

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, :

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

AARON THOMAS LUSTER, a/k/a AARON
LESTER and ARIEN THOMAS LUSTER,

Appellants

No. 1058 WDA 2004

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ALLEGHENY COUNTY

Appeal from the Judgment of Sentence entered on May 19, 2004
in the Court of Common Pleas of Allegheny County,
Criminal Division, No. CC 2003-03599

BEFORE: HUDOCK, MUSMANNO and TAMILIA, JJ.

MEMORANDUM:

FILED: April 17, 2006

Aaron Thomas Luster, a/k/a Aaron Lester and Arien Thomas Luster ("Luster"), appeals from the judgment of sentence entered following his conviction of third degree murder and murder of an unborn child.¹ We affirm.

On the evening of January 27, 2003, Christine Karcher ("Karcher"), who was approximately seven months pregnant, went to the Chez Lounge in the Coraopolis/Moon Township section of Allegheny County. After Karcher left the Chez Lounge, she encountered Eric Branaugh ("Branaugh"), who was an old friend. At that time, Karcher appeared nervous and scared, and Branaugh thought that Karcher had been drinking. Karcher told Branaugh that she and Luster had an argument and that she was afraid that Luster

¹ 18 Pa.C.S.A. §§ 2502(c), 2604.

was going to do "something bad to her." Karcher asked Branaugh to stay with her, but he declined. However, Branaugh gave Karcher his telephone number.

Karcher returned to the Chez Lounge. She subsequently gave another acquaintance, Michael Smith ("Smith"), a ride to another bar. When the two returned to the Chez Lounge, they encountered Luster. Luster began screaming at both Smith and Karcher. Karcher left with Luster in Luster's vehicle. While in Luster's vehicle, Karcher placed several calls, including calls to 911. During those calls, Luster could be heard threatening Karcher in the background. Luster subsequently put Karcher out of his vehicle on State Route 60, a limited access highway.

James Caleffi ("Caleffi"), while driving home from work on Route 60, hit Karcher, who was lying on the roadway. Prior to this time, Caleffi had consumed alcohol. Caleffi mistakenly believed he had struck a deer. Caleffi called 911 and reported an obstruction on the roadway. Karcher died as a result of being struck by Caleffi's vehicle.

A jury subsequently convicted Luster of two counts of third degree murder. Thereafter, the trial court sentenced Luster to an aggregate prison term of 168 to 336 months, after which Luster filed the instant timely appeal.

Luster presents the following claims for our review:

1. Is the evidence insufficient to support the guilty verdicts in this case because the Commonwealth

failed to establish beyond a reasonable doubt that the victim and her unborn child were killed due to the acts of [Luster], and, in fact, the evidence proved instead that the deaths were caused by the actions of another?

2. In a related matter, did the lower court err in instructing the jury with respect to the issue of causation?
3. Did the lower court err when it permitted the Commonwealth to play a 911 tape to the jury and also when it permitted the jury to view a transcript made by the Commonwealth purported to be the contents of this tape?

Brief for Appellant at 5. We will address these claims in order.

Luster first challenges the sufficiency of the evidence underlying his convictions of third degree murder. In this regard, Luster asserts that Karcher's death was not foreseeable, and that the chain of causation was broken by Caleffi's alleged criminal act of driving while intoxicated, and by Karcher's act of lying down in the roadway.

In reviewing the sufficiency of the evidence, we must determine whether the evidence, and all reasonable inferences deducible therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all of the elements of the offenses beyond a reasonable doubt. ***Commonwealth v. Hopkins***, 747 A.2d 910, 913 (Pa. Super. 2000). The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. ***Commonwealth v. Dellavecchia***, 725 A.2d 186,

188 (Pa. Super. 1998) (*en banc*). The trier of fact is free to believe all, part, or none of the evidence presented. ***Commonwealth v. Carson***, 741 A.2d 686, 693 (Pa. 1999).

Third degree murder occurs "when a person commits a killing which is neither intentional nor committed during the perpetration of a felony, but contains the requisite malice." ***Commonwealth v. Kling***, 731 A.2d 145, 147 (Pa. Super. 1999).

Malice exists where there is a "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured." Where malice is based on a reckless disregard of consequences, it is not sufficient to show mere recklessness; rather, it must be shown the defendant consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily injury. A defendant must display a conscious disregard for almost certain death or injury such that it is tantamount to an actual desire to injure or kill; at the very least, the conduct must be such that one could reasonably anticipate death or serious bodily injury would likely and logically result.

Id. at 147-48 (citations omitted).

"Criminal responsibility is properly assessed against one whose conduct was a direct and substantial factor in producing the death." ***Commonwealth v. Nicotra***, 625 A.2d 1259, 1260 (Pa. Super. 1993) (citations omitted). This is true even though other factors combined with that conduct to achieve the result. ***Id.*** The relevant standard for determining causation is as follows:

In order to impose criminal liability, causation must be direct and substantial. Defendants should not be exposed to a loss of liberty based on the tort standard which only provides that the event giving rise to the injury is a substantial factor. Although typically the tort context refers only to substantial and not to direct and substantial as in the criminal context, the additional language in the criminal law does not provide much guidance. Therefore, criminal causation has come to involve a case-by-case social determination; *i.e.*, is it just or fair under the facts of the case to expose the defendant to criminal sanctions. In other words, was the defendant's conduct so directly and substantially linked to the actual result as to give rise to the imposition of criminal liability or was the actual result so remote and attenuated that it would be unfair to hold the defendant responsible for it?

Commonwealth v. Rementer, 598 A.2d 1300, 1304-05 (Pa. Super. 1991). "[S]o long as the defendant's conduct started the chain of causation which led to the victim's death, criminal responsibility for the crime of homicide may properly be found." ***Nicotra***, 625 A.2d at 1264 (collecting cases).

The evidence, viewed in a light most favorable to the Commonwealth, as verdict winner, is as follows. At trial, the Commonwealth presented the testimony of Caleffi, whose vehicle had struck Karcher. Caleffi testified that he worked the evening shift for an airline beginning on January 27, 2003 and ending in the early morning hours of January 28, 2003. N.T., 3/15-19/04, at 139. Caleffi left work at approximately 1:30 a.m., and went to a bar. ***Id.*** at 140, 146. At the bar, Caleffi had "a few beers." ***Id.*** at 140. As

he was driving on State Route 60 towards downtown Pittsburgh, Caleffi described what next transpired as follows:

Well, it was real dark outside and I was going down the highway, and I came upon a white object, [it] just came into my headlights at the last minute, and then I turned to miss it and then I ended up clipping it. And then it shook the car pretty bad, and from there I tried to pull over, and there really wasn't a breakdown lane there, *per se*, so I had to pull into the Wyndham parking lot. From there I called 911.

Id. at 144. Caleffi gave his name to the 911 dispatcher, reported that there was an obstruction of some type on the road, and stated that they needed some state workers to clear the obstruction. **Id.** at 145, 146. Caleffi believed that he had hit a dead deer, or a box that had fallen off of a truck. **Id.** Caleffi saw no movement from the object on the road. **Id.** at 152.

Sally Nelson ("Nelson"), the bar manager at the Chez Lounge, observed Karcher in the bar earlier in the evening, between 10:00 p.m. and 11:00 p.m. **Id.** at 56. Karcher requested and was served a beer, even though she was several cents short of the cost of the beer. **Id.** at 56-57. Nelson indicated that Karcher did not appear intoxicated, but did appear "frazzled." **Id.** at 57. Nelson did not observe Karcher leave the bar. **Id.** Nelson subsequently observed Luster twice enter the bar, look around, go into the back room, and then depart. **Id.** at 57-59.

Chester Bell ("Bell") testified that he and Karcher had maintained a relationship for ten years. **Id.** at 63-64. Bell testified that in January 2003, Karcher was living with him. **Id.** at 66. Karcher had informed Bell that she

was pregnant with Luster's child. *Id.* at 67. On January 27, 2003 at about 9:00 p.m., Bell met with Karcher at Black Stone's bar where Karcher had a mixed drink. *Id.* at 74. Karcher told Bell that she was going to go and play euchre with her friends. *Id.* Thereafter, Karcher departed. *Id.* at 75.

Bell further testified that he returned to their apartment at about 10:00 p.m., and was asleep in bed by 11:00 p.m. *Id.* At about 3:30 a.m. on January 28, 2003, Bell woke up and discovered that his cell phones and vehicles were not where he had left them prior to going to sleep. *Id.* at 79. Bell assumed that Karcher had taken his vehicle. *Id.*

Eric Branaugh ("Branaugh") testified that he saw Karcher on January 27, 2003, at about 10:30 p.m. *Id.* at 98, 104. They spoke, and Branaugh stated that Karcher "sounded like she had been drinking. She was nervous and scared." *Id.* at 100. Karcher told Branaugh that she was scared because she and Luster "had an argument that night and he was going to do something real bad to her and she was, like, really scared." *Id.* at 101. At about 11:45 p.m. or midnight, Karcher called Branaugh's cell phone. *Id.* According to Branaugh,

[s]he says she was with [Luster], [and] she was scared. She was crying. I heard [Luster] in the background screaming and cussing at her. She was telling me that he's trying to kill me. He's trying to kill me.

Id. at 102. Branaugh heard Luster state the following: "You bitch, mother f***-er and I'm going to kill you bitch, and a couple just obscenities." *Id.* The conversation lasted three to four minutes. *Id.*

Smith testified that he spoke with Karcher at the Chez Lounge during the evening of January 27, 2003. *Id.* at 106-07. Smith had asked Karcher for a ride down the street to Wayne's Lounge, at the other end of Coraopolis. *Id.* at 108. During the five- to ten-minute ride to Wayne's Lounge, Karcher's telephone kept ringing. *Id.* at 109. According to Smith, Karcher would answer the telephone, then hang it up. *Id.* Karcher appeared to be upset. *Id.* at 110.

When Karcher and Smith returned to the Chez Lounge, a car pulled up and stopped in front of Karcher's vehicle. *Id.* Luster jumped out of that vehicle and asked Smith if Smith was having sex with Karcher. *Id.* at 110-11. When Smith indicated that Karcher had only given him a ride, Luster "balled-up his fists like he was coming towards me and he went to the other side of the car." *Id.* at 111. Luster then ordered Karcher out of the vehicle. *Id.* After a few minutes, during which Luster yelled obscenities at Karcher, Karcher exited the vehicle. *Id.* at 112. Smith exited the vehicle and went into the Chez Lounge. *Id.* at 114-15. When Smith went back outside about five minutes later, Luster, Karcher, and Luster's vehicle were gone. *Id.* at 115. Karcher's vehicle was parked in the lot. *Id.*

John Jaso ("Jaso"), a 911 supervisor for the region, testified that on January 28, 2003, at 1:52 a.m., he received a call from a female. *Id.* at 207. According to Jaso, "[i]t was very brief call and basically the call was moaning, crying, and then it probably lasted a few, maybe nine to ten

seconds, and then it was disconnected.” **Id.** The person called 911 two or three more times. **Id.** at 209. Jaso testified that “[o]n the third or fourth call, there was a female whispering for help or indicating that she needed some sort of help over and over and over again.” **Id.** Jaso also testified that he heard a male voice in the background. **Id.** at 212. The call was placed from one of Bell’s cell phones. **Id.** at 211. The series of telephone calls lasted approximately 12 to 15 minutes. **Id.** at 213.

State Police Trooper Timothy Campbell (“Campbell”) testified that he received a radio dispatch at approximately 2:00 a.m. on January 28, 2003. **Id.** at 188. In that dispatch, Campbell was instructed to “be on the lookout for a red Toyota Camry with a female possibly being assaulted.” **Id.** at 189-90. At approximately 2:18 a.m., Campbell received another dispatch that there was a person in the Wyndham parking lot who stated that he had struck a deer “or something” on the road. **Id.** at 190-91. At approximately 2:26 a.m., Campbell was informed by radio that there was a body on the roadway. **Id.** at 191. Campbell proceeded to the location of the body. **Id.** at 191-92.

Cherryl Ann Luster (“Cherryl Ann”), Luster’s legal wife, testified that Luster telephoned her in the early morning hours of January 28, 2003. **Id.** at 132. Luster had last spoken with Cherryl Ann on December 31, 2002. **Id.** According to Cherryl Ann, Luster asked “will you love me no matter what I did, and I said yes.” **Id.** at 132-33. Luster had telephoned Cherryl

Ann from a cell phone belonging to Bell. *Id.* at 135. Cherryl Ann saw Luster at his mother's house at about 6:00 p.m. or 7:00 p.m. that evening. At that time, Luster was in his mother's bedroom, leaning over the bed with his hands over his face and his knees on the floor. *Id.* at 136. Luster would not respond when Cherryl Ann asked what was the matter. *Id.* Thereafter, the police arrived at the residence. *Id.*

Pennsylvania State Trooper Douglas R. Bartoe ("Bartoe"), an accident investigation and reconstruction expert, testified that he was contacted at approximately 3:15 a.m. on January 28, 2003. *Id.* at 238. He arrived at the scene of the body at approximately 4:25 a.m. *Id.* Based on his observations at the scene, Bartoe opined that the victim was lying on the ground at the time Caleffi's vehicle struck her. *Id.* at 249, 262.

Bartoe also examined the red Toyota Camry that Luster had been driving. *Id.* at 155. Bartoe testified that he found what appeared to be blood inside the vehicle. *Id.* at 256-57. He also found "several hair-looking items underneath the car." *Id.* at 258.

The Commonwealth presented testimony that Karcher's blood was on the right sleeve of Luster's jacket and on his jeans. *Id.* at 290. Karcher's blood also was found on the passenger door pocket, the passenger side dash, and the carpet from the passenger side floor of the Camry. *Id.* at 297. A hair sample found underneath the Camry also matched Karcher's DNA profile. *Id.* at 322.

An autopsy disclosed that Karcher was severely intoxicated and had cocaine in her system at the time of her death. *Id.* at 329-30. The autopsy also revealed that Karcher had sustained injuries to her neck, hands and arms that were not caused by being struck by Caleffi's vehicle. *Id.* at 337. The injuries on Karcher's hands appeared to be from a struggle. *Id.* at 339. Contusions on Karcher's right and left arms were consistent with someone grabbing Karcher's arms. *Id.* at 339. Karcher also had sustained injuries consistent with manual strangulation. *Id.* at 343. Although Karcher was alive at the time she exited Luster's vehicle, the Commonwealth presented testimony that the injuries to Karcher's neck, arms and hands had "compromised" her. *Id.* at 352, 354.

State Trooper Kevin Scott ("Scott") testified that he was present during police questioning of Luster. *Id.* at 398. Luster told police officers that Karcher was with him on January 27, 2003. *Id.* at 399. Scott testified as follows:

I told [Luster] we were trying to find out a time line for [Karcher] the night before, ascertain her whereabouts, who she was with. [Luster stated that] [i]f that is all you need to know, I can tell you that. [Karcher] was with me last night. We were partying in Coraopolis. We went over to [Bell's] house to get some money for crack. [Karcher] had then left [Luster] at [Bell's] house.

[Luster] then told me [that] because [Karcher] had left [Luster] there, [Luster] took the car keys to the red Toyota Camry and [Bell's] cell phone. He then began an attempt to locate [Karcher]. [Luster] got ahold [sic] of her on the phone. An argument ensued on the phone.

* * *

[Luster] then found [Karcher]. Apparently she was with another man. [Luster] became enraged that [Karcher] was with another man. The two began fighting. There was an argument. [Luster] said [that] he put [Karcher] into the Camry and said we're going to go to Carnegie to try to work things out. Apparently they had an apartment together in Carnegie. [Luster] said that the fighting intensified the further they went.

[Luster] said that [Karcher] didn't want to go to Carnegie so he was going to put her out of the car.

* * *

As [Luster and Karcher] were traveling south on 31/60, which is Business 60, they observed a police car which would have been on the northbound side. Once they saw the police car, the fighting relaxed. As soon as they passed the police car, the fighting got more intense. [Luster] said that is when he put [Karcher] out of the car. [He] slammed the gear shift into park and put her out of the car. He told me he could show me where he put her out of the car.

* * *

[H]e told me he could show me where he put her out of the car and he basically described the location right about here (indicating [on an exhibit]). . . .

* * *

After [Luster] told me that he put her out of the car four times, then he showed me where it occurred. I asked him if he stopped or if he continued. He said that he continued on and went up to the Hill district and got some crack.

N.T., 3/15-19/04, at 399-402.

Our review of the record discloses that the Commonwealth presented sufficient evidence to sustain Luster's conviction of third degree murder. The evidence established that Luster "consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily injury." *Kling*, 731 A.2d at 148 (defining the malice necessary for a conviction of third degree murder). As the trial court stated in its Opinion,

There was testimony that [Luster] was threatening to kill the victim earlier in the evening. There was testimony that the victim called 911 requesting help while in [Luster's] vehicle and [Luster's] voice could be heard in the background. There was evidence of blood in [Luster's] vehicle and a hair belonging to the victim on the underside of [Luster's] vehicle, indicating that the vehicle hit the victim after she was ejected from it. [Luster] in his statement, admitted to "putting the victim out" of his vehicle, although he denied that she was lying on the roadway. But for [Luster] forcing the pregnant [Karcher] from his vehicle on a 55-MPH highway, she would not have been lying on the pavement to be hit by Mr. Caleffi. Basically, [Luster] set up the scene that led directly to the death of [Karcher] and her unborn child. His actions were malicious and without regard to the life of his "girlfriend," who was carrying his child. . . .

Trial Court Opinion, 2/7/05, at 5-6. The evidence was sufficient to establish that Luster's conduct was so directly and substantially linked to the actual result as to give rise to the imposition of criminal liability. Accordingly, Luster is not entitled to relief on his claim.

Luster next claims that the trial court improperly instructed the jury on the issue of causation. According to Luster, the trial court erred by instructing the jury that "a Defendant's conduct may be a direct cause of

death if it initiates an unbroken chain of events leading to the death of the victim." N.T., 3/15-19/04, at 514-15. According to Luster, the trial court failed to define either "what event could initiate a chain, or what could break a chain," causing confusion for the jury. Brief for Appellant at 36. Luster further asserts that the trial court failed to instruct the jury that it could find him not guilty if an intervening cause was found to have occurred. *Id.* Luster points out that the jury's confusion was evident from its request to be recharged on the elements of the crimes, and its later questions on causation.

In evaluating challenges to jury instructions, it is essential that the charge be read as a whole. *Commonwealth v. Paddy*, 800 A.2d 294, 321 (Pa. 2002). "The trial court may phrase its instructions as it chooses, provided that the law is clearly, adequately, and accurately presented to the jury." *Id.*

This Commonwealth has expressly rejected the tort theory of causation in assessing criminal responsibility. *Commonwealth v. Skufca*, 321 A.2d 889, 894 (Pa. 1974). "The law is clear that a victim's contributory negligence, if any, is not a defense . . . if the defendant's conduct was a direct and substantial factor in causing the accident." *Nicotra*, 625 A.2d at 1264. "Criminal responsibility is properly assessed against one whose conduct was a direct and substantial factor in producing the [injury] even though other factors combined with that conduct to achieve the result."

Commonwealth v. Shoup, 620 A.2d 15, 18 (Pa. Super. 1993) (quoting **Skufca**, 321 A.2d at 893). As long as the defendant's conduct started the chain of causation that led to the victim's injuries, criminal responsibility may properly be found. **See Nicotra**, 625 A.2d at 1264; **accord Commonwealth v. Ketterer**, 725 A.2d 801, 805 (Pa. Super. 1999).

A review of the trial court's instruction on this issue reveals precise conformity to the existing law. **See** N.T., 3/15-19/04, at 514-15. The trial court's charge, in its entirety, adequately and correctly informed the jurors of the relevant considerations particular to causation in the instant case. **See Commonwealth v. Clark**, 683 A.2d 901, 904 (Pa. Super. 1996) (stating that a review of jury instructions includes review of the entire charge; an abuse of discretion will not be found where the law was presented sufficiently and accurately). Although the jury asked to be re-instructed on the issue of causation, this does not establish that the instruction was confusing or misleading. Because we discern no abuse of discretion or error of law in the trial court's instruction, we cannot grant Luster relief on this claim.

Luster next claims that the trial court improperly admitted the 911 recording, permitting it to be played to the jury. According to Luster, portions of the tape were unintelligible and of such poor quality as to require the jury to speculate as to the contents of the tape. Luster further argues that the inflammatory nature of the tape outweighs its probative value.

Initially, we observe that the admission of evidence is reserved to the sound discretion of the trial court. ***Commonwealth v. Travaglia***, 792 A.2d 1261, 1263 (Pa. Super. 2002). Our standard of review is whether the trial court abused its discretion in admitting the challenged evidence. ***Id.*** An abuse of discretion is not merely an error in judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence of record, discretion is abused. ***Commonwealth v. Holder***, 815 A.2d 1115, 1118 (Pa. Super. 2003).

In ***Commonwealth v. Groff***, 514 A.2d 1382 (Pa. Super. 1986), this Court employed a two-part test to determine the admissibility of 911 tapes at trial. First, the trial court must determine whether the evidence is inflammatory in nature. ***Id.*** at 1384. If the evidence is inflammatory, the trial court must decide whether the evidence is of "essential evidentiary value" such that its need clearly outweighs the likelihood of inflaming the minds and passions of the jurors. ***Id.***

"[T]ape recordings are admissible in evidence when they are properly identified and are a true and correct reproduction of the statements made, and when the voices are properly identified." ***Commonwealth v. Leveille***, 433 A.2d 50, 52 n.3 (Pa. Super. 1981) (citations omitted). In addition, recordings are admissible despite imperfections, unless the imperfections are so substantial that the recordings as a whole are untrustworthy. ***Id.*** at 52.

In its Opinion, the trial court set forth its reason for admitting the 911 tape recording at trial. The trial court stated as follows:

The fact that the 911 tape was only partially audible does not make this evidence irrelevant. On the contrary, this evidence was very relevant. It demonstrated that the victim was in need of help and in fear for her life while in [Luster's] vehicle. She was attempting to seek help, but was having great difficulty, apparently due to the physical violence in the car, in communicating what she needed and where she was located. Thus, the tape supports the Commonwealth's position that [Luster] was attempting to harm the victim and accomplished his goal when he threw her out of his vehicle. As such, this argument is not grounds for a new trial.

Trial Court Opinion, 2/7/04, at 6. We adopt this reasoning and conclude, upon review of the record, that the inflammatory nature of the 911 tape is outweighed by its probative value.²

Luster also asserts that the trial court erred when it permitted the jury to view a purported transcript of the 911 tape that was made by the Commonwealth. In his appellate brief, Luster acknowledges that his challenge to the use of a transcript of the 911 tape recording was not set

² We further note that at trial, Smith testified that Luster had screamed obscenities at Karcher. N.T., 3/15-19/04, at 112. In addition, Branaugh had testified that Karcher telephoned him from Luster's vehicle. During that telephone call, Luster screamed obscenities and threatened to kill Karcher. *Id.* at 102. Thus, the jury was aware that Luster was screaming at Karcher, and had threatened to kill Karcher when she was in his vehicle. Finally, we note that "a trial court is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts form part of the history and natural development of the events and offenses with which the defendant is charged." *Commonwealth v. Peer*, 684 A.2d 1077, 1083 (Pa. Super. 1996) (citation omitted).

forth in his Concise Statement of matters complained of on appeal, filed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). However, Luster presents a claim of ineffective assistance of counsel based upon counsel's failure to include that issue in the Concise Statement.

The Pennsylvania Supreme Court has held that "in order to preserve their claims for appellate review, appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925. Any issues not raised in a Pa.R.A.P. 1925(b) statement will be deemed waived." ***Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998); ***accord Commonwealth v. Castillo***, 888 A.2d 775, 780 (Pa. 2005). Thus, Luster's claim that the trial court erred when it permitted the jury to view a purported transcript of the 911 tape is waived based on his failure to include the issue in his Concise Statement.

Luster also presents an ineffectiveness claim based upon counsel's failure to include this claim in his Concise Statement. In ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), the Pennsylvania Supreme Court held stated that "as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." ***Id.*** at 738. Underlying this rule is the Supreme Court's observation that "time is necessary for a petitioner to discover and fully develop claims related to trial counsel ineffectiveness." ***Id.*** at 737-38. Thus, "the record may not be

sufficiently developed on direct appeal to permit adequate review of ineffectiveness claims[.]” *Id.* at 737. Because appellate courts do not normally consider issues that were not raised and developed in the court below, the *Grant* court reasoned that “deferring review of trial counsel ineffectiveness claims until the collateral review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel.” *Id.* at 738; *see Castillo*, 888 A.2d at 780 (reiterating its ruling in *Grant*, but distinguishing *Commonwealth v. Halley*, 870 A.2d 795 (Pa. 2005), wherein the Supreme Court held that when **all** of a criminal defendant's issues are waived on direct appeal under *Lord* due to his attorney's failure to file a Rule 1925(b) statement, the Court will presume that the defendant suffered prejudice due to ineffective assistance of counsel because the actions of counsel resulted in the denial of the criminal defendant's right to direct appeal).

Accordingly, Luster's claim that the trial court improperly permitted the jury to view a transcript of the 911 tape is deemed waived. Luster's claim of ineffective assistance of counsel is dismissed without prejudice to Luster's right to raise this claim in collateral proceedings.

Judgment of sentence affirmed.

Judgment Entered:

Eleanor K. Valecko

Deputy Prothonotary

DATE: April 17, 2006