evidence and a witness. The State believed its case against Mr. Ardrey was even weaker than its case against Mr. Phillips. While generally a plea bargain is not the same as an acquittal, this case can be distinguished in that the State has gone on record admitting that in its opinion it could not convince a jury to convict either Mr. Phillips or Mr. Ardrey of first-degree murder.

 When ruling on defendant’s motion to dismiss, the trial court must consider the evidence in the light most favorable to the State. *State v. Davis*, 325 N.C. 693 (1989). The State is entitled to every reasonable inference to be drawn from the evidence presented. Id. Evidence favorable to the State is to be considered as a whole, and the test of sufficiency to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial, or both. *State v. Earnhardt*, 307 N.C. 62 (1982).

 The trial court should have dismissed the charge of accessory after the fact to first degree murder in this case, as the State had taken the principal’s case to a jury and the jury had not convicted the principal of first-degree murder. After the hung jury, the State offered pleas to manslaughter because in its opinion the principals would have been acquitted if Mr. Phillips had been re-tried and Mr. Ardrey’s case had been taken to trial. The State must provide substantial evidence of each element of a crime in order to survive a motion to dismiss. Given the circumstances that the State did not believe it could obtain a conviction for first degree murder, it failed to present sufficient evidence of the element that the principal had committed the underlying felony. A conviction based on insufficient evidence violates a defendant’s constitutional right to due process under the federal and state constitutions. U.S. Const. Amends. V and XIV; N.C. Const. Art. I, Secs. 19 and 35; *Jackson v. Virginia*, 443 U.S. 307 (1979) A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the error was harmless beyond a reasonable doubt. The burden is upon the State to show the violation to have been harmless. N.C.G.S. § 15A-1443(b). “Where defendant is convicted upon a charge for which there is insufficient evidence, defendant’s federal due process rights have been violated.” *State v. Arnold*, 329 N.C. 128, 140 (1991). In this case, as the State had not been able to obtain a jury verdict convicting principals of first-degree-murder, the State had insufficient evidence of the required element that the principal committed the underlying felony. Accordingly, Mr. Underwood’s conviction for accessory after the fact must be vacated.

CONCLUSION

For the reasons set forth above, Defendant respectfully contends that this Court should reverse her convictions.

 Respectfully submitted this the 12th day of April 2022.

Electronic Filing

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**CERTIFICATE OF FILING AND SERVICE**

 I hereby certify that the original Defendant-Appellant’s Brief has been filed electronically pursuant to Rule 26.

 I further hereby certify that a copy of the above and foregoing Defendant-Appellant’s Brief has been duly served upon Kenzie M. Rakes, Special Attorney General, by email to krakes@ncdoj.gov

 This the 12th day of April 2022.

Electronic Filing

Marilyn G. Ozer

Attorney at Law

**CERTIFICATE OF COMPLIANCE**

 Undersigned counsel certifies that this Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it was prepared using Microsoft Word, Century Schoolbook, 13-point type. The word count, including footnotes and citations, is less than 8750 words, as indicated by Word, the program used to prepare the brief.

 This the 12th day of April 2022.

Electronic Filing

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1. The two co-defendants were arrested on April 14, 2017. (Tp. 687) Mr. Underwood was arrested on August 8, 2017. (Rp. 3) [↑](#footnote-ref-1)