IN THE
TENTH COURT OF APPEALS

No. 10-09-00331-CR

SABRINA M. HAWKINS,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 249th District Court
Johnson County, Texas
Trial Court No. F43584

MEMORANDUM OPINION

Raising three issues, Appellant Sabrina Hawkins appeals her felony conviction and forty-year sentence on two counts of delivery of a controlled substance. We will affirm.

We begin with her third issue, which asserts that her Sixth and Fourteenth Amendment rights were violated when her oral motion to dismiss the petit jury array was denied before voir dire began. The basis of the motion was that Hawkins was African-American and there were no African-Americans on the jury panel. The State

agreed that there appeared to be no African-Americans on the jury panel. Article 35.07 of the Code of Criminal Procedure provides:

> Each party may challenge the array only on the ground that the officer summoning the jury has wilfully summoned jurors with a view to securing a conviction or an acquittal. All such challenges must be in writing setting forth distinctly the grounds of such challenge. When made by the defendant, it must be supported by his affidavit or the affidavit of any credible person. When such challenge is made, the judge shall hear evidence and decide without delay whether or not the challenge shall be sustained.

TEX. CODE CRIM. PROC. ANN. art. 35.07 (Vernon 2006). Because Hawkins's motion was not in writing and was not supported by an affidavit, we agree with the State that Hawkins failed to preserve this complaint for appellate review.

Moreover, to establish a prima facie violation of the requirement that there be a fair cross-section of the community, an appellant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Pondexter v. State*, 942 S.W.2d 577, 580 (Tex. Crim. App. 1996) (citing *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979)). Hawkins's brief admits that she cannot meet the third prong because she offered no evidence on it. She thus requests us to change the law to not require such evidence in a case like hers with no African-Americans on the jury panel. As an intermediate appeals court, we cannot change the law and overrule precedent of the Court of Criminal Appeals or the U.S. Supreme

Court. Issue three is overruled.

Hawkins's first two issues are related. She was convicted for selling crack cocaine on two occasions to a confidential informant who was cooperating with law enforcement. The informant was outfitted with a video device that recorded each transaction, along with the events occurring before and after each transaction, including the informant's conversations with the undercover officers who drove him to and from each transaction. Conversations between the informant and Mark Goetz, the lead investigator, were also recorded. While the vast majority of the recorded conversations was miscellaneous "small-talk" between the informant and the undercover officers, some of the conversation was incriminating as to Hawkins, as was some of the conversation between the informant and Goetz.

Issue one asserts that the trial court erred in refusing to exclude certain recorded hearsay statements made by law enforcement personnel, and issue two asserts that the trial court erred in denying Hawkins's request that the trial court first review the approximately two hours of video outside the presence of the jury. The State contends that any error was harmless because the same or similar evidence was properly admitted or was admitted without objection. *See Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004). We agree.

While the videos of each transaction were played for the jury, the video was periodically stopped and each undercover officer testified to the same or similar incriminating statements that Hawkins complains of. Accordingly, any error in admitting the recorded statements is harmless. *See Brooks v. State*, 990 S.W.2d 278, 287

(Tex. Crim. App. 1999); *see also Sanchez v. State*, No. 10-09-00389-CR, 2010 WL 3272401, at *3 (Tex. App.—Waco Aug. 18, 2010, no pet.) (mem. op. not designated for publication) (finding admission of videotaped statements harmless where information on recording was cumulative of other admitted evidence).

Additionally, we agree that Hawkins cannot possibly show harm from the small-talk on the videos, especially given the overwhelming evidence of guilt. See TEX. R. APP. P. 44.2(b); *Bagheri v. State*, 119 S.W.3d 755, 763 (Tex. Crim. App. 2003) ("In considering non-constitutional error, an appellate court must disregard the error if the court, 'after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect.'"). For these reasons, we overrule issues one and two.

Having overruled all three issues, we affirm the trial court's judgment.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed September 28, 2011
Do not publish
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