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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

OTIS BARWAY,

Defendant and Appellant.

B291746

(Los Angeles County
Super. Ct. No. BA452571)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Kathleen Kennedy, Judge. Affirmed.

Vanessa Place, 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, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Otis Barway and codefendant Kenneth Mack were jointly charged with assaulting a victim with a screwdriver and raping another victim in concert. The same accusatory pleading charged Mack only with an earlier rape and robbery of a third victim, as well as a robbery of a fourth victim. Following a joint trial before the same jury, defendant was found guilty of assault and rape in concert and Mack was found guilty on all charges.¹

On appeal, defendant contends that the trial court abused its discretion when it denied his motion for separate trials under Penal Code section 1098² and his subsequent motion pursuant to section 954 to sever from the accusatory pleading the unrelated counts against Mack. We affirm.

II. FACTUAL BACKGROUND

A. *Prosecution's Case*

1. Rape and Robbery of Amber A. (counts 5 and 6 against Mack only)

On July 31, 2016, Amber A. was with friends at a hookah lounge in Hollywood. When the lounge closed, Mack and a friend offered to drive Amber to an after-hours party in the Hollywood Hills. Instead of driving the group to the party, Mack dropped

¹ Mack is not a party to this appeal.

² All further statutory references are to the Penal Code.

his friend off and drove Amber into the Hollywood Hills where he parked the car and raped her at gunpoint. After Mack finished raping Amber, he drove her back down the hill, stole from her a bracelet, two iPhones, and \$1,000, and dropped her off at the hookah lounge.

2. Robbery of Naghifazel (count 1 against Mack only)

On November 26, 2016, at approximately 1:30 p.m., Shahram Naghifazel was leaving a video store on Cahuenga Boulevard when he was lured into an adjacent alley by an unidentified woman. In the alley, the woman made a gesture signaling Mack to enter the alleyway, and then “disappeared.” Mack then assaulted Naghifazel, striking him in the face and knocking him to the ground. Mack knelt over his fallen victim and continued to hit him, causing a cut to the inside of his lip, bruising to his face, and contusions to his ribs. Mack then went through Naghifazel’s pockets and took his wallet. Out of the corner of his eye, Naghifazel saw a man on the street and asked him to call the police, which caused Mack to run away.

3. Assault of Thomas (count 2 against both defendants)

Ryheem Thomas became acquainted with defendants through mutual friends. He knew Mack as “G Red” and defendant as “Rude Boy.” In November 2016, defendants were staying at Thomas’s residence on Wilcox Avenue in Hollywood “for a few nights.” Thomas “was just doing them a favor.”

On November 30, 2016, Thomas argued with defendants about paying rent and then told them he “didn’t want nobody

staying there with [him] anymore.” A fight broke out during which defendant, who was behind Thomas, punched him in the “back of [his] face,” causing him to lose his balance. Mack, who was facing Thomas, then lacerated the left side of Thomas’s left chest with a screwdriver.

After Mack cut Thomas, defendants ran from his house, and he followed them to the front porch while attempting to call the police. Thomas’s chest wound was bleeding heavily, leaving “a whole bunch of blood on the steps and everything.” From the front gate, defendant threw a bottle at Thomas, missing him by seven or eight inches.

4. Rape in Concert of Annet H. (counts 3 and 4 against both defendants)

On December 5, 2016, Annet H., who was visiting Hollywood from Berlin, Germany, drank with friends at a bar on Hollywood Boulevard.³ At about 2:30 a.m., she left the bar alone and walked toward her nearby vacation rental. On her way to the rental, Annet met and spoke with three men, who asked her if she wanted “to go on a rooftop to see the city.” She agreed to accompany them.

Annet and the men entered a nearby building through a side door and climbed the stairs to the roof of the building. As

³ Annet admitted she had three or four gin and tonics over a four or five-hour period. The parties stipulated that Annet’s blood alcohol content was measured as part of her sexual assault examination and that the result was .19, which was over twice the legal limit for operating a motor vehicle.

Annet was looking around, one of the three men, Mack,⁴ approached her and touched her neck. Annet tried to push him away, but “he got stronger.” Mack pushed her to the ground on her back and got on top of her. Annet tried to scream, but Mack covered her mouth with his hand. She struggled and Mack punched her in the face at least once.

Mack “took out his penis” and “put it in [Annet’s] vagina.” Another one of the men, “the second guy,” was standing nearby. After a short time, Mack and the second guy “switched” places, and the second guy “did the same thing,” i.e., he “[p]ut his penis in [her] vagina.”

When they finished their assault, Mack and the second guy took Annet’s bag, which contained a smaller bag with her passport in it, and ran away from the scene. But the third man who had been on the roof came back and returned Annet’s passport to her.

Annet came down from the rooftop and eventually called 911. The police arrived and took Annet for a sexual assault examination. She suffered several injuries as a result of the assault, including bleeding abrasions to her back, marks on her face, swollen cheeks, and abrasions to her knees and elbows.

Cindy Swintelski worked as a nurse practitioner at the Santa Monica UCLA rape treatment center. She performed forensic medical exams on both victims and suspects of rape. On December 5, 2016, Swintelski performed a forensic examination of Annet. Annet told Swintelski that she had not had consensual intercourse with anyone in the past five days. Annet further stated that she had been taken to a roof top and “physically and

⁴ Annet identified Mack from a six-pack photographic line-up and at trial as the first man who assaulted her.

sexually assaulted” by three males. One of the assailants “repeatedly took her head and threw it onto the ground, hitting her head and face multiple times.” The other two assailants “were holding her down and restraining her when she tried to move.” She stopped resisting because she feared for her life. As she was being held down by her assailants, “[two of them] took turns forcing their penis inside of her vagina multiple times.”

During the physical exam, swab samples were taken from Annet’s external genitalia, vagina, cervix, and anus to preserve genetic material for DNA testing. At the end of her testimony, the nurse opined that Annet’s description of the assault was consistent with the multiple injuries that the nurse observed, which included lacerations to her vagina and debris around Annet’s vagina and anus.

City of Los Angeles Police Detective Daniel Wise was a member of the West Bureau sex unit assigned to investigate the sexual assault of Annet. As part of his investigation, he took swab samples from both defendants for purposes of DNA analysis. He also showed Annet six-pack photographic line-ups for each defendant. She identified Mack from the first line-up as the first man who assaulted her. Annet identified defendant from a second six-pack line-up as the second man who sexually assaulted her.

Heather Simpson was a criminalist for the Los Angeles Police Department assigned to the serology DNA unit. She worked as a DNA analyst and analyzed rape kits. She conducted the DNA analysis of Annet’s sexual assault rape kit. Her analysis detected sperm cells on four swab samples taken from Annet. At least two of the swabs contained mixtures of two people’s DNA, with a major contributor, whose DNA was more

prevalent, and a minor contributor, whose DNA was less prevalent. The major DNA profile from each of the four swabs matched Mack. The minor DNA profile from two of the four swabs matched defendant.

B. *Defense Case*

On December 5, 2016, Officer Chas Maloch responded to a call at approximately 4:00 a.m. in Hollywood. He made contact with Annet and noticed abrasions on her face, arms, and knees. Annet appeared intoxicated⁵ and upset, making his initial attempts at interviewing her difficult.

Defendant testified about the incident involving Thomas as follows: In November 2016, a man named Knox, who was leaving town for a trip to Miami, told defendant, Thomas, and others that they were welcome “to crash” at his home. Thomas went to Knox’s home first and picked up the key.

On November 27, 2016, defendant saw his friend Mack in Hollywood and invited him to stay at Knox’s house. Thomas, however, did not want Mack to stay in the house because he believed Mack had taken his watch. Defendant gave Thomas money for the watch and Thomas agreed to allow Mack to shower.

On November 30, 2016, Thomas “kick[ed Mack] out” of Knox’s house, which made defendant angry. Defendant and Thomas then had a dispute over the key to Knox’s house, which Thomas refused to give to defendant. The men argued and Thomas punched defendant. Defendant “punched him back” and

⁵ Annet told the officer she had consumed three vodka sodas.

the two men wrestled. During the altercation, defendant saw the house key fall from Thomas's pocket, grabbed it, and ran away.

Thomas came outside with a bottle in his hand and demanded the key back. Thomas then threw the bottle at defendant, but missed, causing the bottle to shatter and cut Thomas's hand. Defendant then kicked Thomas, who ran back into the house.

Defendant called for an Uber driver to pick him up from the residence. As he was waiting for his ride, the police arrived and arrested him. Defendant denied stabbing Thomas that day.

Defendant described the incident with Annet as follows: In the early morning hours of December 5, 2016, defendant was hanging out with friends "selling clothes in the middle of the street in Hollywood." They were listening to music and "smoking weed."

He saw Annet with Mack, a woman named Iris, and "some dude." Iris told defendant that Annet was visiting Hollywood from Germany. Defendant introduced himself to Annet and spoke to her for about 25 minutes. According to defendant, he and Annet, who did not appear to be "sober," drank vodka shots from a bottle she had in her purse.

Because Annet wanted more to drink, the group walked to a liquor store. Mack then told defendant that he, Iris, and Annet were going to a park.

Defendant left and went to a mall. While there, he received a call about "a little kickback party at the rooftop." Mack then dropped Annet off at defendant's location and left to visit his girlfriend. Annet told defendant she wanted "to hang out," i.e., go to a party, listen to music, and drink.

Defendant, Annet, and defendant's friend went to the rooftop of a "condo." On the way, they stopped at a liquor store because Annet "want[ed] more drinks." They then proceeded to the rooftop where they drank, listened to music, and danced. Annet began touching defendant and asked him to show her his penis. When defendant complied, Annet performed oral sex on him; she then pulled her clothing down and defendant had sex with her.

After they had sex, defendant asked Annet if she wanted to get something to eat, but she "didn't want to . . . get nothing to eat[, as] she [was] still . . . drunk, going crazy, dancing with different people, doing all type of stuff that normal people don't do." Defendant decided to leave the party, but left Annet \$25 so she could get something to eat. He left the party and later saw Annet "with somebody else." Her face was bruised and she was crying. Defendant tried to call Uber for her, but she threw a bottle against the wall and "was just going crazy." Because Annet would not listen to him, defendant left.

Defendant denied raping Annet and insisted that their sexual encounter had been consensual, i.e., "that's what she wanted to do."

Defendant claimed that when he was interviewed by the police, he did not tell them the whole story because, based on prior experience, he was concerned they would "twist [his] words, because [he knew] how the police work[ed]." Also, when he was detained, he had a gun, a "bunch of drugs and a lot of money." The police told defendant, "We don't really want you . . . we want

Mack.” Defendant decided to tell the police “what they wanted to hear.”⁶

III. PROCEDURAL BACKGROUND

In an information, the Los Angeles County District Attorney charged defendant and Mack in count 2 with the assault with a deadly weapon of Thomas in violation of section 245, subdivision (a)(1); and in counts 3 and 4 with the rape in concert of Annet in violation of section 264.1, subdivision (a). The District Attorney also charged Mack in count 1 with the rape of Amber and in counts 5 and 6 with the assault and robbery of Naghifazel.

In closing argument, the prosecutor argued that with respect to count 3, Mack acted as the primary rapist and defendant aided and abetted him in the rape; and that with respect to count 4, defendant acted as the primary rapist and Mack aided and abetted him.

During jury deliberations, the jury sent the trial court a number of notes, including two asking how it should complete the verdict forms if jurors could not unanimously decide beyond a reasonable doubt that defendant forcibly raped Annett, but also concluded that defendant aided and abetted Mack’s rape of Annett. After consulting with counsel, the trial court provided

⁶ Defendant’s interview with the police was played for the jury during his cross-examination by the prosecution. Defendant’s description of his conduct on the morning of the incident with Annet was inconsistent in several material respects with his trial testimony.

responses to those questions. Defendant does not challenge the trial court's response.

The jury found defendant not guilty on count 2, but guilty of the lesser offense of assault, and guilty on count 3, the rape in concert involving Annet. The jury could not reach a unanimous verdict as to defendant on count 4 and the trial court therefore declared a mistrial on that count. The jurors advised the court that they had been deadlocked 8 to 4, in favor of defendant's guilt, on count 4. The jury found Mack guilty on all six charges asserted against him.

The trial court sentenced defendant on count 3 to the upper term of nine years and on count 2 with a consecutive six-month sentence.

IV. DISCUSSION

A. Section 1098 Motion for Separate Trials

1. Background

The information was filed on May 2, 2017, and three weeks later, defendant filed a motion pursuant to section 1098 to be tried separately from Mack. According to defendant, it would be unfair to try him with Mack because of the likelihood that the jury would find defendant guilty by mere association. The prosecution opposed the motion arguing that the two unrelated incidents involving Mack only were "not seriously inflammatory in such a way that they would cause [defendant] to be prejudiced by association with . . . Mack." The prosecution also maintained that separate trials "would create substantial hardship for the

[two] rape victims and create a significant inefficiency for the court.” The trial court, Judge Wapner presiding, denied the motion.

2. Legal Principals/Standard of Review

“Section 1098[] provides in part, ‘When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, *they must be tried jointly*, unless the court order separate trials.’ We construe the section to mean that a defendant may not be tried with others who are charged with different crimes than those of which he is accused unless he is included in at least one count of the accusatory pleading with all other defendants with whom he is tried. [¶] The requirement of the section that defendants jointly charged be jointly tried—unless in the trial court’s discretion separate trials are appropriate—clearly implies that a joint trial is improper if there is no joint charge.” (*People v. Ortiz* (1978) 22 Cal.3d 38, 43, italics added (*Ortiz*).)

“Under []section 1098, a trial court *must* order a joint trial as the ‘rule’ and *may* order separate trials only as an ‘exception.’ [Citation.]” (*People v. Alvarez* (1996) 14 Cal.4th 155, 190.) “‘The Legislature has expressed a preference for joint trials [Citations.] Joint trials promote efficiency and help avoid inconsistent verdicts. (*Zafiro v. United States* (1993) 506 U.S. 534, 537 . . . ; [*People v.*] *Bryant, Smith and Wheeler* [(2014) 60 Cal.4th 335,] 378-379.) “[I]mportant concerns of public policy are served if a single jury is given a full and fair overview of the defendants’ joint conduct and the assertions they make to defend against [the] ensuing charges.” ([*Id.*] at p. 379.) The court has

discretion to order separate trials if there is an incriminating confession, prejudicial association, likely confusion due to evidence on multiple counts, conflicting defenses, or the possibility that a codefendant might provide exonerating testimony at a separate trial. (*Ibid.*) Prejudicial association might exist if “the characteristics or culpability of one or more defendants [is] such that the jury will find the remaining defendants guilty simply because of their association with a reprehensible person, rather than assessing each defendant’s individual guilt of the crimes at issue.” (*Id.* at p. 383.) We review the court’s denial of severance for abuse of discretion *based on the facts as of the time of the ruling*. If the court properly denied severance at the time, the reviewing court may reverse a judgment only if it finds that the joint trial caused gross unfairness that denied due process. (*Id.* at p. 379.)’ (*People v. Sanchez* (2016) 63 Cal.4th 411, 463-464)” (*People v. Anderson* (2018) 5 Cal.5th 372, 386-387, italics added.)

Moreover, even if a trial court abuses its discretion in refusing to order separate trials, reversal is unwarranted unless, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. (*People v. Avila* (2006) 38 Cal.4th 491, 575.) As the Supreme Court explained in *Ortiz, supra*, 22 Cal.3d 38, “In [*People v. Massie* (1967) 66 Cal.2d 899,] we analyzed the factors to be applied in considering whether the denial of severance was prejudicial. These factors include whether a separate trial would have been significantly less prejudicial to defendant than the joint trial, and whether there was clear evidence of defendant’s guilt. (*Id.*, at p. 921.) We further held that reversal would follow only upon a showing ‘of a reasonable probability that the defendant would have obtained a

more favorable result at a separate trial.’ (*Id.*, at pp. 922-923.)” (*Ortiz, supra*, 22 Cal.3d at p. 46.)

3. Analysis

Defendant contends that the trial court abused its discretion when it refused to order separate trials on all counts under section 1098, given the violent and reprehensible nature of Mack’s conduct in relation to both the jointly charged offenses and unrelated charges against him. According to defendant, the cumulative effect of the evidence against Mack on all the charges against him would only serve to inflame the jurors and cause them to convict defendant simply because of his association with Mack, the truly culpable party.

It is undisputed that defendant and Mack were jointly charged with the commission of the offenses in counts 2, 3, and 4. As discussed above, under section 1098 and the policies underlying it, those three jointly charged offenses mandated a joint trial of all the crimes charged in the accusatory pleading, unless, in the trial court’s discretion, separate trials were appropriate because of the potential for prejudicial association. Defendant therefore had the burden in the trial court on the section 1098 motion of demonstrating prejudicial association.

At the time of the hearing on the section 1098 motion, the trial court had limited information available to it concerning the charges. From the accusatory pleading, the trial court was aware that counts 2, 3, and 4 were jointly charged and involved: (1) a joint assault on Thomas with a screw driver that inflicted great bodily injury; and (2) the rape in concert of Annet on a subsequent occasion. The pleading further informed the court

that counts 1, 5, and 6 were unrelated to defendant and involved the prior independent conduct of Mack in robbing Naghifazel and raping and robbing Amber. Beyond the face of the pleading, however, the only other information before the trial court at the time of the hearing on the separate trial motion was contained in the motion itself and the opposition, neither of which provided any further significant detail concerning the nature of the jointly charged and unrelated offenses.

Based on the information available to the trial court on the motion for separate trials, the court did not abuse its discretion in denying it. Contrary to defendant's assertion, it was not reasonably apparent from that limited information that Mack's conduct in relation to both the joint and unrelated charges was exceedingly violent and reprehensible, when compared to defendant's conduct in relation to the joint charges only. Although Mack was alleged to have committed a total of three robberies and two rapes, there was nothing further to suggest to the trial court that the jury would be unable, with proper instructions, to evaluate separately defendant's independent conduct in relation to the assault of Thomas and the rape of Annet, i.e., defendant failed to demonstrate that the "characteristics or culpability" of Mack for the crimes alleged against him had a potential to cause the jury to find defendant guilty "simply because of [his] association with a reprehensible person." (*People v. Anderson, supra*, 5 Cal.5th at p. 386.) The trial court therefore did not abuse its discretion.

Although defendant contends that he was "prejudiced" *at trial* based on the trial court's denial of the separate trial motion, it is unclear whether he is contending that: (1) even if the trial court did not abuse its discretion in denying his motion, the joint

trial nevertheless resulted in a gross injustice in violation of due process; or (2) but for the court's abuse of discretion in denying the motion, he would have obtained a more favorable result in a separate trial. We will assume that defendant is making both contentions, in the alternative, but we nevertheless conclude—based on our review of the trial evidence—that defendant was not prejudiced at trial based on the trial court's refusal to order separate trials.

First, defendant has not demonstrated that a separate trial would have been significantly less prejudicial to him. Even in a separate trial for defendant on the charged crimes against Thomas and Annet, the jury would have heard all the prosecution's evidence in support of those crimes, including Thomas's testimony describing his altercation with defendant and Mack, Annet's testimony describing the defendants' brutal assault, her prior statements to Swintelski, and the results of the analysis of the DNA evidence. Thus, the jurors in such a trial would have known about Mack's role in the assault of Thomas, including Thomas's claim that Mack lacerated his chest with a screwdriver. They would also have heard Annet's description of Mack's brutal physical assault prior to raping her and that the two other men held her down as Mack raped her.

Second, the trial evidence concerning defendant's guilt was strong. Defendant admitted fighting with Thomas and having sexual relations with Annet on the rooftop. Thus, there was no dispute that defendant participated in both incidents described by the victims. The only dispute on count 2 was whether defendant's altercation with Thomas was self-defense, as defendant claimed, or a coordinated assault, as Thomas described. Similarly, the primary dispute on count 3 was

whether defendant aided and abetted Mack's rape of Annet, as Annet told the nurse practitioner, or whether he was not present during Mack's rape, as defendant testified. The physical evidence, which included Annet's multiple injuries, as well as the DNA evidence, strongly supported the verdict.

Finally, contrary to defendant's argument, the record reflects that the jury did not find defendant guilty merely because of his association with Mack. To the contrary, even though the jury convicted Mack of count 2, assault with a deadly weapon, it acquitted defendant of that greater charge and found him guilty of the lesser included offense of assault. Similarly, although it convicted defendant of aiding and abetting Mack's rape of Annet, as charged in count 3, it was unable to reach a unanimous verdict on count 4, which, the prosecutor argued, charged defendant with acting as the principal in the second rape of Annet. This verdict and the jury notes that preceded it demonstrate that the jury was well able to analyze the evidence against defendant and Mack separately and did not convict defendant simply because of his association with Mack.

We thus cannot conclude that defendant's joint trial resulted in gross unfairness amounting to a violation of due process or that, but for the trial court's ruling, defendant would have obtained a more favorable result in a separate trial.

B. *Section 954 Motion to Sever Counts*

1. Background

On July 6, 2017, just prior to the commencement of trial, defendant filed a motion entitled "Evidence Code 402 Motion to

Sever Co-defendant, and Counts” pursuant to section 954. In the motion, defendant asserted two different requests for relief: (1) to sever count 2—the assault of Thomas—from counts 3 and 4—the rape in concert of Annet; and (2) to sever the separate counts against Mack—count 1, the rape of Amber and counts 5 and 6, the assault and robbery of Naghifazel—from the jointly charged offenses. Defendant does not contend on appeal that the trial court’s refusal to sever count 2 from counts 3 and 4 was an abuse of discretion. Defendant argued below that the separate and unrelated charges against Mack—counts 1, 5, and 6—should be severed from the jointly charged offenses in counts 2, 3, and 4, because: (1) the evidence of the separate offenses against Mack was not cross-admissible on the jointly charged offenses against defendants; (2) the evidence of the separate offenses against Mack would inflame the jury; and (3) the evidence against Mack on the separate charges would cause the jury to impute guilt by association on the jointly charged offenses.

At the beginning of the jury trial, the trial court heard argument on defendant’s renewed motion to sever. The court initially noted that the motion was “basically the same motion” that Judge Wapner had already denied. It then explained that “none of the other crimes that [do] not involv[e defendant] are any more egregious than the rape in concert charges of which he is a co-defendant. And moreover, I don’t think that they are going to confuse the jury—or they are going to cause prejudice to him because it’s going to be clear—from my understanding of the facts in this case and from reading the trial brief that the prosecutor had filed, that it’s going to be clear that it’s not alleged that [defendant] committed those other offenses [charged against Mack]. And I think that the jury will be able to discern the

difference and keep these things separate. [¶] Also, it's relevant that there is a relationship between [defendant] and . . . Mack that apparently pre-dates the alleged rape in concert that's alleged in counts [3 and 4]. [¶] And so the court is not going to change the ruling that Judge Wapner had made and . . . exercising [the court's] own discretion, is going to deny [defendant's] request to sever counts at this time."

2. Legal Principles /Standard of Review

"The law prefers trying charged offenses together because doing so ordinarily promotes efficiency. (*People v. O'Malley* (2016) 62 Cal.4th 944, 967 . . .) [S]ection 954 embodies this preference. That section provides as relevant: 'An accusatory pleading may charge two or more different offenses connected together in their commission, . . . or two or more different offenses of the same class of crimes or offenses, under separate counts . . . ' (§ 954.) 'Offenses "committed at different times and places against different victims are nevertheless 'connected together in their commission' when they are . . . linked by a "common element of substantial importance.'"" (*People v. Mendoza* (2000) 24 Cal.4th 130, 160 . . .) [¶] Even if . . . joinder is proper, the court may order the counts tried separately. '[T]he court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.' (§ 954.) 'When, as here, the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its

discretion in denying the defendant's severance motion.' (*People v. Mendoza, supra*, 24 Cal.4th at p. 160.) 'In determining whether a trial court's refusal to sever charges amounts to an abuse of discretion, we consider four factors: (1) whether evidence of the crimes to be jointly tried is cross-admissible; (2) whether some charges are unusually likely to inflame the jury against the defendant; (3) whether a weak case has been joined with a stronger case so that the spillover effect of aggregate evidence might alter the outcome of some or all of the charges; and (4) whether any charge carries the death penalty or the joinder of charges converts the matter into a capital case.' (*People v. O'Malley, supra*, 62 Cal.4th at p. 968.)" (*People v. Anderson, supra*, 5 Cal.5th at pp. 388-389.)⁷

3. Analysis

Defendant contends that, even if the trial court did not abuse its discretion by refusing to order that defendant be tried separately from Mack, pursuant to section 1098, it nevertheless abused its discretion by refusing to sever the three unrelated charges against Mack only. According to defendant, the inflammatory nature of Mack's unrelated conduct against Amber and Naghifazel—which was not linked together with the conduct alleged in the joint charges or otherwise cross-admissible—could only serve to taint defendant's independent conduct and cause a finding of guilt by association.

As an initial matter, it appears that the jointly charged offenses and the unrelated offenses charged only against Mack

⁷ The fourth factor concerning capital punishment does not apply to any of the charges.

were properly joined under section 954 because they were offenses of the same class of assaultive crimes. (See *People v. Alvarez, supra*, 14 Cal.4th at p. 188 [“Rape is an assaultive crime against the person, as are robbery and murder”].) Thus, defendant was required to make a clear showing in the trial court of potential prejudice at trial to establish an abuse of discretion in denying the motion to sever. We conclude that defendant failed to make such a showing.

““In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, *“we consider the record before the trial court when it made its ruling.”* [Citations.] We consider first whether the evidence of the two sets of offenses would have been cross-admissible if the offenses had been separately tried. [Citation.] If the evidence would have been cross-admissible, then joinder of the charges was not prejudicial.” (*People v. Thomas* (2012) 53 Cal.4th 771, 798 (*Thomas*)). Here, the trial court apparently assumed that the evidence of Mack’s assaultive behavior against Amber and Naghifazel would not have been admissible to prove defendant’s guilt on the jointly charged crimes against Annet and Thomas; and the Attorney General does not contend otherwise on appeal.

But the assumed lack of cross-admissibility was not, by itself, sufficient to establish the potential prejudice necessary to defeat joinder of the two sets of charged crimes. (See *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1221-1223.) “Because the evidence would not have been cross-admissible, we next inquire ‘whether the benefits of joinder were sufficiently substantial to outweigh the possible “spill-over” effect of the “other-crimes” evidence on the jury in its consideration of the evidence of

defendant's guilt of each set of offenses.' [Citations.]" (*Thomas, supra*, 53 Cal.4th at p. 798.)

Based on the information known to the trial court at the time it ruled on the section 954 motion, Mack's conduct in relation to the unrelated charges involving Amber and Naghifazel was not likely to unusually inflame the jury against defendant when considering the joint charges. For similar reasons, it was not evident that the cases against Mack on the unrelated charges were stronger than the cases on the jointly charged offenses. Indeed, the information contained in the accusatory pleading and motion to sever provided only a general description of the respective charges, bereft of the detail necessary to evaluate either the potential inflammatory nature, or the relative strength, of the evidence on the unrelated crimes as against the evidence of the jointly charged ones.

For example, as to the unrelated charges, the accusatory pleading informed the trial court only that Mack committed second degree robbery against Naghifazel and Amber on separate occasions and that, on the same date he robbed Amber, he raped her by force. The motion as to these counts added no significant detail. As to the joint charges, the pleading informed the court that Mack and defendant assaulted Thomas with a screw driver inflicting great bodily injury and that, on a different occasion, they raped Annet in concert. Again, the motion as to these counts added no significant detail. Simply put, defendant failed at the outset to provide the information necessary to support his request for severance.

Moreover, even if we view the trial court's refusal to sever counts through the benefit of hindsight, and consider the trial evidence not available to the court at the time it ruled, we would

find no abuse of discretion. Although Mack raped Amber at gunpoint, he did not brutally beat and physically injure her as he did Annet before raping her. Similarly, although Mack punched and injured Naghifazel before robbing him, he did not stab him as he did Thomas. In addition, the physical injuries to both Thomas and Annet were serious, consistent with the version of events described by those victims, and corroborated by compelling physical evidence, including the results of Annet's sexual assault exam and the analysis of the DNA evidence. Thus, Mack's conduct on the unrelated charges could not have served to incite the passions of the jurors against defendant as they considered the brutal character of the jointly charged offenses. Nor could the evidence on those unrelated charges be construed as so much stronger than the evidence on the joint charges, as to cause a less favorable result at trial for defendant.

We conclude that the trial court did not abuse its discretion when it denied the motion to sever counts under section 954. And based on our review of the trial evidence, there is no merit to defendant's assertion that he received an unfair trial in violation of due process or that, but for the trial court's refusal to sever the unrelated charges against Mack, he would have obtained a more favorable result in a separate trial on the joint charges only.

V. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.