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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID DANIEL HERNANDEZ, Defendant and Appellant.	B275232 (Los Angeles County Super. Ct. No. VA131458)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Affirmed as modified.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stacy S. Schwartz and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted David Daniel Hernandez (appellant) of attempted murder (Pen. Code, §§ 664/187, subd. (a)).[1] It found true the allegations that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and that appellant personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)). In a separate proceeding, the trial court found true the allegation that appellant suffered two prior serious convictions (§ 667, subd. (a)(1)). Appellant was sentenced to a state prison term of 45 years to life as follows: 25 years to life, plus 10 years for violation of section 186.22, subdivision (b)(1) in the commission of a violent felony (§ 186.22, subd. (b)(1)(C)), and 10 years for the serious felony convictions. The trial court stayed the deadly weapon enhancement.

On appeal, appellant challenges his attempted murder conviction on the ground that two undercover deputy sheriffs posed as gang members in his jail cell and coerced his confession by asserting that the authorities had a strong case against appellant, and by implying that they could help him hire a private defense attorney if he told them about the crime. Also, appellant contends—and the People concede—that we should reverse his 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) given that he received a life sentence and is therefore subject to a minimum parole eligibility of 15 years (§ 186.22, subd. (b)(5)). Upon review, we conclude that appellant's confession was not coerced. We modify the judgment to omit the gang enhancement, and to impose the minimum parole eligibility of 15 years provided by section 186.22, subdivision (b)(5). As modified, the judgment is affirmed.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

FACTS

Background

The Pico Viejo gang has approximately 174 documented members, 28 of whom are active. Wagon Wheel is a bar within the gang's territory. The gang's primary activities are attempted murders, violent assaults, robberies, burglaries, identity theft, possession of guns and weapons, and the sale of drugs. Appellant is an admitted member of the Pico Viejo gang, and is known by the moniker "Bossy" or "Boxer." Isaac Galindo, who goes by the moniker "Smiley," is in the same gang. He is a shot caller, i.e., a veteran gang member who makes decisions for the gang. A person may be marked for death or a "hit" if a gang believes he or she is "snitching" or complaining about drugs or crime.

Ricardo Jauregui (Jauregui) and Jose Luis Vargas (Vargas) are long time patrons of Wagon Wheel. They are friends with a woman named Joann Marie Lieras (Lieras). In the beginning of July 2013, Jauregui complained to Vargas about people using drugs at Wagon Wheel.

The attempted murder; Appellant's Arrest

On July 17, 2013, a man with a hoodie approached Jauregui, who was sitting at the Wagon Wheel's bar counter, and struck his head eight times with a hammer. Appellant was arrested for the crime.

Appellant's Conversation with Undercover Officers

In August 2013, Anthony Castro (Castro) and Dillon Navarro (Navarro) were deputies with the Los Angeles County Sheriff's Department assigned to an undercover duty in the Custody Division. Dressed like gang members, they were placed in the jail cell where appellant was being held.

Early on, Castro told appellant that jail officials could not listen to their conversation "when the water's working." Appellant said, "Oh, yeah?" In response, Castro said, "Yeah, . . . it's against our . . . rights for them to listen to us if we're using the restrooms or anything, so if they shut the water off, that means they're listening in the cell." He said if the water was running, "you're good to go." Castro said to appellant, "So this is your first one and you don't have no money in the neighborhood for a lawyer?"

The conversation continued as follows:

"[APPELLANT]: No, I have family.

"[CASTRO]: They'll put up a house or something?

"[APPELLANT]: How much does your lawyer cost?

"[CASTRO]: Well, ours is paid through our [kitty], like our guy runs that. . . . [W]e don't have anything to do with it.

"[APPELLANT]: Even for a hot one?

"[CASTRO]: Yeah. . . .

"[APPELLANT]: What's his name?

"[CASTRO]: The lawyer? Booker, he's a black dude. His name's Booker, he's a black dude, but he works for—. . . he's out of, like, I think like Rancho out there that way, but I mean, you've got to pay him, you know? F***ing, if your neighborhood gets money. There's a lot of good ones out there though. And then try to get a black one. Like, it just looks better.

"[APPELLANT]: Oh, man, they got me here, fool, for . . . attempted murder."

"[NAVARRO]: That's what they told you? [¶]

"[APPELLANT]: Yeah, that this fool told me right now that I'm being charged for attempted murder, like, one of my other homies told me to go to a bar and hit somebody in the head

with a hammer. [¶] . . . [¶] . . . And . . . they got the hammer and . . . they got me [o]n video[.]"

Castro asked if there was "anybody else in the neighborhood there?" Appellant explained: "Yeah, it's a . . . gang bar. We all kick it right there. I was there but . . . I just left[.]" He said there was video that placed him somewhere else. Castro warned appellant to "be careful with that" because "when you start using [an] alibi[,] . . . there's a lot of people . . . and then all they got to do is . . . catch you on the one camera somewhere that puts you there, and then they . . . know that you're lying." Appellant said, "I left, I was at my house, fool, I left that bar . . . and went to somewhere else[.] I was at home where they got me." He added that "they said they found a hammer," but he did not believe it. Navarro asked if appellant's DNA was on the hammer. Castro interjected, "That DNA . . . is no joke, bro." Appellant explained that he "should be good," but said he was "stressed out about attempted murder." Also, he said the police wanted him to "snitch . . . or give them someone[.]"

Continuing on, appellant said the police mentioned "my other homeboy right there," and then "mentioned a lot of information that they shouldn't have had." This prompted Navarro to say, "[L]ittle homie snitching. . . . That's what's going on right there, too." Castro told appellant he needed to get in touch with his family, and that he needed his lawyer.

Later, Castro said, "Look, man, if you were there, and the camera puts you . . . there, then there's nothing you can do." Appellant said, "No, no, no, no—I was there." Explaining further, he said he left 10 or 20 minutes before "the accident" and went to his "homegirl's pad" and a motel. Castro kept warning appellant about lying and saying he was not "there" because the police could use video and prove otherwise. They talked about DNA. According to appellant, the police told him there was DNA on the hammer. Castro thought "they could be holding it," and appellant replied, "Well, he said he was going to talk to me again and he's going to show me everything." After a few more exchanges, Castro said, "[Y]our homie did you dirty."

Appellant asked how long Castro and Navarro were "fighting a murder[.]" Castro said six months, and Navarro said 10 months. Castro explained, "They, uhm, he got him on something about, like, with the evidence, but they didn't process it right, so that's how I beat mine." Appellant asked, "With the same lawyer?" and Castro said, "Yeah, the same lawyer."

Once again, appellant asked for the lawyer's name, and Castro said it was Douglas Booker. As to whether Booker was expensive, Castro said "he's a little up there, but I mean, he does the job right, you know?" Appellant proceeded to talk about how the police did not have a case, and to say there was no video camera. Navarro suggested maybe cell phones would be a problem. Appellant said, "The cell phones, maybe, but I'm going to find out later on today[.]"

Officers escorted Castro away from the cell.[2]

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[2] The transcript of the conversation indicates that an unidentified female and male came to the cell. The male said, "All right, turn around. Step up. . . . Go all the way down the

Referring to Booker, appellant said to Navarro, "I can't say your name? That you recommended me to him?" Navarro gave his permission and said he would get the number when they went to county jail.

Officers returned Castro to the cell, and Navarro said, "Hey, what did they say?" The following conversation proceeded thusly:

"[CASTRO]: We need a lawyer. We need to get a lawyer?

"[NAVARRO]: Huh?

"[CASTRO]: We need to get a lawyer (INAUDIBLE) 'cause that other fool, he kept talking, (INAUDIBLE) walked by (INAUDIBLE) they had a picture on the table and they were just like (INAUDIBLE) this fool's . . . done, 'cause he's . . . smart . . . , we got this fool. Yeah, they had a picture on there. What the hell? [¶] . . . [¶]

"[APPELLANT]: They had a picture of the hammer? [¶] . . . [¶]

"[CASTRO]: . . . I just saw it real quick. . . . [¶] . . . Yeah, but I could hear . . . and they were . . . laughing it up. . . . So, yeah, . . . —and they said they got some people, they had somebody to talk to [and that] means someone's snitching and they have witnesses. [¶] . . . [¶]

"[APPELLANT]: . . . So they had, they had a picture in there?

"[CASTRO]: They had a picture of the . . . hammer. . . ."

At this juncture, a male officer began talking to appellant.

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hall." For several pages, Castro does not appear to be present. Then he seems to return.

"[MALE OFFICER]: I just spoke to homeboy, got the last piece of the puzzle. [¶] . . . [¶] . . . I got all I need to know. I don't need to talk to you anymore, brother. We go to court on this on Wednesday.

"[APPELLANT]: . . . [Y]ou said you were going to pull me out and—

"[MALE OFFICER]: . . . But I don't need it anymore. We got you dead, dead to rights. All right? [¶] . . . Like we talked about earlier. You know what we talked about. What did we talk about?

"[APPELLANT]: That attempted murder charge[?]

"[MALE OFFICER]: I don't need you no more."

After the male officer left, appellant, Castro and Navarro continued talking. Castro said the police had appellant on video, they had the hammer and a snitch, and they had witnesses. Then Castro said, "I'm telling you, homie, it sounds like your homeboy was setting you up for a fall." Appellant again asked if Castro and Navarro could recommend their lawyer. Castro replied, "I could recommend him but he's not going to do [anything] for free[.]" On the heels of that, Castro told appellant, "Don't go with the public defender." Appellant explained that his plan was to hire an attorney so he could "see what everything" was, and then to fire his attorney and then to represent himself. He went on to explain that he had represented himself in connection with a prior case.

Later, Castro suggested if appellant hired Booker, he might advise appellant to take a deal. Castro asked what kind of deal appellant would be willing to take. He said he would take 10 years.

Navarro was escorted out of the cell. When he returned, he indicated that he spoke to his brother on the phone, and that his brother had called Booker. Navarro represented that Booker said he would visit them in county jail that day or the next. The three men proceeded to talk about a variety of topics such as selling drugs. Eventually, Castro told appellant, "[Y]ou can make some money . . . if we get you out." He replied, "[H]ey, you know what fool? Hey—oh man, if you get me out . . . [,] I'll get plugged in and everything, fool." He said he could come up with $5,000. This prompted Castro to say they liked to work with people they could trust. He added that "it sounds like you need to get out to make more money, for us to make more money, 'cause we don't know the rest of your homies in your neighborhood."

The following exchange ensued:

"[CASTRO]: And right now we don't even know who we can trust. And so you're the one we know right now. We might be able to help you. . . . [¶] Seems like they're witnesses that put you there and that's a . . . big deal. . . . [D]o you know of anyone that can take care of those witnesses?"

"[APPELLANT]: No.

"[CASTRO]: They have to be farmed out from our neighborhood, though.

"[APPELLANT]: Yeah. Look, I know—. . .

"[CASTRO]: A $1,000 . . . for the hit.

"[APPELLANT]: That's—but the way it went down, because . . . —

"[CASTRO]: You had a mask?

"[APPELLANT]: Yeah, and . . . the hammer is at my homeboy's pad right now. Right now.

"[CASTRO]: The hammer's at your homeboy's pad?

"[APPELLANT]: Yeah, fool. That's why I was saying, like, . . . how . . . do you—nah. . . . [T]he only thing is probably a camera, fool. That's the only . . . thing.

"[CASTRO]: But what about the witnesses?

"[APPELLANT]: They don't know it was me.

"[NAVARRO]: What about the homies?

"[APPELLANT]: Someone, yeah, someone's probably saying [something]—

"[NAVARRO]: (Talking over)—

"[APPELLANT]: —[B]ut they won't know, like, it's for sure me.

"[CASTRO]: But then how would the camera know it's you?

"[NAVARRO]: That's true too.

"[CASTRO]: Was it, like, I mean if they got you on camera, how, I mean, how covered were you?

"[APPELLANT]: Good, man, like – my hoodie.

"[CASTRO]: You had a hoodie on, too? And you're sure they don't have any of that [stuff]?

"[APPELLANT]: Nothing.

"[CASTRO]: You got rid of all of it?

"[APPELLANT]: I burned everything.

"[CASTRO]: You burned everything?

"[NAVARRO]: Oh, that's good.

"[APPELLANT]: Even, that's what I'm saying, like, like, how did they have the hammer when they can't. Like, literally—

"[CASTRO]: Okay, but, look man, I don't want to disrespect anybody in your neighborhood, all right? You said your homeboy has the hammer. It was left at his house. Who is your homeboy and do you trust him?

"[APPELLANT]: Yeah, I already—it's already burned.

"[CASTRO]: Oh, you burned the hammer too?

"[APPELLANT]: Yeah. All that [stuff].

"[CASTRO]: You sure you saw the hammer burn?

"[APPELLANT]: I was right there. I'm the one that—

"[CASTRO]: You're the one that set it on fire? Then why do you think they have it?

"[APPELLANT]: Exactly. . . ."

They continued to talk about the crime, and Castro suggested there was a snitch. He asked if there was any evidence "out there," and appellant said the Wagon Wheel bartender said the cameras do not work. Castro asked about who might be talking, and said "[t]hose are people you need to get rid of. We can help you with that, if you're out there making money for us, and there's no beef between our neighborhoods. That's the last thing we want."

Castro said the witnesses worried him, and appellant said, "I guarantee you if you could try to put me on your roster of the lawyer. [¶] . . . [¶] I bet you anything he could . . . find a loophole[.]" Appellant went on to say he could help "sew up an area," and explained that he had not used heroin in two months. Castro said, "You can't use it if, if you're working" for us. Castro later said, "We could definitedly do business and we can definitely hook you up with our lawyer, and we can help you out with that, as long as business goes right." Then he said, "But like I was saying, we don't want any . . . [problems] with your case, because it's going to cost us money to help our lawyer out with you. It's going to cost us money out of our pocket so we're getting our money back." Appellant agreed. Castro said, "You're going to work the money off."

Castro said he did not want appellant to lie about his case because it would cost them money and the lawyer could not help appellant if "there's more [stuff] popping up in your case[.]" When asked by Castro, appellant admitted that he burned his clothes and the hammer, and there was no DNA. Queried whether he cleaned his hands after "it happened," he said, "Yeah."

They started talking about selling drugs, and appellant said he had been working in Anaheim for "one of . . . the homies." But according to appellant, that "didn't go so well," and added, "so—I'm mostly like a hitman[.]" Castro said, "We can use that talent too," but then indicated appellant would have to choose between being a hit man and selling drugs. Appellant said he preferred to sell drugs because being a hit man came with consequences.

Castro asked, "Why'd it happen . . . ?" Appellant responded, "They just said, hey, we want this dude f**ked up." He said he had been "out" for two months, and he had a new baby. He said, "[E]verything I was doing, I was trying to do for her, it wasn't even about me no more. It wasn't about me. That's why I couldn't even buy a pair of shoes, fool, 'cause everything I just gave to her." He asked if Castro and Navarro were going to try and rescue him. Castro said he would call Booker and have him send an associate. Castro asked for appellant's booking number. Appellant recited it.

Motion to Exclude Appellant's Jailhouse Statements

Defense counsel moved to exclude the statements appellant made to Castro and Navarro on the ground that they had been obtained through coercion or improper psychological force. In particular, defense counsel noted that Castro and Navarro led appellant to believe they would retain private counsel for him.

The trial court pointed out that appellant made incriminating admissions before the alleged coercive conduct began.

The motion was denied.

Evidence Appellant was at Wagon Wheel; Evidence He was the Assailant

The prosecutor played a portion of the transcript of appellant's conversation with Castro and Navarro for the jury.

Lieras testified that she arrived at Wagon Wheel at about 3:30 or 4:30 p.m. She bought a beer and went to the bathroom. As she exited, she encountered a shirtless young man who was "pumped up" and had a large "Pico Viejo" tattoo on his stomach. He said, "What? What? What? You want some of this?" She told him to get out of the way. Later, Lieras saw the same man drinking beer with three young woman. Smiley "came out and told [the shirtless man], 'Hey, what are you doing? Put your shirt on."

Lydia Gonzalez (Gonzalez), a bartender at Wagon Wheel, started work 5:00 p.m. She saw appellant and Smiley. Appellant told Gonzalez he had gotten a job. Later that evening, Gonzalez saw appellant sitting in Wagon Wheel's back patio. Appellant sometimes came into the bar to buy beer.

At about 8:00 or 8:30 p.m., Lieras was sitting on a bar stool with Vargas to her left and Jauregui to her right. Out the window she could see a man wearing a hoodie. Based on his height and build, she thought it was the same person she had encountered after leaving the bathroom. Right before the attack on Jauregui, Lieras noticed Smiley by the backdoor, and another gang member by the front door. Lieras described Jauregui's assailant as five-foot seven, "maybe" 140 pounds, and wearing a hoodie that covered his face.

At trial, Lieras identified the shirtless man and the man with the hoodie she saw out the window as appellant.

Detective Stephen Valenzuela of the Los Angeles County Sheriff's Department opined that the attempted murder of Jauregui was committed for the benefit of the Pico Viejo gang.

DISCUSSION

I. Appellant's Confession was not Coerced.

"The Fourteenth Amendment of the federal Constitution and article 1, section 15, of the state Constitution bar the prosecution from using a defendant's involuntary confession. [Citation.]" (*People v. Massie* (1998) 19 Cal.4th 550, 576.) Before using a defendant's confession, a prosecutor must prove by a preponderance of the evidence that it was voluntary. (*Ibid.*) A confession is voluntary unless there has been coercive police conduct, i.e., it was obtained through the use of threats, violence, direct or implied promises, or the exertion of improper influence. (*People v. Benson* (1990) 52 Cal.3d 754, 778.) The "'question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne.'" [Citation.] Whether the confession was voluntary depends upon the totality of the circumstances. [Citations.] "'On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review.'" [Citation.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 169.)

When an undercover agent speaks to a suspect, the concerns underlying *Miranda v. Arizona* (1966) 384 U.S. 436 are not implicated. (*Illinois v. Perkins* (1990) 496 U.S. 292, 296 (*Illinois*).) "The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. [Citations.] When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking. [Citation.] There is no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess."

According to appellant, we must reverse because Castro and Navarro secured a confession by conveying a false implied promise that they would help him obtain a private attorney if he told them about the crime. In other words, appellant contends that his confession was involuntary under the totality of the circumstances because his will was overborne by government deception.

Deception does not make a statement involuntary unless it is of a type reasonably likely to procure an untrue statement. (*People v. Williams* (2010) 49 Cal.4th 405, 443 (*Williams*).) The deception used by Castro and Navarro does not qualify. Appellant believed he was talking to fellow cell mates and gang members. As explained by the *Illinois* court, "Where the suspect does not know that he is speaking to a government agent there is no reason to assume the possibility that the suspect might feel coerced." (*Illinois*, *supra*, 496 U.S. at p. 299.) Moreover, Castro

and Navarro never asked appellant to admit the crime. Rather, they merely pressed for assurances that there were no problems with the case. We do not construe that as an implied request for an admission. Even if it could be construed that way, an implied promise to help appellant was not likely to procure an untrue statement because appellant said he could raise $5,000 for a private attorney, he had the option of using a public defender, he indicated he had been incarcerated before, and he explained that his ultimate plan was to fire his attorney and represent himself, as he had done in the past. Further, because Castro and Navarro said they wanted to trust appellant and work with him but thought he might not get out of jail if there were problems with his case, appellant had incentive to assure them he was not guilty. Castro and Navarro's more overt promises were made after appellant had already made inculpatory admissions, and those more overt promises were not likely to lead to an untrue statement. Rather, they were likely to lead to statements consistent with what appellant had already said. We therefore do not perceive any likelihood the deception in this case violated constitutional principles.

Appellant notes that tactics used by undercover agents may, under certain circumstances, amount to coercion. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 288 [due to a credible threat of violence against defendant unless he confessed, his confession was coerced by a jailhouse informant's offer of protection in exchange for defendant talking about his crime].) He contends that *Leyra v. Denno* (1954) 347 U.S. 556 (*Leyra*) provides the light to guide our opinion.

In *Leyra*, the police questioned defendant for several days and nights to no avail. Because the defendant was suffering from a painful sinus attack, a police captain offered to get a physician to help. The defendant was introduced to a psychiatrist. Instead of giving medical help, the psychiatrist used "subtle and suggestive questions" to continue "the police effort of the past days and nights to induce petitioner to admit his guilt. For an hour and a half or more the techniques of a highly trained psychiatrist were used to break petitioner's will in order to get him to say he had murdered his parents. Time and time and time again the psychiatrist told petitioner how much he wanted to and could help him, how bad it would be for petitioner if he did not confess, and how much better he would feel, and how much lighter and easier it would be on him if he would just unbosom himself to the doctor. Yet the doctor was at that very time the paid representative of the state whose prosecuting officials were listening in on every threat made and every promise of leniency given. [¶] . . . [¶] Finally, after an hour and a half or longer, petitioner, encouraged by the doctor's assurances that he had done no moral wrong and would be let off easily, called for [the captain]. The captain immediately appeared. It was then that the confession was given[.]" (*Leyra*, *supra*, 347 U.S. at pp. 559–560.) Subsequently, the defendant gave a formal confession after talking to his business partner and two state prosecutors. (*Id*. at p. 560.)

A New York state court and a lower federal court concluded that though the first confession was the product of mental coercion, the formal confession was voluntary. The United States Supreme Court reversed. It reasoned that the first and second confessions were "simply parts of one continuous process. All

were extracted in the same place within a period of about five hours as the climax of days and nights of intermittent, [and] intensive police questioning. First, an already physically and emotionally exhausted suspect's ability to resist interrogation was broken to almost trance-like submission by use of the arts of a highly skilled psychiatrist. Then the confession petitioner began making to the psychiatrist was filled in and perfected by additional statements given in rapid succession to a police officer, a trusted friend, and two state prosecutors." (*Leyra*, *supra*, 347 U.S. at p. 561.)

Here, prior to appellant making his initial admissions, Castro and/or Navarro said they had a good private lawyer; they warned appellant that lying came with risk; they told appellant that he needed to hire a lawyer; they asked if appellant's DNA was on the hammer; they suggested that an informant was talking to the police about the attempted murder; they said their attorney helped them defeat murder charges; they talked about the possibility that the crime had been captured on video; they said they would give appellant the number for their attorney; they indicated the police had a picture of the hammer and were talking and laughing about how they had witnesses. An unidentified male officer said he had talked to "homeboy," so the police did not need to talk to appellant anymore because they had him "dead to rights." After that, Castro and/or Navarro said the police had appellant on video, and they had the hammer, a "snitch," and witnesses; they again suggested that appellant's "homeboy" was setting him up for a fall; they explained that their lawyer would not represent appellant free; they said their attorney might recommend that appellant take a deal, and they asked him what kind of deal he would accept; they said that their

attorney would visit them in county jail that day or the next; they told appellant he could make some money when he got out of jail; they said they liked to work with people they could trust; they indicated that they "might" be able to help appellant but expressed concern that witnesses could place appellant at the scene of the crime; and they talked about having witnesses killed, and said they could "farm it out" to their neighborhood.

After the foregoing, Castro asked if appellant wore a mask. In response, appellant indicated that he had worn a mask, and gave the location of the hammer. When Castro asked about witnesses, appellant said, "They don't know it was me." He also explained that a camera was no problem because he had been wearing a hoodie. In addition, appellant said he burned everything. Anything discussed by Castro, Navarro and appellant after these initial admissions was simply repetition and clarification of things said earlier.

This is not a case in which a confession was extracted by promises of physical relief from pain or promises of leniency. Thus, *Leyra* is inapposite.

Next, appellant suggests that a reversal is dictated by *People v. Cahill* (1994) 22 Cal.App.4th 296 [police officer's statements amounted to a threat if defendant did not confess, and promise of leniency if defendant did confess] and *People v. Vasila* (1995) 38 Cal.App.4th 865 [same]. But again, this case does not involve a promise of leniency. Nonetheless, appellant suggests that the reasoning in these promise of leniency cases should apply to a case in which an undercover agent promises, or impliedly promises, some type of benefit or reward. There is no case law to support this suggestion, and we decline to create a

new rule. We conclude that the *Williams* test is adequate to protect defendants in the deception context.[3]

II. The 10-Year Gang Enhancement Must be Reversed.

When a defendant violates section 186.22, subdivision (b)(1) in the commission of a felony punishable by life in prison, the defendant "shall not be paroled until a minimum of 15 calendar years have been served." (§ 186.22, subd. (b)(5).) A Three Strikes sentence of 25 years to life qualifies as a life sentence under section 186.22, subdivision (b)(5). (*People v. Williams* (2014) 227 Cal.App.4th 733, 744.) When a defendant is subject to the minimum parole eligibility provided by section 186.22, subdivision (b)(5), it should be imposed. In that situation, it is error for a trial court to instead impose a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). (*People v. Williams*, *supra*, 227 Cal.App.4th at p. 745.) Thus, as appellant argues, and as the People concede, we must reverse the 10-year gang enhancement and instead impose the minimum parole eligibility of 15 years.

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[3] Appellant raises an ineffective assistance of counsel argument if we conclude his trial attorney waived any objection to the voluntariness of the confession. The People concede nothing was waived. We have addressed the merits and need not reach the ineffective assistance of counsel argument.

DISPOSITION

The judgment is modified to omit the 10-year gang enhancement and to impose the 15-year minimum parole eligibility provided by section 186.22, subdivision (b)(5). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.