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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL OCAMPO,

Defendant and Appellant.

B235282

(Los Angeles County
Super. Ct. No. TA107586)

APPEAL from a judgment of the Superior Court of Los Angeles County. Eleanor J. Hunter, Judge. Affirmed as modified with directions.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer and Thomas C. Hsieh, Deputy Attorney Generals, for Plaintiff and Respondent.

INTRODUCTION

Appellant Manuel Ocampo was charged with the murder of Juan Corrales. Prior to trial, Ocampo filed a motion to suppress evidence that the victim's wife, Maria Campana, had tentatively identified him as the perpetrator. Ocampo argued that Campana's identification was unreliable because police had engaged in suggestive conduct when showing her a photographic lineup. The court denied the motion.

At trial, Campana testified that she was fifty percent certain that Ocampo was the man she saw on the night of her husband's death. In addition, Manuel Arzate, who was initially charged as a codefendant, testified that he saw Ocampo shoot the victim. The jury found Ocampo guilty. The court sentenced Ocampo to 50 years to life in prison and imposed several penalties and fees, including a \$20 DNA assessment under Government Code section 76104.7.

On appeal, Ocampo argues that the trial court erred when it: (1) denied his motion to suppress evidence related to Campana's identification; and (2) assessed a \$20 DNA fee. We modify the judgment to strike the \$20 DNA fee and affirm the conviction in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

A. Events Preceding Trial

At approximately 11:00 p.m. on June 19, 2009, Maria Campana was at her apartment with her daughter and heard the sound of "truck noise" and "squeaking wheels." Campana went to the window and saw her husband, Juan Corrales, trying to park his white pickup truck next to the apartment building. Although it was dark outside, Campana had a clear view of the truck and could see her husband sitting in the driver seat.

Immediately after Corrales turned off the engine, Campana saw three Hispanic males approach the driver side of the vehicle. Campana heard the man closest to Corrales say, in Spanish, "Fuck it. It's over." She then saw him extend his hand toward the truck

and heard what sounded like gunshots. The three males ran away and Campana went to check on Corrales, who was unconscious and bleeding. Corrales later died from gunshot wounds.

On June 24, 2009, detectives from the Los Angeles County Sheriffs Department interviewed Campana about the incident. During the recorded interview, Campana described the male who had extended his arm toward her husband's vehicle as being "kind of white," "skinny," "bald" and having a "somewhat pointed" nose. When asked to clarify if "kind of white" meant Hispanic, Campana stated that she thought he was "like Hispanic." Campana also stated that the suspect was "really young. Like seventeen, eighteen years old." When an officer asked whether the suspect might have been between "eighteen and twenty," Campana stated "around there."

Campana could not recall any details about the appearance of the other two men who approached Corrales, explaining that "[t]he first one was the one that was most facing me. He's the one that walked ahead." Campana also said the suspects probably lived nearby because she never heard a car pull up. She believed the men were bothered by the fact that her husband had been "driving fast" around the neighborhood.

After Campana described the suspect, the officers asked her if she could identify him from photos. In response, Campana stated, "[w]ell maybe but I'm not too too [*sic*] sure." An officer then read Campana the following admonishment: "you are going to look at a series of six photographs of individuals of similar appearance. The suspect involved in this crime may or may not be among these photographs. You're under no obligation to make an identification. This purpose [*sic*] of showing you these photographs is to eliminate the innocent as well as to identify the person who is guilty." The officer also told Campana that she should "try to keep in mind [that] lighting is different. People have shorter hair, longer hair, based on the time when the photo was taken." Campana confirmed that she understood the instructions and had no questions.

After looking at the six photographs, Campana stated that "[t]hey d[idn't] look like [him]," but that the person in picture number six – which was Ocampo – "ha[d] a certain air." Campana clarified that, of the six men, Ocampo looked the most similar to

the man who approached her husband's truck. Based on Campana's responses, the officers became concerned that she was afraid to make an identification and told her the police would protect her. Campana stated that she was not afraid because she had never done "anything to anybody."

The officers then asked Campana to estimate how certain she was that Ocampo was the perpetrator. Campana said she was only "about five percent" certain and that she "honestly" did not believe it was him. The officers again informed Campana that they would protect her if she was afraid "something may happen . . . from the . . . gang members." Campana said she was not sure Ocampo was the right person because the perpetrator "didn't have a beard [and] was balder." In response, an officer reminded her that people can change their hairstyles and facial hair. Campana then said "Yes, he looks like him a little."

The officers told Campana that without her cooperation, "the people who killed your husband are going to remain free." Campana said it was "just that [she did not] remember well," to which the officers responded "if you don't remember, you don't remember." Campana looked at the pictures again and said "I think but I [am] not sure." She then agreed to sign a statement at the bottom of the photographic lineup stating "out of the photos #6 most closely resembles [the] person she saw. She thinks he extended right arm toward husband."

After making the identification, Campana asked the officers whether they had arrested anyone. The police said nobody was in custody and that she and her neighbor were the only people who could identify the perpetrators. Campana asked the police: "Is he going to find out that I could have said that it was him? . . . Because if it's not and he thinks [] come later and grab my daughter [*sic*]." The officers assured Campana that the police would be able to protect her and then asked her again whether Ocampo was the individual who approached her husband. She stated, "I think but I'm not sure."

Campana then asked whether the police were going to investigate the man pictured in photograph number six and whether they were going to "tell him . . . that I talked." The officers told her that Ocampo was going to be arrested and that "they are not going to

ask you for anything. . . . [Y]ou have time to think about everything and to be sure. But the young man is not going to know about you.” Campana added, “I just can’t accuse anyone. If I’m not sure how can I accuse someone? You did it, and I’m . . . not sure.” An officer then stated “the reasons the young man is in that series of photos is because he’s the one that . . . they think it was him.”

B. Trial Court Proceedings

1. Information and preliminary hearing

On February 23, 2010, the Los Angeles County District Attorney filed an information charging Ocampo and a codefendant, Manuel Arzate, with a single count of murder (See Pen. Code, § 187, subd. (a)).¹ The information included special allegations asserting that Ocampo had discharged a firearm, causing great bodily injury and death (§ 12022.53, subd. (d)), and that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

At the preliminary hearing, Campana testified that the man who extended his arm toward her husband’s truck was “white” and had a “long” and “pointy” nose. Campana also confirmed that, on June 24th, 2009, she had signed a statement on the photographic lineup indicating that Ocampo most closely resembled the man she saw next to her husband’s truck. Campana then testified that the person in photograph number six was sitting in the courtroom and pointed to Ocampo.

On cross-examination, Campana confirmed that she had only told officers that Ocampo “most closely resembled the suspect” and never said she was sure of her identification. Campana also stated that when the prosecutor asked her whether the man in the photographic lineup was in the courtroom, she identified Ocampo based on the picture and not on her recollection of the events of June 19th. Campana then clarified that Ocampo’s “face, [his] color, his nose looks like [the person who approached her husband],” but admitted that she was not sure he was the perpetrator.

¹ All further statutory references are to the Penal Code unless otherwise specified.

2. Ocampo's motion to suppress

Prior to trial, Ocampo moved to suppress any evidence of “the photographic 6-pack line-up, the in-court identification made by Maria Campana, any statements made regarding identification of the defendant by Maria Campana and any future in-court identification by Maria Campana.” Ocampo argued that the officers had used “impermissibly suggestive” procedures during the identification process. More specifically, Ocampo asserted that “the [officers] pressured and threatened” Campana into making an identification and told her that they believed Ocampo had killed her husband. According to Ocampo, this conduct “tainted” any “in-court identification or further information gathered from Maria Campana . . . and violated defendant[']s due process of law.” At the hearing on the motion to suppress, Ocampo’s counsel also argued that the photographic lineup was suggestive because Ocampo was the only suspect that fit Campana’s description. Counsel also asserted that the officers had tried to direct Campana to Ocampo’s picture by reminding her that people can change their appearances and inducing her to say that the suspect was between eighteen and twenty rather than seventeen or eighteen. The court denied the motion to suppress, explaining that it did not find the photographic lineup to be “unduly suggestive.” According to the court, the lineup included several pictures of thin, “young Hispanic individuals” who had “varying degrees of hair on their head.” The court concluded that there was nothing about Ocampo’s image that would “automatically . . . draw[]” a witness’s attention or otherwise make him “stick[] out.”

The court also explained that, despite Ocampo’s allegation that police had pressured Campana to make a definite identification, she had refused to do so: “In her signing of the identification, she [only] says No. 6 . . . most closely resembles the person she saw. So there’s never a positive identification. So with all of that pressure . . . you are arguing was applied to her from the police, you would think it to be a hundred percent identification And I think that she was tentative from the very beginning and continued that.”

In the court's view, the issues Ocampo had raised went to the "weight [of the evidence] as opposed to admissibility, and it's as much weight as what the jury wants to give it. And certainly the arguments that you raise are good arguments and you can point that out to the jury, but it doesn't rise to the level that I think it is so unduly prejudicial that the defendant's constitutional rights would be hindered if I let it in."

3. Trial testimony

Campana's trial testimony was substantially similar to the statements she made during the June 24th police interview and the preliminary hearing. Campana stated that the man who extended his arm toward her husband's vehicle had a "little hair, pointy nose [and] was light-skinned." When the prosecution asked Campana whether she saw this individual in the courtroom, she pointed to Ocampo, but clarified that she was only "50 percent" certain and "not totally sure." Campana explained that although she "was sure" Ocampo "looked like the person" who approached her husband, she was not certain he was the same man. She also confirmed that she had signed the statement on the photographic lineup card indicating that Ocampo most resembled the assailant.

On cross-examination, Campana admitted that, on the night of the incident, she was afraid for her safety and told police she had not seen anything. However, she elected to speak to police on June 24th "because [the officers] were right there present with me." Campana could not recall whether she told officers she was only five percent certain of her identification. However, she did recall stating that she was hesitant to identify Ocampo because she did not want to blame an innocent person. She also reiterated that although she identified Ocampo because of his "[similar] characteristics," she was still not "sure" he was the perpetrator.

The prosecution also called Manuel Arzate, who was originally charged as a codefendant. Arzate stated that he was associated with the gang "Largo 36" and frequently hung out at a blue house owned by a gang member named Ricardo. Arzate knew Ocampo and considered him to be a member of Largo 36. On the evening of June 19, 2010, Arzate was at Ricardo's house drinking alcohol and smoking marijuana on

the front porch with Ocampo and eight or ten other guests. Ocampo and another member of Largo 36 got into a dispute over money.

As the two men were arguing, a driver in a white truck pulled up and started “stepping on his gas . . . and left a cloud of smoke or burned tire.” The truck drove off and then returned and did the same thing again. According to Arzate, Ocampo was “pumped up” from his dispute and said that they needed to go “check” the driver of the truck. Arzate explained that the term “check” meant that they needed to inform the driver that he could not do things like that in their neighborhood. Ocampo then got a gun from Ricardo and put it in his pocket.

Ocampo started walking down the street toward the man in the truck. Arzate and others followed Ocampo, thinking that they were just going “to tell him to stop.” Ocampo approached the driver and asked him “what the fuck was his problem.” The driver said he was going inside his apartment and was rolling up his window. Arzate then saw Ocampo shoot toward the driver three times. At the time of the shooting, Arzate did not have a gun and did not see anyone else with a gun other than Ocampo.

On cross-examination, Arzate admitted that he told police he witnessed the shooting only after being informed that he faced a sentence of 50 years to life in prison. He also admitted that, prior to agreeing to take a seven year jail sentence in exchange for his testimony, he presented officers with several different versions of what had occurred.

The prosecution also called Jorge S., who was Corrales’s 13-year-old nephew. On the night of the incident, Jorge was outside playing cards with his cousin when he saw Corrales start “burning rubber” and doing “donuts” in his white truck. After Corrales parked the truck, Jorge saw three Hispanic males approach the vehicle. He then heard three gunshots and saw the men run away. Several days later, Jorge was shown a photographic lineup and identified Arzate as one of the men who was present during the

shooting. He also testified that he had seen Arzate at a blue house about a block away from Corrales's apartment.²

Ocampo did not call any witnesses in his defense.

4. Conviction and sentencing

The jury found Ocampo guilty of murder and found all of the special allegations to be true. The trial court sentenced Ocampo to a term of 25 years to life for murder, plus an additional consecutive term of 25 years to life for the use of a firearm. (See § 12022.53, subd. (d).) The trial court imposed an additional term for the gang enhancement, but stayed that portion of the sentence.

The trial court ordered Ocampo to pay fees and penalties including a forty dollar court security fee (§ 1465.8, subd. (a)(1)), a \$30 criminal conviction assessment (Gov. Code, § 70373), a \$20 DNA assessment (§ 76104.7), a \$200 dollar restitution fine (§ 1202.4, subd. (b)) and a \$200 parole revocation fine (§ 1202.45). Ocampo filed a timely appeal.

DISCUSSION

Ocampo raises two issues on appeal. First, he contends that the trial court erred in denying his motion to suppress any evidence related to Campana's identification. Second, he argues that the trial court had no authority to impose a \$20 DNA assessment under Government Code section 76104.7.

A. The Trial Court Did Not Err in Denying Ocampo's Motion to Suppress Evidence Related to Campana's Identification

Ocampo argues that officers engaged in improper, suggestive conduct that unfairly tainted Campana's initial out-of-court identification and her subsequent in-court identifications.

² The prosecution called several other witnesses whose testimony is not relevant to the issues on appeal.

1. Summary of applicable legal principles

“We independently review ‘a trial court’s ruling that a pretrial identification procedure was not unduly suggestive.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 698-699 (*Avila*)). The defendant bears “the burden of showing an unreliable identification procedure.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 412 (*Ochoa*)).

“‘Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable.’ [Citation.]” (*Avila, supra*, 46 Cal.4th at p. 698.) The proper inquiry is whether the identification procedure was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” (*Simmons v. United States* (1968) 390 U.S. 377, 384 (*Simmons*); see also *People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

“‘The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness’s degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.’ [Citation.] In other words, ‘[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.’ [Citation.]” (*Ochoa, supra*, 19 Cal.4th at p. 412.)

2. The trial court did not err in admitting the identification evidence

Ocampo contends that officers employed two types of suggestive procedures that resulted in an unreliable identification. First, the officers allegedly utilized a suggestive photographic lineup. Second, the officers allegedly made statements and asked questions that pressured or otherwise induced Campana to identify Ocampo as the assailant.

a. The photographic lineup was not unduly suggestive

Ocampo argues that the photographic lineup was unduly suggestive because he was the only person “who immediately appeared to be skinny” and “was the only person depicted with both a mustache and a beard.”³ The trial court rejected these arguments, concluding that the photographic lineup included several “similar [appearing], young Hispanic males.”

In determining whether a photographic lineup was unduly suggestive, “[t]he question is whether anything caused defendant to “stand out” from the others in a way that would suggest the witness should select him.’ [Citation.]” (*Cunningham, supra*, 25 Cal.4th at p. 990.) “[T]here is no requirement that a defendant in a lineup be surrounded by people nearly identical in appearance [citations]’ [Citation.]” (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.) “Because human beings do not look exactly alike, differences [among individuals in a lineup] are inevitable.” (*People v. Carpenter* (1992) 15 Cal.4th 312, 367 [superseded by statute on other grounds, see *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106 [superseded by statute on other grounds], *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1119, fn. 5]).) Consequently, a photographic lineup will not be deemed unduly suggestive where the defendant’s picture “was similar to that of the others.” (*Cunningham, supra*, 25 Cal.4th at p. 990.)

We have examined the photographic lineup and agree with the trial court’s finding that it was not unduly suggestive. The six individuals appearing in the lineup are all

³ Ocampo also argues for the first time in his reply brief that the photographic lineup was unduly suggestive because he was the only person depicted with a black line running around the collar of his shirt and down his left arm. The argument is forfeited as it was not raised until the reply brief. (*People v. Newton* (2007) 155 Cal.App.4th 1000, 1005 [“we do not consider an argument first raised in a reply brief, absent showing why the argument could not have been made earlier”].) The argument is also without merit. The “black line” to which Ocampo refers appears to be a shadow caused by the photograph itself. Similar “black lines” appear around the collars of several other individuals in the lineup. Nothing about these lines cause Ocampo to ““stand out” from the others in a way that would suggest the witness should select him.’ [Citation.]” (*Cunningham, supra*, 25 Cal.4th at p. 990.)

relatively young Hispanic males with no noticeably distinctive features. Three of the men have some form of facial hair, four have a closely trimmed haircut and at least three appear to be “thin.” In sum, “[t]he facial idiosyncracies [*sic*] among the [six men] [we]re no more marked than those which normally distinguish one person from another.” (*People v. Malich* (1971) 15 Cal.App.3d 253, 260 [disapproved on other grounds, *People v. Medina* (1972) 6 Cal.3d 484, 489 [disapproved on other grounds *Kowis v. Howard* (1992) 3 Cal.4th 888, 896].)

b. The officers’ questions and statements did not require the exclusion of Campana’s testimony

Ocampo next argues that the officers made several types of suggestive remarks that tainted Campana’s identification. First, he asserts that the officers improperly pressured Campana into making an identification. Second, he contends that officers asked leading questions that induced her to make an improper identification. Third, he alleges that the officers told Campana that Ocampo was the perpetrator, thereby tainting any subsequent identification.

1. The detectives did not improperly pressure Campana to identify Ocampo

Ocampo asserts that officers improperly pressured Campana to identify him as the assailant by asking her if she was afraid to testify and by telling her that they needed her cooperation to apprehend her husband’s killer.

The interview transcript indicates that the officers became concerned Campana was unwilling to make a definite identification because she feared for the safety of herself and her daughter.⁴ To assuage her fears, officers informed Campana that the police would be able to protect her and relocate the family. Later in the conversation, the officers told Campana that, without her cooperation, “the people that murdered her

⁴ On several occasions, Campana stressed to the officers that the perpetrators lived near her home. Toward the end of the interview, Campana asked whether the suspect would find out she “said it was him” and worried that someone might “come later and grab my daughter.”

husband for no reason are going to go unpunished.” The officers also stated that whoever committed the crime should be made to “pay.”

None of these statements impermissibly suggested that Campana should select Ocampo or otherwise made Ocampo stand out from the other individuals in the photographic lineup. These comments do not reference anything about Ocampo or include any information about the person they believed committed the crime. At most, these comments suggest the police were pressuring Campana to identify whoever she believed committed the crime. Moreover, the officers specifically admonished Campana that she was under no duty to make an identification and that the suspect might not appear in the photographic lineup.

In sum, the fact that officers told Campana they would protect her from retribution and could not apprehend the perpetrator without her cooperation was not unduly suggestive of the perpetrator’s identity.

2. The officers’ clarifying questions and comments were not unduly suggestive

Ocampo next contends that the officers asked a series of leading questions and made other statements that were intended to “suggest that Campana’s [initial] description of the suspect was not entirely accurate and to suggest the description of the suspect that [the officers] wanted [her] to identify.”

First, Ocampo complains that the officers instructed Campana that, when reviewing the photographic lineup, she should “take into account” that people can change their hair style and facial hair. Ocampo contends that because Campana initially described the suspect as clean shaven and bald, officers included these admonishments to steer her toward Ocampo’s photograph. A mere reminder that the witness should consider the fact that a person may alter his or her appearance does not give rise to “a very substantial likelihood of irreparable misidentification.” (*Simmons, supra*, 390 U.S. at p. 384.) That is especially true here given that several people in the photographic lineup had facial hair and only one appears to be bald.

Second, Ocampo complains that, prior to showing Campana the photographic lineup, the officers asked leading questions that caused her to believe the suspect was Hispanic and between the ages of eighteen and twenty. The record shows that when describing the suspect, Campana initially said he was “like white.” The detectives inquired whether she meant that he was “white” or a “light skinned” Hispanic, to which she responded, “I think he was like kind of like Hispanic.” When Campana stated that the suspect was “really young. Like seventeen, eighteen years old,” an officer asked her, “like between eighteen and twenty?” Campana responded “around there.”

We find nothing in these questions that suggested Campana should select Ocampo from the photographic lineup. The questions were merely intended to clarify the appearance of the man that Campana had seen. Moreover, all of the individuals in the photographic lineup appeared to be Hispanic males of a fairly young age. It is therefore unclear how the officers’ comments could be interpreted as an improper suggestion that Campana should select Ocampo.

3. Campana’s identification was not rendered unreliable by officer’s comment that police believed Ocampo committed the crime

Finally, Ocampo argues the police engaged in impermissibly suggestive conduct when an officer informed Campana that Ocampo was included in the lineup because they believed he committed the crime. Before the officer made this comment, Campana had made several tentative identifications of Ocampo that varied in their degree of certainty. Initially, Campana said Ocampo did “not look much” like the assailant and that she was only “five percent” sure. She later stated that Ocampo looked “a little like him” and then, on three occasions, said she “th[ought]” Ocampo was the person, but was “not sure.” After Campana made all of these statements and after she signed the photographic lineup card, an officer informed her that “the reason [Ocampo] is in that series of photos is because he’s the one that . . . they think it was him.”

The Attorney General argues that, as a matter of law, the officer’s comment cannot be construed as unduly suggestive because it was “made after Campana’s initial tentative identification [and therefore] did not induce that identification.” Ocampo,

however, contends that the act was impermissibly suggestive because it caused Campana to become more certain of her identification.

For the purposes of this case, we need not resolve whether the comment was unduly suggestive because, even if we assume that it was, “the in-court identification was nevertheless reliable under the totality of the circumstances.” (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 38 (*Nguyen*) [“Assuming the procedure is unduly suggestive and unnecessary, the court must next decide whether the in-court identification was nevertheless reliable under the totality of the circumstances”].) When assessing the reliability of an in-court identification, “the court examines, ‘the opportunity of the witness to view the criminal at the time of the crime, the witness’s degree of attention, the accuracy of [the witness’s] prior description of the criminal, [and] the level of certainty demonstrated at the confrontation . . . [citation].’ [Citations.]” (*Ibid.*)

Numerous factors indicate that Campana’s identification was sufficiently reliable to warrant admission at trial. First, the evidence shows Campana “had a meaningful opportunity to view [Ocampo] at the time of the crime.” (*Nguyen, supra*, 23 Cal.App.4th at p. 39.) Campana stated that she was looking out a window that provided a clear view of her husband and his vehicle at the time he was shot. She also stated that Ocampo was facing toward the window as he approached her husband’s vehicle, giving her a clear view of the perpetrator.

Second, it is apparent that Campana was paying close attention to the events that preceded her husband’s shooting. Campana testified that after hearing her husband’s truck pull in, she looked out the window, watched the assailants approach and then watched the confrontation. Her attention was focused entirely on the events leading to her husband’s death.

Third, the initial description that Campana provided of the perpetrator, which she offered to police before seeing the photographic lineup or hearing the comment in question, was consistent with Ocampo’s appearance. Campana informed the officers that the man who approached her husband was a thin, Hispanic male in his late teens, with a light complexion and a pointy nose. Ocampo closely matches that description.

Fourth, the reliability of Campana's identification is bolstered by the fact that she selected Ocampo from among the six pack of photographs prior to the allegedly suggestive conduct. Before showing Campana the photographic lineup, officers informed her that the assailant might not be pictured and that she was under no obligation to make an identification. Despite those admonishments, she immediately signaled to Ocampo's photograph, noting that he had a "certain air" about him. She later stated that she thought Ocampo was the assailant but remained uncertain. Ultimately, Campana agreed to sign a statement indicating that, of the six men pictured in the lineup, Ocampo most resembled the man who approached her husband. The fact that Campana selected Ocampo prior to the conduct at issue suggests that her identification was not tainted or otherwise caused by the allegedly suggestive conduct.

Finally, the record indicates that Campana's identification testimony remained substantially consistent both before and after the allegedly suggestive conduct. At the pretrial police interview, Campana initially said she was five percent certain of her identification. After examining the pictures again, she repeatedly stated that she thought Ocampo was the perpetrator, but was not certain. The police then told her they believed Ocampo was the suspect. At the subsequent trial, Campana said she was only fifty percent certain that Ocampo was the perpetrator. On cross-examination, defense counsel questioned Campana extensively about her current and prior identifications. Campana admitted that she was uncertain of her identification during the pretrial interview and remained uncertain now. These statements indicate that, regardless of whether the officer's comment that Ocampo committed the crime was unduly suggestive, the comment did not have a material effect on Campana's testimony.⁵

⁵ Ocampo argues at length that Campana's identification at trial was more certain than her initial identification. In support, he argues that Campana initially told police she was only five percent certain, but then said she was fifty percent certain at trial. While it is true that Campana initially told officers she was only five percent certain, Ocampo ignores the fact that, later in the same interview, Campana repeatedly said she thought Ocampo was the assailant, but remained unsure. These comments, which were made

In sum, there are numerous factors indicating that Campana’s testimony was sufficiently reliable to warrant its admission at trial: she was in a good position to see the crime; her attention was focused on her husband when the shooting occurred; her initial description of the suspect matches Ocampo’s appearance; she tentatively identified Ocampo before the suggestive statement and her level of certainty regarding the identification remained substantially identical both before and after the allegedly improper suggestive conduct.

B. The Trial Court Erred in Assessing a DNA Fee

Ocampo contends that the trial court did not have the legal authority to impose a \$20 DNA assessment under Government Code section 76107.7. The Attorney General agrees and requests that we modify the abstract of judgment to strike the assessment.

At sentencing, the trial court imposed a \$200 restitution fine (§ 1202.4, subd. (b)), a \$40 court security fee (§ 1465.8, subd. (a)(1)), a \$30 criminal conviction assessment (Gov. Code, § 70373) and a \$200 parole revocation fine, which was stayed (§ 1202.45). The court also imposed what it described as “a \$20 DNA fee.” The minute order does not include any reference to a “DNA fee,” but the abstract of judgment states that the court included a “DNA penalty assessment of \$20 pursuant to [Government Code] 76104.7.”

The version of Government Code section 76104.7 in effect at the time of the trial court proceedings stated, in relevant part: “(a) Except as otherwise provided in this section . . . there shall be levied an additional state-only penalty of one dollar (\$1) for every ten dollars (\$10), or part of ten dollars (\$10), in each county upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses [¶] (b) . . . These funds shall be deposited into the county treasury DNA Identification Fund.” (Gov. Code, § 76104.7 (2009).)⁶

prior to the allegedly improper conduct, are substantially similar to the level of certainty expressed at trial.

⁶ The current version of the statute contains identical language, but imposes a penalty of four dollars for every ten dollars of fine, penalty or forfeiture imposed.

As the Attorney General concedes in its brief, however, “[t]he DNA fines [described in section 76104.7] do not apply to [] any of the fines imposed in this case.” The statutes authorizing the four types of assessments imposed by the trial court – restitution, court security fee, criminal conviction assessment, and parole revocation fine – each contain language expressly stating that section 76104.7 assessments do not apply to them. (See § 1202.4, subd. (e) [“The restitution fine shall not be subject to penalty assessments authorized in . . . Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code”]; § 1465.8, subd. (b) [“The penalties authorized by Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code . . . do not apply to this assessment”]; § 70373, subd. (b) [“The penalties authorized by Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code . . . do not apply to this assessment”]; § 1202.45 [“parole revocation restitution fine shall not be subject to penalty assessments authorized by . . . Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code”]; see also *People v. Valencia* (2008) 166 Cal.App.4th 1392, 1395-1396.) The trial court therefore erred in imposing an independent DNA assessment, and the judgment shall be modified to strike any reference to the assessment.

DISPOSITION

The judgment is affirmed, as modified. The trial court is directed to strike from the abstract of judgment the DNA penalty assessment under Government Code section 76104.7. The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.