

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIJUANNA DONIELLE MCCLINTON,

Defendant-Appellant.

UNPUBLISHED

May 9, 1997

No. 186001

Calhoun Circuit Court

LC No. 94-2916 FC

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant appeals as of right her conviction by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278. Defendant was sentenced to 8 to 20 years' imprisonment. We affirm.

Defendant first argues that there was insufficient evidence to sustain her conviction of assault with intent to commit murder, and that her conviction was against the great weight of the evidence. We disagree.

In reviewing the sufficiency of evidence, this Court must view the evidence in the light most favorable to the prosecution and decide whether the evidence is sufficient to justify a reasonable trier of fact in finding that the elements of the crime were proved beyond a reasonable doubt, and must not interfere with the jury's task of weighing the evidence or making determinations as to witnesses' credibility. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 443 Mich 1201 (1992).

Defendant argues that the witnesses in this case were incredible and the prosecution failed to sustain its burden of proving all of the elements beyond a reasonable doubt. The issue of sufficiency of evidence, however, addresses not whether the evidence was conflicting, but whether there was sufficient evidence that, if the jury chose to believe it, would justify convicting the defendant. *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994), aff'd sub nom *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995). When the evidence in this case is viewed in the light most favorable to the prosecution, it is sufficient for the jury's finding that defendant was present and assaulted the victim, and

to infer from the severity of the wounds and the fact that defendant fled the scene that defendant had the requisite intent to kill.

In determining whether a verdict is against the great weight of the evidence, the trial court cannot substitute its judgment for that of the factfinder. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 210; 457 NW2d 42 (1990). On appeal, this Court reviews the trial court's grant or denial of the motion for a new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). The test is whether the verdict is against the overwhelming weight of the evidence. *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990).

Defendant's argument that the verdict was against the great weight of the evidence is unpreserved because she did not move for a new trial. *Richmond Twp v Erbes*, 195 Mich App 210, 218; 489 NW2d 504 (1992). Nevertheless, this Court may review the issue if failure to do so would result in a miscarriage of justice. *Id.* Defendant's sole argument that the verdict was against the great weight of the evidence is based on conflicting evidence and incredibility of the witnesses. Although this issue generally involves matters of credibility or circumstantial evidence, where the evidence is conflicting, this Court will not interfere with the factfinder's task of determining which testimony was or was not credible. *Rossien v Berry*, 305 Mich 693, 701; 9 NW2d 895 (1943); *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989). Therefore, we find that no miscarriage of justice has resulted and review is precluded. *People v Bart*, 220 Mich App 1, 10-13; ___ NW2d ___ (1996).

Defendant next argues that she was denied effective assistance of counsel because her trial counsel advised defendant to waive her preliminary examination, waived defendant's opening statement, submitted no evidence, persuaded defendant not to testify on her own behalf, and did not request jury instructions on lesser included offenses.

In order to prevail on an ineffective assistance of counsel claim, defendant must show that her trial counsel's performance was deficient and that the deficiency resulted in prejudice to defendant in the outcome of the case. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Further, to show such a deficiency, defendant must overcome a strong presumption that counsel's assistance amounted to sound trial strategy. *Id.*, 687.

Defendant failed to preserve a record of counsel's deficiency in connection with a new trial motion or an evidentiary hearing; therefore, our review is limited to facts on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Trial counsel's decisions to waive the preliminary examination, waive the opening statement, and rest without presenting any evidence are all matters of trial strategy, and this Court will not find assistance of counsel to be ineffective based merely on failed attempts at reasonable trial strategies. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). We find nothing from the record to indicate that counsel's actions were unreasonable, though they may have failed.

Defendant also argues that she was denied effective assistance of counsel because trial counsel did not request jury instructions of lesser included offenses. Defendant did not preserve this issue on

appeal, because she did not state which lesser included offenses should have been included. *People v Todd*, 186 Mich App 625, 630; 465 NW2d 380 (1990). Failure to sufficiently argue an issue on appeal constitutes abandonment of that issue. *Dresden v Detroit Macomb Hosp*, 218 Mich App 292, 300; 553 NW2d 387 (1996). Further, there is nothing in the record to suggest that counsel's failure to request the instructions was not merely part of a sound trial strategy. *People v Robinson*, 154 Mich App 92, 93-94; 397 NW2d 229 (1986).

This Court must review trial counsel's actions objectively and without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Based on the facts on record, counsel's actions were not below the prevailing professional norms, and therefore, we need not address whether counsel's strategy prejudiced defendant. *Stanaway*, *supra*, 688.

Finally, defendant argues that she was denied her right to a fair trial when the prosecutor improperly commented on defense counsel's failure to present any evidence, which could be interpreted by the jury as a reflection of defendant's failure to testify, and that the prosecutor denigrated defense counsel when she said in closing rebuttal that he was "paid to believe" defendant and he was "only pulling the wool over your eyes."

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Defendant failed to preserve this issue for review, however, because she did not object below. *Stanaway*, *supra*, 687. Therefore, we will review this issue only if the alleged misconduct could not have been cured by a timely instruction or where failure to review would result in manifest injustice. *Id.* We find neither situation in this case.

Our Michigan Supreme Court held in *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995), that "[t]he nature and type of comment allowed is dictated by the defense asserted." Further, this Court held in *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996), that it is permissible for the prosecutor to argue from the facts, even as related to defendant's believability. The prosecutor in this case was responding to defendant's theory that the prosecutor failed to present a prima facie case. We find that, although the prosecutor's comments regarding defense counsel's failure to put on evidence may not have been proper, they did not constitute harmful error and any possibility of prejudice was dispelled by the judge's instruction that defendant need not testify and her decision not to testify must not affect the verdict in any way. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Defendant also argues that the prosecutor's comments constituted improper denigration of defense counsel. This Court has held that such comments are improper where they tend to mislead the jury. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). However, defendant did not object below, and because the error in the prosecutor's remarks could have been cured by a proper objection and timely instruction, appellate review is precluded. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

Affirmed.

/s/ Clifford W. Taylor

/s/ Harold Hood

/s/ Roman S. Gibbs