




---

---

---

---

---

---

---

---

**NO! NO ! NO ! THEY CAN'T SAY  
THAT NO MORE:  
HOW TO SHOW THAT A  
SUMMATION ERROR CAUSES A  
SUBSTANTIAL RISK OF A  
MISCARRIAGE OF JUSTICE**  
JOSEPH N. SCHNEIDERMAN, ESQ.  
MASSACHUSETTS ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS  
MARCH 22, 2019

---

---

---

---

---

---

---

---

**Our friends, The Kozec Factors**

- Comm. v. Kozec, 399 Mass. 514, 518 (1987)
- First: Was there an objection?
- Second: Did the error go to the heart of the case or to a collateral issue?
- Third: Did the judge provide any curative or other instructions to the jury?
- Fourth: In light of the circumstances of the trial as a whole, did the error influence the verdict?

---

---

---

---

---

---

---

---

### Kozec Factor 1-GOOD CITES

- Remember and remind the AC although lack of objection puts you in SRM-Jungleland, it's NOT AND NEVER CAN BE FATAL.
- [Comm. v. Harris, 443 Mass. 714, 732 \(2005\)](#) (Lack of an objection **only factor** that favors the Commonwealth)
- [Comm. v. Shelley, 374 Mass. 466, 469 \(1978\)](#) (“...the failure to object and possibly obtain a curative instruction may be the very thing which permits the remarks to have their maximum prejudicial effect.”)
- Good recent case on the adequacy of preservation: [Comm. v. McDonagh, 480 Mass. 131 \(2018\)](#) give Patrick Levin a big hand!
- Prosecutor ran her summation by the judge first to harp defendant's prior bad acts of viewing child pornography as to state of mind...
- Defendant had previously objected to prior bad acts (viewing child pornography), judge cut her off on objection...
- SJC-This is enough to preserve.

---

---

---

---

---

---

---

---

### But what about the rest?

- Look for links between evidentiary errors and summation errors!
- Or, is it a pure credibility contest???
- Goes to the second and fourth factors- and whether the Court should harbor grave doubt about the fairness of the verdict.
- How do YOU know, Joe?

---

---

---

---

---

---

---

---

### I'M GLAD YOU ASKED! RECENT CASES! DIRGO!

- [Comm. v. Dirgo, 474 Mass. 1012 \(2016\)](#) (Give Merritt Schnipper a big hand!)
- Pure credibility contest-believe the victim because they are in court.
- NO. NO. NO. They can't say that-esp. since the victim was smoking.
- Knowledge of sexual terminology-knew because of abuse...
- NO. NO. NO. Indeed, there was an undisclosed 51A report.
- First complaint-Commonwealth can't parade witnesses to tell you the same thing.
- NO. NO. NO. Comm. can't exploit the limits of the first complaint doctrine or fight fire with fire. See also Harris (Comm. excluded evidence of victim's priors as a prostitute and then said there was no evidence victim was a prostitute.)
- All told, SRMJ.

---

---

---

---

---

---

---

---

### More Recent Cases-Hamel

- [Comm. v. Hamel, 91 Mass. App. Ct. 347 \(2017\)](#) (Give Laura Mannion a BIG HAND!)
- Comm. admitted records that a child suffered dermatitis on his genitals-and dermatitis was the result of abuse.
- Prejudicial error-NO EXPERT testimony on point.
- AND Summation caused SRMJ-same as Dirgo-believe the victim because they are here-taken together, SRMJ.
- Contrast [Comm. v. Childs, 94 Mass. App. Ct. 67 \(2018\)](#), (pattern of uncharged sexual abuse properly admitted to show relationship under guide to evidence, prosecutor could emphasize and harp in closing-if improperly admitted, there would be prejudice Childs was a 2-1, Justice Singh and asserted it was improperly admitted.)

---

---

---

---

---

---

---

---

### Recent Cases-Horne/Cuevas

- This notion also works the other way too...Unobjected evidentiary error can cause SRMJ, if Comm. emphasizes in summation.
- [Comm. v. Horne, 476 Mass. 222 \(2017\)](#) (Give Rebecca Jacobstein a big hand!)
- Boston Police Sergeant testified as to what crack addict (does) not do, Comm. emphasized in closing on possession w/inte charges
- SRMJ-Profiling evidence is inadmissible, so is negative profiling is too- "mirror image" that detracts from individual guilt.
- SRMJ-prosecutor magnified the point in closing.
- See also [Comm. v. Cuevas, 94 Mass. App. Ct. 780 \(2018\)](#) (Give Joe Lattimore, if he's here, a BIG HAND!)
- Comm. admitted RMV records of refusals-Prosecutor emphasized in opening and closing.
- SRMJ-Evidence sufficient of impairment, but, defendant stopped on a technical violation of driving on a sidewalk on a narrow street, citing [Comm. v. Gibson, 82 Mass. App. Ct. 834 \(2012\)](#) (A Golden Egg SRMJ in an OUT case!!!!)
- Watch in the pipeline: Comm. v. Brown, 2019-P-187 (Partially preserved summatio error a la Horne/Hamel/[Comm. v. Ferreira, 460 Mass. 781](#).)

---

---

---

---

---

---

---

---

### Recent Cases-Sherman, Sutherland

- Contrast [Comm. v. Sherman, 481 Mass. 464 \(2019\)](#) (Judge erred in allowing cocaine use to challenge memory, no SRMJ because prosecutor didn't emphasize it in closing.) Condolences to Edward Crane.
- Contrast also [Comm. v. Sutherland, 93 Mass. App. Ct. 65 \(2018\)](#)-NO SRMJ because there was consciousness of guilt and not emphasized in closing. Condolences to Barbara Sweeney.

---

---

---

---

---

---

---

---

Recent Cases: Brown

- [Comm. v. T. Brown, 479 Mass. 800 \(2018\)](#)
- Gun possession case: Prosecutor insinuated that female passenger was new girlfriend, the case was about confessions (including about how she took a gun out of her purse), and female passenger had a motive to lie as the girlfriend.
- SJC-NO, No, no-No evidence in the record of a relationship- another person in the car-inference was a stretch.
- NO SRMJ: Discrepancies in officer and "girlfriend's" statements were before and up to the jury-no difference.
- See also [Comm. v. Wood, 90 Mass. App. Ct. 271](#) (inartful use of jury instruction on excuse or accident error but NOT SRMJ since it was isolated part of closing reviewing documents.),
- [Comm. v. Lugo, 89 Mass. App. Ct. 229 \(2016\)](#) (like McDonagh too, prosecutor improperly referenced prior as propensity to evade responsibility and said victim despite motion in limine, but collateral issue and curative instructions.)

---

---

---

---

---

---

---

---

Recent Cases: Contrast Dirgo with Casbohm

- [Comm. v. Casbohm, 94 Mass. App. Ct. 613 \(2018\)](#) (prosecutor was inflammatory but emphasized the evidence-viz., the age of victim, argue credibility after attacked [why make this up, not believe b/c here], photos did depict sex and victim could not consent legally to acts or photos.)
- See also [Mattei, 90 Mass. App. Ct. 577](#) (rhetorical flourish), [Villalobos, 89 Mass. App. Ct. 432](#) (marshal evidence), S.C., 478 Mass. 100?

---

---

---

---

---

---

---

---

Recent Cases: Santana and Leary

- [Comm. v. Santana, 477 Mass. 610 \(2017\)](#)
- Murder case: three alleged unobjected to misstatements: Enhanced hearing, bitemarks on ducttape, DNA statistics and proof beyond a reaonsable doubt
- SJC: enhanced hearing-No, but no SLMJ because isolated and collateral, bitemarks based in evidence, DNA focused on certainty, not moral certainty-i.e. proof beyond a reasonable doubt (unlike Ferriera)
- [Comm. v. Leary, 92 Mass. App. Ct. 332 \(2017\)](#)-similar, motor vehicle homicide-"We don't have to prove he drove erratically but he obviously did[ in evidence]" , no vouching Officer described witness as falling down drunk,
- "go back in time to stop victims death-BAD-appeal to sympathy-but NO SRMJ, isolated although on the heart of guilt, no curative instructions, hefty evidence of guilt-D admitted to striking victim and drinking.

---

---

---

---

---

---

---

---

Which brings us to our real summation.

- **Charges Aggravated A&B, A&BDW.**
- **Victim and defendant are roommates, non English speakers, both had interpreters. Only witnesses, save a police officer.**
- **Fight-Both injured, victim lost thumb later as a result of thumb being bitten.**
- **Defendant raised self-defense. Defendant was taller, victim was heavier.**

---

---

---

---

---

---

---

---