IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JARROD DEMAR MANSKER,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2015-194**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

Appellant Jarrod Demar Mansker was tried and convicted by a jury in the District Court of Tulsa County, Case No. CF-2014-2975, for the crime of Domestic Assault and Battery, Second Offense, after two or more felonies, in violation of 21 O.S.2011, §644(C).[1] The jury recommended Mansker be sentenced to four (4) years imprisonment plus one year post-imprisonment supervision and a $1,250.00 fine. The Honorable William LaFortune, District Judge, sentenced Appellant in accordance with the jury's recommendation and further ordered Appellant to pay a $150.00 Victim's Compensation Assessment and court costs. From this Judgment and Sentence, Mansker now appeals.

Appellant alleges three propositions of error on appeal:

I. THE TRIAL COURT ABSUED ITS DISCRETION IN FAILING TO APPOINT SUBSTITUTE COUNSEL FOR APPELLANT;

II. THE APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF TRIAL COUNSEL; and

[1] Mansker was additionally charged with Domestic Assault and Battery with a Dangerous Weapon (Count 2); however, the State dismissed this charge at the beginning of the trial, prior to the jury being seated.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT APPELLANT CREDIT FOR TIME SERVED.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence and Appellant's judgment should be **AFFIRMED**. However, finding merit with Appellant's third proposition of error, the matter is **REMANDED** for further proceedings consistent with this opinion to afford Appellant consideration of his request to receive credit for time served.

1.

We review a trial court's refusal to appoint substitute counsel for an abuse of discretion. *See Cole v. State,* 2007 OK CR 27, ¶ 11, 164 P.3d 1089, 1094 (trial court's reasons for denying request for new counsel were supported by the record); *United States v. Lott,* 310 F.3d 1231, 1249 (10th Cir. 2002) (review district court's refusal to substitute counsel for an abuse of discretion). "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue." *Neloms v. State,* 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

Good cause for substitute counsel "consists of more than a mere strategic disagreement between a defendant and his attorney." *Lott,* 310 F.3d at 1249. As noted by this Court in *Swain v. State,* 1980 OK CR 120, 621 P.2d 1811:

> A personality conflict involving a disagreement over the conduct of the defense will not justify discharge by the defendant of his attorney. Otherwise, a defendant could delay the trial indefinitely by demanding a new attorney every time the trial is set.

Swain, 1980 OK CR 120, ¶ 13, 621 P.2d 1811, 1183. *See also Johnson*, 1976 OK CR 292, ¶ 33, 556 P.2d at 1294 (demand for new counsel due to personality conflict or disagreement as a delaying tactic). Moreover, when an uncooperative defendant "substantially and unreasonably" contributes to the communication breakdown, there is no "complete breakdown of communication" of the type addressed in *Romero v. Furlong*, 215 F.3d 1107, 1111 (10th Cir. 2000) and *Lott*, 433 F.3d at 725-26. *Cole*, 2007 OK CR 27, ¶ 11, 164 P.3d at 1094.

Upon review, we find the trial court's reasons for denying Appellant's request for substitute counsel are fully supported by the record as Appellant "substantially and unreasonably" contributed to the communication breakdown which occurred prior to trial. *Cole*, 2007 OK CR 27, ¶ 11, 164 P.3d at 1094. Moreover, Appellant fails to demonstrate any resulting prejudice. Notwithstanding Appellant's conduct, the record clearly demonstrates defense counsel zealously represented Appellant and successfully secured the minimum sentence for Appellant despite him having two prior felony convictions. Thus, relief is denied for Proposition I.

2.

Appellant specifically asserts that trial counsel was ineffective for failing to object to the admission of Esther's 911 call on the grounds of hearsay. To prevail on an ineffective assistance of counsel claim, the defendant must show

both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Trial counsel will not be found ineffective for failing to raise objections which would have been overruled". *Eizember v. State*, 2007 OK CR 29, ¶ 155, 164 P.3d 208, 244. This Court has approved the admission of 911 tapes in certain cases where the party on the tape testifies at trial. *Williams v. State*, 2008 OK CR 19, ¶ 71, 188 P.3d 208, 223 (citing *Stouffer v. State*, 2006 OK CR 46, ¶¶ 114-17, 147 P.3d 245, 269).

While the victim's 911 call arguably is an excited utterance, any error arising from the admission of the 911 call was nonetheless harmless. *Martin v. State*, 1973 OK CR 269, ¶ 8, 510 P.2d 1394, 1395 (reviewing erroneous admission of hearsay evidence for harmless error). *See also Stouffer*, 2006 OK CR 46, ¶ 190, 147 P.3d at 278 (failure to object to evidence does not rise to the level of ineffective assistance when the Appellant has failed to show any resulting prejudice). Appellant does not raise a federal Confrontation Clause violation—no doubt because the victim testified and was subject to cross-examination about the statements she made in her 911 call. *Goode v. State*, 2010 OK CR 10, ¶ 32, 236 P.3d 671, 679 (quoting *Crawford v. Washington*, 541 U.S. 36, 59 n.9 124 S. Ct. 1354, 1369 n.9, 158 L. Ed. 2d 177 (2004)) ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."). For this same reason, any error from admitting the challenged

911 call was harmless. The victim testified in court to essentially the same thing and was subject to cross-examination.

Relief is denied for Proposition II. *Beavers v. State*, 1985 OK CR 146, ¶ 7, 709 P.2d 702, 705; *Martin*, 1973 OK CR 269, ¶ 8, 510 P.2d at 1395; 20 O.S.2011. § 3001.1.

3.

Appellant asserts the trial court abused its discretion when it denied Appellant's request to receive credit for time served based upon Appellant's decision to exercise his right to a jury trial. At sentencing, defense counsel requested Appellant receive credit for time served. In response, Judge LaFortune stated:

> Credit for time served to me is usually almost a negotiated part of a plea and it's a benefit that is afforded to those that plead. Sometimes you're granted it, sometimes you aren't. But for me that's where I consider it. **I don't consider it after a jury trial.** And it has nothing to do with being difficult or not. So, no, he won't get credit for time served.

(emphasis added).

The determination of whether to grant a defendant credit for time served is left to the sound discretion of the trial court. *Holloway v. State*, 2008 OK CR 14, ¶ 8, 182 P.3d 845, 847. We have defined an abuse of discretion by the trial court as "any unreasonable, unconscionable and arbitrary action taken without proper consideration of the facts and law pertaining to the matter submitted." *Riley v. State*, 1997 OK CR 51, ¶ 20, 947 P.2d 530, 534-35. In *Cavaness v. State*, the Court recognized:

> [S]uspension or deferral of sentence is a matter of grace, to be granted or denied by the trial court in the exercise of its best discretion. However, a defendant's exercise of his or her right to a jury trial is not a proper factor.

1978 OK CR 76, ¶30, 581 P.2d at 481. Consideration of a defendant's decision to exercise his or her right to a jury trial in sentencing is "forbidden ground". *See Id.*, 1978 OK CR 76, ¶ 33, 581 P.2d at 482. *See also Gillepsie v. State*, 1960 OK CR 67, ¶ 16, 355 P.2d 451, 456 ("A policy designed to deny defendant a suspended sentence solely because he demanded a jury trial is contrary to law and an unjustifiable denial of defendant's rights to have his application for a suspended sentence considered upon its merits.").

The record in this case clearly demonstrates the trial court did not consider the facts and circumstances of this case prior to denying Appellant's request for time served. Rather, as the State's concedes, the trial court denied Appellant such credit simply because he exercised his right to a jury trial. Relief for Proposition III is thus granted.

DECISION

The judgment of the district court is **AFFIRMED.** The matter is **REMANDED** to the district court for **RESENTENCING** for the sole purpose of affording Appellant fair consideration of his request to receive credit for time served. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM D. LAFORTUNE, DISTRICT JUDGE

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SMITH, P.J.: CONCUR IN RESULTS
LUMPKIN, V.P.J.: CONCUR IN RESULTS
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN RESULTS