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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. DAARON LEE HAMMOND, Defendant and Appellant.	B223658 (Los Angeles County Super. Ct. No. NA076870)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark C. Kim, Judge. Modified and affirmed with directions.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Daaron Lee Hammond appeals from the judgment entered following a jury trial in which he was convicted of two counts of attempted murder, three counts of second degree robbery, one count of attempted second degree robbery, and conspiracy to commit robbery. Defendant contends his confession should not have been admitted at trial because it was involuntary and obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602] (*Miranda*). He also argues that the length of his sentence is constitutionally disproportionate. We affirm.

BACKGROUND

About 8:00 p.m. on December 21, 2007, two men wearing hooded sweatshirts and bandanas over their lower faces entered Vera's Market in Long Beach. (Undesignated date references pertain to 2007.) Isela Vera and her 16-year-old nephew David Vera were working that night. One of the men was four to six inches taller than the other one, and one's sweatshirt was a camouflage pattern of black, gray, and white. The men pointed guns at Isela, who was standing by the cash register waiting on her customers, Yesenia Cisneros and Bryan Lopez. Isela smiled at the men because she recognized them as previous customers and thought they were joking. Both men fired their guns at the ceiling. The shorter robber walked around to Isela's side of the counter, pointed the gun at her again, and demanded that she put all of the money from both drawers of the cash register into a pillowcase he had brought into the store. Isela complied, placing about $400 into the bag.

The taller robber approached Cisneros and Lopez, who had moved toward the back of the store, and demanded their money and Cisneros's purse. The shorter robber ran to join the taller robber. Cisneros refused to hand over her purse. Lopez handed one robber $20 and said it was all he had. Lopez then said, "'This can't be real.'" The robber looked at Lopez with a "crazy look in his eyes and said, 'What? What?'" One or both of the robbers then shot Cisneros in the abdomen and Lopez twice in the shoulder. Isela testified that both robbers shot Lopez and Cisneros; Cisneros and David testified the taller robber shot Lopez and Cisneros; and Lopez testified that the shorter robber shot

Lopez and Cisneros. The taller robber then approached David, who was at a second cash register, and asked if he had anything. David emptied his pockets. The taller robber then demanded that David hand over his white tennis shoes. David complied, and both robbers left the store.

At trial and from photographic arrays, David identified defendant as the shorter robber and codefendant Eric Williams as the taller robber who shot Lopez and Cisneros and took David's shoes. David testified that defendant had been a regular customer of the store and had a recognizable brown mark on his cheek. Cisneros testified that the robber who shot her was taller than the other robber and had a scar or mole on his cheek. At the preliminary hearing, she identified Williams as the robber who shot her and Chris Gaither as the robber who took money from the cash register.

From a single photographic array, Isela selected defendant's photograph and the photograph of another man (not Williams or Gaither). At trial, she testified that when she viewed the array she was certain that defendant's photograph was that of the shorter robber and the photograph of the other man might be that of the taller robber. She testified she was sure about defendant because he had been a customer of her store and she recognized his eyes. She was not sure about the man whose photograph she had selected. Detective Mark Sisneros testified that when he showed Isela two photographic arrays, she circled defendant's photo (in position four) and the photograph in position five as possibly depicting of one of the robbers. She said she was more certain about defendant's photograph, but she did not tell Sisneros that she thought the man in position five might be the second robber. Isela identified defendant in the courtroom at trial as the shorter robber. She identified Williams only as a customer, although she had identified him as the taller robber at the preliminary hearing.

The robbers fled in a gray or silver 2003 or 2004 Mustang, in which a driver was waiting. An employee of Vera's Market and his brother followed the getaway car in their own car and alerted another person, who pursued in his own car and wrote down the last three digits of the Mustang's license plate, "824." Using that information, the police

discovered that a silver or gray Mustang with license plate "4MXW824" was registered to Williams.

Cisneros was hospitalized for eight days and required surgery to repair gunshot wounds to her stomach, small intestine, and abdominal wall. The gunshot wound to Lopez's shoulder fractured his collar bone, humerus, and scapula. The crime so traumatized Cisneros that she was afraid to leave her house and stayed home most of the time.

Margaret Bradley testified that Williams, his cousin Gaither, and Joaquin Hamilton lived in her apartment at the time of the crimes. Gaither and Williams arrived at Bradley's apartment around 11:30 p.m. on December 21, and Williams walked in carrying a pair of white tennis shoes.

The police searched Bradley's apartment and recovered a pair of white tennis shoes that David Vera identified at trial as the ones taken from him during the December 21 robbery. The police found a loaded nine-millimeter semiautomatic handgun under the driver's seat of Bradley's car. Ballistics analysis established that that gun fired an expended nine-millimeter casing found inside Vera's Market. An expended .38-caliber bullet was also recovered.

The police searched defendant's home and found a black, gray, and white camouflage-patterned sweatshirt that Lopez identified as matching the shirt one of the robbers wore during the robbery.

Detective Todd Johnson and Detective Buchheim interviewed defendant in custody on the night of December 22. The initial portion of the interview was not recorded. Johnson testified that defendant initially stated that on the night of December 21 he napped from 7:00 p.m. to about 10:00 p.m., then went Christmas shopping at Del Amo Mall with his uncle and a friend. Johnson told defendant that he knew defendant was lying, then Johnson and Buchheim left the room for about 15 or 20 minutes. After the detectives resumed the interview, defendant told them a similar story, with a few details changed, and said he had seen Gaither and Williams, but did not hang

out with them. Johnson again said that he knew defendant was lying, and falsely stated that defendant's fingerprints had been found on the cash register and on the back seat of Williams's car. Johnson and Buchheim then left the room for 10 to 15 minutes. When the detectives returned, Detective Mark Sisneros joined them. Johnson gave defendant a bottle of water and told defendant to tell him the truth. Defendant said, "'Okay. I was there. I was the look-out.'" With defendant's knowledge, Johnson recorded the remainder of the interview, which was played at trial.

In his recorded statement, defendant stated that he had been riding around in Williams's silver Mustang with Williams and Gaither, and they stopped and went into Vera's Market to make a purchase. After they came out, Williams and Gaither proposed robbing the market. Defendant went along with the plan. Gaither was the getaway driver, and Williams and defendant went in to rob the market. Defendant carried a revolver, and Williams had an "automatic." They wore their hoods up and had on cloth masks. When they entered the market, the clerk was smiling at them, showing them a lack of respect, so they fired their guns at the ceiling. A man in the store said defendant's gun was not real, which angered defendant. The man came toward defendant and tried to take his gun. Defendant backed toward the door and fired twice toward the man. Defendant fired a total of three shots inside the store and thought Williams fired once.

Defendant testified that at the time of the robbery, he was 16 years old and had been a member of the Young Foundation Crew set of the Insane Crips gang for a year or two as of the date of his arrest. Gaither was a member of the same gang set. Defendant insisted he did not hang out with other members of the gang while they committed crimes, and he was not obligated to commit crimes for the gang. But younger members of the gang were expected to comply with the directives or requests of older gang members or risk discipline. On the night of December 21, Gaither phoned defendant twice and admitted robbing a store with Williams and shooting two customers on the way out. Gaither told defendant to "take the rap for the shooting" because defendant was a juvenile and would probably just go to camp, whereas Gaither was 19 and might get a

life term. Defendant agreed to confess to the crimes because he was concerned that if he refused, the gang would harm him or his family. Gaither's family was a notorious, violent family involved in the Insane Crips gang. When defendant was arrested and questioned, he repeatedly told them he did not commit the robbery, which was the truth. He asked to speak to his grandfather and his father, and an officer said, "'Well, you know your grandfather could be held accountable for your actions, so we could throw him in jail, if you don't want to cooperate.'" Eventually, defendant falsely confessed, using the facts about the crimes that Gaither and the police had given him. Defendant explained that he implicated Gaither in his statement to the police because the police told him Gaither had "already admitted to those two things," and defendant "took the rap for the more serious charge." Defendant explained that he could testify truthfully at trial because his family had moved away and Gaither "already has time for something."

Defendant testified that a week before his testimony, Williams showed defendant a letter in Gaither's handwriting, and defendant took it away from Williams. According to questions by defendant's attorney, the letter said, "'I am about tired of Hammond telling people he is not taking the blame for me and he better not be telling on me.'" It also said, "'Tell 3 [*sic*] keep my name out of his mouth . . . and don't try telling on me. If he does cuz no west [*sic*] up.'" Defendant said "no west up" meant that he would know "what's up" if he did not "take the rap." The letter also said, "'So keep C.G. out his [*sic*] mouth, and he better hope they don't ever give us the same court date because I'm a [*sic*] punch . . . him out.'" Although the letter was marked for identification and defendant testified about its contents, it was not admitted in evidence.

Defense gang expert Dr. James Shaw testified that "older gang members occasionally get younger gang members to accept the rap for a crime that they didn't commit." A young gang member who refused a demand to do so might be beaten or even killed.

Defendant's grandmother testified that defendant's mother partially abandoned him, he was not violent and, as far as she knew, was not in a gang. Defendant always wanted to please other people and obtain their approval and love.

Defendant was about five feet five inches or five feet six inches tall at the time of trial, and probably a little shorter at the time of the crime. When Williams was booked, he reported his height as five feet ten inches. Defendant admitted he was shorter than Williams and Gaither.

Defendant was tried as an adult, along with Williams, with a separate jury for each. Gaither accepted a plea offer and pleaded guilty to one count of second degree robbery and one count of attempted murder seven months before Williams and defendant went to trial. He refused to testify, but was shown to both juries.

The jury convicted defendant of two counts of attempted murder, three counts of second degree robbery (of Lopez, Isela, and David), one count of attempted second degree robbery (of Cisneros), and conspiracy to commit robbery. With respect to each offense except conspiracy, the jury found that defendant personally used and fired a gun (Pen. Code, § 12022.53, subds. (b), (c); undesignated statutory references are to the Penal Code), but it did not find that the attempted murders were willful, deliberate, and premeditated, or that any of the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang. The court sentenced defendant to 38 years in prison, consisting of the high term of nine years for attempting to murder Cisneros, plus 20 years for the section 12022.53, subdivision (c) enhancement applicable to that charge, plus a consecutive subordinate term of nine years for attempting to murder Lopez and the section 12022.53, subdivision (c) enhancement applicable to that charge. The court stayed the sentence on the conspiracy count and imposed concurrent sentences on the four remaining counts.[1]

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[1] Defendant's request for judicial notice filed on April 8, 2011, is denied.

DISCUSSION

1. *Pitchess* motion

Codefendant Williams filed a motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, seeking discovery information pertaining to complaints against Detectives Todd Johnson, Mark Sisneros, or Hector Gutierrez, alleging a variety of acts, such as excessive force and racial prejudice. Defendant joined in the motion. The trial court granted the motion with respect to allegations of the use of force or fear to coerce admissions or confessions. The court conducted an in camera review of complaints produced by the custodian of records for the three detectives. It found no relevant complaints against any of them.

Defendant requests that this court review the record of the in camera proceedings to determine whether the trial court ordered disclosure of all responsive material. We have done so and determine that the trial court made a proper and sufficient record (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229), but there were no documents alleging the use of force or fear to coerce admissions or confessions.

2. Admissibility of defendant's confession

In the trial court, defendant sought to exclude his confession on the ground that it was obtained in violation of *Miranda, supra,* 384 U.S. 436, in that the warnings required by *Miranda* were not given and he invoked his rights by asking to speak to his father.

On appeal, defendant contends that his confession was not only inadmissible because it was obtained in violation of *Miranda,* but also because it was involuntary.

a. Proceedings in the trial court

At the evidentiary hearing on the motion to exclude, Detective Johnson testified that defendant was arrested near his home around 10:00 p.m. on December 22 and taken to the police station, where he was interviewed in the gang division offices located on the fifth floor. Detective Buchheim was present with Johnson throughout the interview, and Detective Sisneros arrived later. The entire interview lasted about 90 minutes, including several breaks. After talking to defendant for about 40 or 45 minutes, the detectives

began taping the interview. (At the start of the recorded portion of the interview, Detective Sisneros stated it was 8:35 p.m., and at the end he stated the time was 8:46 p.m.) At one point, the detectives gave defendant a bottle of water.

Johnson testified that before he began questioning defendant, he read the *Miranda* advisements to defendant from a card. This occurred before the detectives began taping the interview, and defendant was not asked to sign a *Miranda* advisement and waiver form because the detectives had run out of forms. Johnson testified, "I asked him if he understood these rights, he said 'Yes.' I asked him, when I talked to him, he said, 'Yes,' and we began the interview." No one presented evidence of an express waiver or of defendant's statements in the unrecorded portion of the interview.

Johnson did not recall defendant asking for his father, and no one told Johnson that defendant had previously asked to speak to his father. At some point, someone else informed Johnson that defendant's father was downstairs. Johnson neither threatened to arrest defendant's father or other relatives nor made any other threats in order to coerce a statement from defendant.

Defendant testified at the hearing that five police officers arrived and arrested him on the corner near his home. He asked to speak to his grandfather, who was in the house, but the officers did not let him. Before being questioned at the station, defendant asked Johnson if he could speak to his father. Johnson did not respond. The police never advised defendant of his rights under *Miranda*. Defendant testified that he later heard his father's voice over a loudspeaker and again asked to speak to his father, "but nobody responded to me." Defendant testified that Johnson was not present at that time, but he did not testify that any other officer was present to hear his request or that he made any statement to police after requesting to see his father.

Defendant's father testified at the hearing that when he learned on December 22 that defendant had been arrested, he went to the police substation at Pacific and 20th Street and asked to speak to his son. The police said he could not do so. Defendant's father heard his own voice being projected through a speaker and thought defendant

heard it, too. Asked on cross-examination how he could know what had been heard on the fifth floor of the building, defendant's father clarified that the substation he went to was in a single-story building.

In the course of the parties' arguments on the motion, the trial court noted that defendant had testified that he had not been *Mirandized*, and stated, "So that is a credibility call." Defense counsel agreed. The court continued, "And if the court rules that [defendant] is not credible when he says that, then everything along with it, other claims, the credibility also attaches. The court can either reject it or accept it because it makes sense. That's the reason I asked you about credibility call [*sic*] relating to *Miranda* statements. So you have not addressed that issue."

Defense counsel responded, "Well, [defendant] has testified, based upon his recollection two years ago, he wasn't *Mirandized*. [¶] . . . [¶] . . . And I understand. I understand that this officer indicates he was *Mirandized*, though he has presented no physical documentary evidence to support the claim. So, I mean, obviously, I believe my client was credible, but I analyze the case differently. Even if he was *Mirandized*, but he has also asked to see his parents, I believe under the case law, all questioning has to cease."

The court opined that defense counsel did not understand the court's point and explained, "This is my point. If his claim is, two years after, that I was not *Mirandized*, and if the court concludes that statement, after two years of this arrest he makes that claim for the first time, if that is the case and the court finds that that particular statement is not credible, then everything he says about what happened to him on the night or on the day of November 22nd, 2007, also brings the question of credibility."

After additional argument by the parties, the trial court denied the motion to exclude defendant's confession. It stated, "It does come down to credibility issue [*sic*] . . . . [¶] . . . [Y]our client's father testified that he came to the police station when he found out that his son was arrested. He went to the first floor. There was basically debate as to how many floors there are at Long Beach Police Department, but he said he

went to the first floor, right? And he wanted to speak to someone who was in charge, that he wanted to have access to [defendant]. And I believe that. However, the law is clear there is no requirement by Long Beach Police Department to provide access to his son. [¶] Number two, when your client wants access to his father, that comes into play, if it is plausible. [¶] The reason I ask you to address the two issues, and I broke it down to *Miranda* rights, that number one, he was never advised of his *Miranda* rights, if the court finds his testimony to be credible, then the whole statements are stricken or not going to be allowed. [¶] Detective Johnson states that he did give him his advisement. In fact, there is some corroboration because the co-defendant, Mr. Williams, was interviewed not that long before Mr. Hammond. In fact, in that situation Detective Johnson did use an admonition form. Detective Johnson's explanation why no such form existed for your client is because he indicated he had run out of form [*sic*]. Why would he ask defendant Williams to waive his rights in writing and yet not your client? I believe Detective Johnson's reason for that is credible. [¶] But I find your client's testimony incredible when he says that he was able to hear his father's statement that he was asking for his client [*sic*]. And the reason is pretty simple. His father is on the first floor. There is no evidence to contradict that. [Defendant] is on the fifth floor in the gang area in the interview room. For him to hear from the first floor what his father was saying to where he was, well unless he had supernatural talent it would be impossible. Therefore, I don't buy that particular testimony. [¶] And therefore, because that testimony is incredible, his statement about not being provided with *Miranda* warning [*sic*] is also not credible. Therefore, motion to strike and not allow his testimony [*sic*] to come in is denied."

b. *Miranda* violation

Before interrogating a person in custody, the police must warn the person that he or she has a right to remain silent, that any statement the person makes may be used as evidence, and that the person has a right to the presence of retained or appointed counsel.

(*Miranda*, *supra*, 384 U.S. at p. 444.) Statements obtained in violation of this rule may not be used to establish guilt. (*Ibid*.)

A suspect may knowingly and intelligently waive these rights following advisement and an opportunity to exercise them. (*Miranda*, *supra*, 384 U.S. at p. 479.) Such a waiver may be either express or implied, but it must be voluntary, i.e., the product of a free and deliberate choice, and made with a full awareness of the nature of the right waived and the consequences of such a waiver. (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135]; *North Carolina v. Butler* (1979) 441 U.S. 369, 373 [99 S.Ct. 1755].) In determining whether these criteria are met, the totality of the circumstances must be considered, keeping in mind the particular background, experience and conduct of the suspect. (*Burbine*, at p. 421; *Butler*, at pp. 374–375.) Although an implied waiver may not be inferred from mere success in obtaining a statement (*Miranda*, at p. 475), "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, and accused's uncoerced statement establishes an implied waiver of the right to remain silent" (*Berghuis v. Thompkins* (2010) 560 U.S. __, __ [130 S.Ct. 2250, 2262] (*Thompkins*)). The state must demonstrate the validity of the waiver by a preponderance of the evidence. (*People v. Williams* (2010) 49 Cal.4th 405, 425.)

The totality of circumstances approach also applies to waivers by minors. (*Fare v. Michael C.* (1979) 442 U.S. 707, 725 [99 S.Ct. 2560]; *People v. Lessie* (2010) 47 Cal.4th 1152, 1167.) These circumstances include the minor's "age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." (*Fare*, at p. 725.) A minor's request to speak to a parent or someone else may be deemed an invocation of the right to silence "if the totality of the relevant circumstances demonstrated that [the minor's] purpose in asking to speak with [a parent] was to invoke his Fifth Amendment privilege." (*Lessie*, at p. 1170.) "[T]here is no presumption that a minor is incapable of a knowing, intelligent waiver of his rights." (*In re Eduardo G.* (1980) 108 Cal.App.3d 745, 756.) "'"Neither a low I.Q. nor any

particular age of minority is a proper basis to assume lack of understanding, incompetency, or other inability to voluntarily waive the right to remain silent under some presumption that the *Miranda* explanation was not understood."'" (*People v. Lewis* (2001) 26 Cal.4th 334, 384 (*Lewis*).)

Miranda requires that the police immediately terminate an interrogation if the accused indicates at any time prior to or during questioning that he wishes to remain silent or to speak with an attorney. (*Miranda*, *supra*, 384 U.S. at pp. 473–474.) Whether a suspect has actually made a post-waiver invocation of his or her right to silence or counsel is an objective inquiry: Invocation requires that the suspect unambiguously articulate his desire to remain silent or have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to silence or counsel. (*Thompkins*, *supra*, 560 U.S. at p. __ [130 S.Ct. at p. 2260]; *Davis v. United States* (1994) 512 U.S. 452, 459 [114 S.Ct. 2350]; *People v. Nelson* (2012) 53 Cal.4th 367, 379–380.)

We independently review a trial court's ruling on a motion to suppress a statement under *Miranda.* (*People v. Waidla* (2000) 22 Cal.4th 690, 730.) But in doing so, "we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence." (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.) With respect to conflicting evidence, "'we must accept that version of events which is most favorable to the People, to the extent that it is supported by the record.' [Citation.]" (*Lewis*, *supra*, 26 Cal.4th at pp. 383–384.)

In addition, in determining whether the trial court erred, we are limited to considering the evidence before the court when it ruled upon the motion to exclude the confession, not evidence produced at a later date. (*People v. Welch* (1999) 20 Cal.4th 701, 739.)

The trial court found that Johnson properly advised defendant of his rights pursuant to *Miranda*. This finding was supported by Johnson's testimony, which the trial court found credible. We necessarily accept this finding.

Nothing in the evidence at the suppression hearing shows an express waiver of rights by defendant. The trial court implicitly found an implied waiver, and substantial evidence supports that finding. Johnson testified that after he advised defendant pursuant to *Miranda*, he asked if defendant "understood these rights," and defendant said, "'Yes.'" Although defendant was a 16-year-old high school student who apparently had had no prior contacts with the criminal justice system, neither his testimony at the suppression hearing nor any other evidence suggests that he was either unable to understand, or did not understand, his Fifth Amendment rights or the consequences of waiving those rights. A review of the recorded portion of his confession reveals that he was articulate and intelligent. He understood each question put to him and responded appropriately and without hesitation, albeit unenthusiastically. Defendant did not testify at the hearing that he invoked his right to silence or counsel, that the police made threats, wore him down, or otherwise coerced him into talking. In contrast, Johnson testified that he made no threats of any type. We need not determine the significance of defendant's request to speak to his father because we must accept the trial court's implicit finding—which is supported by substantial evidence—that defendant made no such request.

Accordingly, we conclude that defendant implicitly waived his rights by giving an uncoerced statement after acknowledging that he understood those rights. To the extent defendant claims that the length of the interrogation was coercive, we note that, according to Johnson's uncontradicted testimony, the entire interview, including breaks, was 90 minutes, and the unrecorded portion consisted of about 40 to 45 minutes of talking. The recorded portion appears to have been only about 11 minutes long, as shown by the statements of Detective Sisneros noting the time of day at the beginning and end of the recorded session. "[T]here is no authority for the proposition that an interrogation of this length is inherently coercive." (*Thompkins*, *supra*, 560 U.S. at p. __ [130 S.Ct. at p. 2263] [three-hour interrogation].)

Finally, we conclude that there was no post-waiver invocation of rights by defendant. The only possible basis for such an invocation was defendant's testimony

regarding a second request to speak to his father, but the trial court implicitly found defendant's testimony on this point was not credible. Even if we were to credit defendant's testimony and assume an officer heard his request, it does not appear to have been an unambiguous articulation of a desire to remain silent or have counsel present. (*Thompkins, supra*, 560 U.S. at p. __ [130 S.Ct. at p. 2260]; *Nelson, supra*, 53 Cal.4th at pp. 376–377.)

Accordingly, the trial court did not err by denying defendant's motion to exclude his confession on the theory it was obtained in violation of *Miranda*.

c. Voluntariness

Defendant did not raise the issue of the voluntariness of his confession in the trial court. He raised only a *Miranda* violation, which failed to preserve his due process claim. (*People v. Cruz* (2008) 44 Cal.4th 636, 669.)

Even if defendant had not forfeited his voluntariness claim, it is not supported by the record. At the hearing on the *Miranda* motion, the only evidence arguably relevant to defendant's involuntariness claim was that Johnson admitted repeatedly telling defendant that he thought defendant was lying. (Defendant's testimony at trial that the police said they could arrest his grandfather was not before the court when it ruled upon the *Miranda* motion and cannot be considered in determining whether the trial court erred in denying the motion to exclude defendant's confession.) Defendant did not testify that this had any effect on him, nor did he testify about the existence or effect of any other potentially coercive tactics or circumstances. The police are prohibited from using only those psychological ploys that, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable. (*People v. Williams* (2010) 49 Cal.4th 405, 436.) Johnson's statements to defendant opining that defendant was lying were not a coercive psychological ploy. Here, the totality of the circumstances does not show that the police obtained defendant's confession by applying physical or psychological influences that overcame defendant's free will. (*Ibid*.) After carefully scrutinizing the record (*Nelson, supra*, 53 Cal.4th at p. 379), we find nothing to indicate

that defendant's confession was involuntary. Accordingly, we would reject his due process claim if he had preserved it.

3. Disproportionality of sentence

Defendant contends that the length of his 38-year prison term violates the California and federal Constitutions.

Defendant forfeited this issue by failing to raise it in the trial court. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229.) But even if defendant had preserved the issue, we would find no merit in it.

We may not intrude upon the Legislature's power to define crimes and prescribe the punishments therefor unless a statutory penalty is so disproportionate to the crime as to shock the conscience and offend fundamental notions of human dignity. (*People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*); *In re Lynch* (1972) 8 Cal.3d 410, 424.) The record must be viewed in the light most favorable to the judgment (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496), and defendant must overcome a considerable burden in convincing us that his sentence is disproportionate (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196–1197 (*Weddle*)).

We consider both the nature of the offense in the abstract and the facts of the crime in the particular case, including its motive, the way it was committed, the extent of the defendant's involvement, and the consequences. (*Dillon*, *supra*, 34 Cal.3d at p. 479.) We also consider whether the punishment is "grossly disproportionate to the defendant's individual culpability as shown by such factors as age, prior criminality, personal characteristics, and state of mind." (*Ibid.*) We may, but need not, also compare the challenged penalty with punishments for more serious offenses in California and with punishments prescribed for the same offense in other jurisdictions. (*Weddle*, *supra*, 1 Cal.App.4th at p. 1198, fn. 8.)

In *Ewing v. California* (2003) 538 U.S. 11 [123 S.Ct. 1179] (*Ewing*), a majority of the United States Supreme Court concluded that in noncapital cases, the Eighth Amendment either contains only a narrow proportionality principle (Chief Justice

Rehnquist and Justices O'Connor and Kennedy) or that it contains no proportionality principle at all (Justices Scalia and Thomas). (*Id.* at pp. 20, 31–32.) Under the narrow proportionality principle recognized by the plurality, the Eighth Amendment does not require strict proportionality between the offense and the resulting sentence and does not mandate comparative analysis within or between jurisdictions. (*Id.* at p. 23.) Rather, it forbids only extreme sentences that are grossly disproportionate to the crime. (*Ibid*.) In weighing the gravity of the defendant's offenses, both his criminal history and his current felony must be considered. (*Id*. at p. 29.) The *Ewing* plurality noted that, outside the capital context, successful challenges to the proportionality of a particular sentence are exceedingly rare. (*Id.* at p. 21.) Ewing was convicted of shoplifting and sentenced under the "Three Strikes" law to 25 years to life. Without comparing Ewing's sentence to the punishment for other crimes in California or to the punishment for the same crime in other states, the court found that the case was not one of the rare cases in which a proportionality challenge could succeed. (*Id.* at pp. 29–30.) It found the sentence "justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record." (*Ibid*.)

Although defendant's sentence is lengthy, he was young when he committed the crimes, and he had no prior criminal record, when his sentence is viewed in light of the number and gravity of his commitment offenses, it violates neither the state nor federal Constitution. His sentence is neither so disproportionate to the crimes as to shock the conscience and offend fundamental notions of human dignity nor an extreme or grossly disproportionate sentence. He played a major role in a robbery of three people and an attempted robbery of a fourth. He admitted shooting at Lopez and, according to the testimony of Isela and Lopez, he shot both Cisneros and Lopez. Cisneros required surgery to repair gunshot wounds to her stomach and small intestine. She was hospitalized for eight days. The gunshot wound to Lopez's shoulder fractured his collar bone, humerus, and scapula. The crime so traumatized Cisneros that she almost never left her house. Defendant attempts to minimize his culpability by relying upon his claims

that his confession was improperly obtained and that Gaither coerced him into accepting responsibility for a crime he did not commit. We have rejected the first claim and the jury rejected the second. We similarly reject his disproportionality claim under the state constitution and note that the trial court showed defendant leniency by imposing concurrent sentences on all remaining unstayed counts.

Finally, we reject defendant's attempt to bring himself within *Graham v. Florida* (2010) __ U.S. __ [130 S.Ct. 2011], which held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." (*Id.* at p. __ [130 S.Ct. at p. 2030].) Defendant was not sentenced to life without possibility of parole, an indeterminate term, or a determinate term that is functionally equivalent to a life term. Defendant was 18 when he was sentenced to 38 years in prison with 925 days of presentence credit and a 15 percent limitation on prison credits. If he earns all of his prison credit and is not convicted of any new offenses while in prison, he will be about 49 years old when he is released on parole. *Graham* is inapplicable.

4. Omitted court security assessment and fee error on abstract of judgment

The Attorney General asks that we correct the abstract of judgment, which states the date of conviction as March 23, 2010, which was actually the date of sentencing. The conviction date should be December 3, 2009.

The Attorney General also asks this court to modify the judgment to include the mandatory court security fee of $30 per count (§ 1465.8) and mandatory court facility assessment (Gov. Code, § 70373) of $30 per count. The trial court failed to impose the latter assessment and imposed only a $30 court security fee, rather than $30 per count. Because defendant was convicted of seven counts, the court should have imposed a $210 court security fee and a $210 court facility assessment. We modify the judgment to include these fees and order the trial court to issue an amended abstract of judgment reflecting these fees and assessments, as well as the correct conviction date of December 3, 2009.

DISPOSITION

The judgment is modified to include a $210 court security fee as required by Penal Code section 1465.8 and a $210 court facility assessment as required by Government Code section 70373. As modified, the judgment is affirmed. If it has not already done so, the trial court is directed to issue an amended abstract of judgment that includes the $210 court security fee and the $210 court facility assessment and reflects the correct conviction date of December 3, 2009.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.