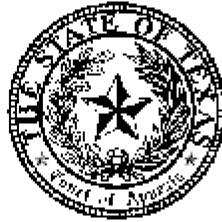
**Affirmed and Opinion filed April 5, 2001.**



**In The**

# Fourteenth Court of Appeals

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**NOS. 14-00-00562-CR, 14-00-00563-CR, 14-00-00564-CR**

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**JOEY DONNELL SIMMONS, Appellant**

**V.**

**THE STATE OF TEXAS , Appellee**

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**On Appeal from the 228th District Court**
**Harris County, Texas**
**Trial Court Cause Nos. 813,965; 813,966 and 813,967**

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## O P I N I O N

Appellant pleaded guilty before a jury to three cases of aggravated robbery. After a punishment hearing, the jury assessed punishment in each cause at confinement for thirty years in the Institutional Division of the Texas Department of Criminal Justice and assessed a four thousand dollar fine.

Appellant's appointed counsel filed a motion to withdraw from representation of appellant along with a supporting brief in which he concludes that the appeal is wholly frivolous and without merit. The brief meets the requirements of *Anders v. California*, 386 U.S. 738,

87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), by presenting a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978).

Appellate counsel raises one potential ground of error in his *Anders* brief. He contends that trial counsel may have been ineffective at the punishment phase of the trial for failing to give an opening statement and failing to cross-examine any of the State's witnesses.

Trial counsel did not make an opening statement to the jury deciding punishment following appellant's plea of guilty. The option for defense counsel to deliver an opening statement immediately after the State makes its opening statement is entirely discretionary. *See Calderon v. State*, 950 S.W.2d 121, 127 (Tex. App.—El Paso 1997, no pet.). Few matters during a criminal trial could be more imbued with strategic implications than the exercise of this option. *See id.* Counsel clearly could have made a tactical decision, and no ineffectiveness is shown. *See Standerford v. State*, 928 S.W.2d 688, 697 (Tex. App.—Fort Worth 1996, no pet.).

Similarly, counsel's failure to cross-examine the State's witnesses at punishment does not demonstrate ineffective assistance of counsel. The State's witnesses described the facts of appellant's three aggravated robbery cases to the jury, which was impaneled only to determine punishment. The cross-examination of witnesses is inherently based on trial strategy. Matters of trial strategy are reviewed only if an attorney's actions are without any plausible basis. *See Shepherd v. State*, 673 S.W.2d 263, 267 (Tex. App.—Houston [1st Dist.] 1984, no pet.). Often, the decision to not cross-examine a witness is the result of wisdom acquired by experience in the combat of trial. *See Coble v. State*, 501 S.W.2d 344, 346 (Tex. Crim. App. 1973). Unless there is a good basis for cross-examining a witness, which appellant has not shown here, it can be more effective to refrain from cross-examining a damaging witness to minimize the impact of his testimony. *See Ryan v. State*, 937 S.W.2d 93, 103 (Tex. App.—Beaumont 1996, pet. ref'd). Appellant does not suggest what purpose

cross-examination of the State's fact witnesses would have served. Neither does appellant suggest what questions his trial counsel should have asked the State's witnesses.

In light of appellant's pleas of guilty to the offenses charged, counsel's failure to cross-examine the State's fact witnesses does not demonstrate ineffective assistance of counsel. Counsel presented the testimony of appellant, appellant's mother, and a probation officer to explain the rules of probation, in a clear attempt to convince the jury to assess a minimal punishment. Under the circumstances, we cannot say that his trial strategy was unsound.

A copy of counsel's brief was delivered to appellant. Appellant was advised of the right to examine the appellate record and to file a *pro se* response. As of this date, no *pro se* response has been filed.

We have carefully reviewed the record and counsel's brief and agree that the appeal is wholly frivolous and without merit. Further, we find no reversible error in the record.

Accordingly, the motion to withdraw is granted, and the judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed April 5, 2001.
Panel consists of Justices Edelman, Frost, and Senior Chief Justice Murphy.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

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[1] Senior Chief Justice Paul C. Murphy sitting by assignment.