



chief upon a trial of the other offense or the offenses are defined by the same or similar statutory provisions (CPL 200.20[2][b], [c]). Severance of counts contained in a single indictment should be granted when a defendant shows that the counts were not joinable under the statutory criteria (*People v Lane*, 56 NY2d 1, 7 [1982]; CPL 200.20[2][b]).

At bar, none of the proof necessary for each offense was material to the other. The facts underlying defendant's conviction for leaving the scene of an accident stemmed from a September 4, 2011 incident. The victim was lying on the road of the Henry Hudson Parkway. After other drivers stopped to try and pull the victim out of the road, a dark Acura ran him over and continued driving without stopping. The victim was pronounced dead at the scene. There was video footage and still pictures from the toll plaza that showed the cars of the drivers who stopped to help, followed immediately by the dark Acura. The footage showed images of the cars, their drivers and their respective license plates. Defendant was the registered owner of the dark Acura.

The DWI conviction was based on an incident that occurred four months later, on January 15, 2012. At that time, defendant was observed by police officers weaving in and out of his lane and driving 85 mph in a 50-mph zone. The officer who arrested defendant for the DWI was permitted to testify relative to the charge of leaving the scene that he recognized the vehicle and driver in the video and stills taken on September 4, 2011 as the same vehicle and person he stopped on January 15, 2012.

The People argue that evidence of the DWI arrest was material and admissible regarding the leaving the scene charge because the DWI arresting officer's testimony was necessary to establish the strength of defendant's identification in the charge for leaving the scene. We disagree.

The witnesses, locations, and dates of the two crimes were completely unrelated. The People did not need the arresting officer in the DWI charge to identify defendant in video and stills, which were only part of the earlier investigation. While certain evidence may be material and admissible to prove a defendant's identity in joint trials (*see e.g. People v West*, 160 AD2d 301 [1st Dept 1990] [separate offenses charged in the indictment were joinable where evidence showed unique modus operandi], *lv denied* 76 NY2d 798 [1990]), that was not the case here. The images could have been presented directly to the jury for them to determine if defendant was the same person depicted therein. Significantly, there were no claims made by the People that by the time of trial defendant had changed his appearance and the officer was more likely to correctly identify the person depicted in the images than was the jury (*People v Coleman*, 78 AD3d 457, 458 [1st Dept 2010], *lv denied* 16 NY3d 829 [2011]).

The court's error was not harmless (*People v Crimmins*, 36 NY2d 230, 242 [1975]). Although the court instructed the jury to consider the evidence separately, defendant was prejudiced by the jury's hearing testimony that defendant was drunk and driving at high speeds on a separate occasion. The evidence of recklessness in that DWI conviction bore upon his conduct in leaving the scene and failing to stop after running over the victim on September 4, 2011. There is a significant possibility that the cumulative effect of the DWI evidence led the jury to convict on the leaving the scene

count (*see People v Stanley*, 81 AD2d 842, 843 [2d Dept 1981]).

The verdicts were based on legally sufficient evidence and were not against the weight of the evidence

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: January 12, 2021

A handwritten signature in black ink, appearing to read "Susanna M. Rojas". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Susanna Molina Rojas  
Clerk of the Court