

People v. Wend, J

COLORADO COURT OF APPEALS

Court of Appeals No.: 07CA1283
El Paso County District Court No. 03CR264
Honorable Timothy J. Simmons, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jennifer Lee-Renee Wend,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division II
Opinion by: JUDGE CARPARELLI
Taubman and Connelly, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: November 26, 2008

John W. Suthers, Attorney General, Katherine A. Hansen, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Lisa Weisz, Boulder, Colorado, for Defendant-Appellant

Defendant, Jennifer Lee-Renee Wend, appeals the judgment of conviction for second degree murder by provocation under § 18-3-103(1), (3)(b), C.R.S. 2008. We affirm.

I. Background

Defendant shot and killed the victim. The two lived in the same residence, and both used and sold methamphetamine.

Defendant was charged with first degree murder. A jury rejected defendant's assertion that she acted in self-defense and found her guilty of second degree murder.

Defendant appealed, alleging several errors were committed during her trial. A division of this court concluded the trial court had given an erroneous instruction, reversed defendant's conviction, ordered a new trial, and declined to address defendant's other assignments of error, apparently because it had already concluded there was reversible error requiring a new trial. The People filed a petition for rehearing and, although the division denied the petition, it modified the opinion to allow the prosecution to elect either to have judgment entered on second degree murder by provocation or to proceed to a new trial. *People v. Wend*, (Colo. App. No. 03CA2517, May 11, 2006) (not published pursuant to

C.A.R. 35(f)). Defendant filed a petition for rehearing contesting the modification, which the division denied.

Defendant then filed a petition for certiorari with the supreme court and asked the court to order the court of appeals to rule on assignments of error the division had declined to address. After the supreme court denied certiorari, defendant filed a motion asking the court of appeals division to reconsider its decision. The division denied the motion.

The mandate then issued based on the modified opinion reversing the conviction and remanding with directions. On remand, the People elected to have judgment entered on second degree murder by provocation in lieu of proceeding to a new trial.

II. Procedural Bar

The People contend that defendant is not entitled to review of the issues she has raised. We disagree.

A. Issues Previously Raised But Not Addressed

The People first contend that defendant abandoned the issues she raised in her initial appeal because she did not include them in the petition for rehearing she filed after the previous division modified its opinion. We are not persuaded.

Every person convicted of an offense has the right of appeal to review the proceedings resulting in conviction. § 16-12-101, C.R.S. 2008. However, an appellate court will not address an “abandoned” argument: one that is raised in the trial court but not renewed on appeal. *People v. Gomez*, ___ P.3d ___, ___ (Colo. App. No. 06CA1205, Sept. 4, 2008) (citing *People v. Hall*, 87 P.3d 210, 213 (Colo. App. 2003) (where defendant does not pursue argument on appeal, argument is deemed abandoned)). Thus, if a defendant raises an argument on appeal in his or her opening brief, it is not abandoned and we may consider it. After an appellate decision is announced, a party is not required to file a petition for rehearing before seeking certiorari in the supreme court. C.A.R. 52(b); *City of Colorado Springs v. Bull*, 143 P.3d 1127, 1139 (Colo. App. 2006).

Here, defendant has again stated assignments of error that she included in her opening brief in the initial appeal. The division that heard her first appeal did not address the arguments in its original opinion, stating that it did not need to do so given its reversal of defendant’s conviction. Although the mandate had not yet issued, defendant had won the appeal, and, had the People not filed their petition for rehearing, there would have been a new trial.

The division then denied the petition, but modified the opinion to afford the People the alternative of either retrying defendant or having judgment entered on the lesser offense.

In accordance with C.A.R. 52(b), defendant was entitled to file her petition with the supreme court without first asking for a rehearing, and she did so. And, in doing so, she asked the supreme court to direct the court of appeals to address the issues it had declined to address. However, the posture of the case at that time was that defendant's conviction was being reversed and it was not yet known whether defendant would be retried or would be convicted of the lesser offense. When the mandate issued, defendant's conviction was reversed, the issues she had raised had not been addressed, and there was no judgment of conviction.

Although the People cite authority regarding the abandonment of a trial motion, they cite no support for their assertion that an issue raised on appeal but not addressed by the reviewing court must or should be deemed abandoned in these circumstances.

Here, we conclude that the issues defendant raised in her initial appeal and now raises again were not abandoned and will be considered.

B. Issues Not Previously Raised

We also reject the People's contention that issues defendant did not raise in her previous appeal cannot be raised for the first time here.

We first reject the People's repeated reference to the entry of judgment now on appeal as a mere resentencing. The decision in the previous appeal reversed defendant's judgment. In the California and federal cases upon which the People rely, the appellate courts affirmed the defendants' convictions but reversed the sentences and remanded for resentencing. *See, e.g., United States v. Fiallo-Jacome*, 874 F.2d 1479, 1481 (11th Cir. 1989). Thus, the cases are inapposite. We also reject the People's contention that the situation here is analogous to one in which the defendant raises a new issue in his or her reply brief, because here the People have had an opportunity to respond to the merits of the issues. We further reject as inapposite the People's analogy to the Crim. P. 35(c)(3)(VII) requirement that we deny any claim raised on collateral review of a conviction previously reviewed and affirmed on direct appeal.

Further, we reject the People's contention that the inclusion of additional issues is contrary to C.A.R. 4(b) because they were not raised within forty-five days after entry of judgment. Once again, the original judgment was reversed and, under the rule, defendant had forty-five days after the entry of the new judgment within which to appeal.

We reject the People's argument that defendant's opening brief here is contrary to C.A.R. 28(g) because, when considered together with her opening brief in the first appeal, her brief exceeds 9500 words. The only opening brief now before us is the one defendant filed after the judgment she now appeals, and it does not exceed the stated limit. The opening brief in defendant's first appeal is not before us and will not be considered.

Thus, we reject the People's contention that this is, in effect, a second direct appeal of the conviction that was reversed. Because the People have made no other arguments and cited no other authority, we reject their contention that this appeal should not be heard. Accordingly, we now proceed to the merits of defendant's claims.

III. Instruction on Non-Deadly Physical Force

Defendant contends that the trial court erred when it declined to include an instruction on the use of non-deadly physical force in self-defense. We disagree.

Because defendant did not object to the jury instruction on self-defense, we review for plain error. *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001); *People v. Dunlap*, 124 P.3d 780, 793 (Colo. App. 2004). We reverse for plain error when an error is obvious and substantial and so undermines the fundamental fairness of the trial that serious doubt is cast on the reliability of the judgment of conviction. *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005). “In the context of instructional error, plain error occurs when a review of the entire record demonstrates a reasonable possibility that the improper instruction contributed to the defendant’s conviction.” *Dunlap*, 124 P.3d at 793.

Under § 18-1-704(1), C.R.S. 2008, a person is justified in using physical force upon another person in order to defend himself or herself from what he or she reasonably believes to be the use or imminent use of unlawful physical force by that other person, and

he or she may use a degree of force which he or she reasonably believes to be necessary for that purpose.

Under § 18-1-704(2), C.R.S. 2008, and as relevant here, a person may use deadly physical force in self-defense only when (1) he or she reasonably believes a lesser degree of force is inadequate; and (2) he or she reasonably believes that he or she is in imminent danger of being killed or receiving great bodily injury.

Where the defendant admits to having used force and the victim died, a trial court should only give the self-defense instruction referring to ordinary physical force when there is a dispute about whether the defendant intended to cause the victim's death. *People v. Vasquez*, 148 P.3d 326, 330 (Colo. App. 2006) (defendant's testimony that he did not realize he took out his knife or recall stabbing victim created a dispute about whether defendant intended to cause death and entitled him to have jury resolve issue of whether he employed ordinary or deadly physical force).

However, when the defendant's use of force caused the victim's death and the intended, natural, and probable consequence of using such force is to produce death, only the self-defense instruction referring to deadly physical force should be given.

People v. Ferguson, 43 P.3d 705, 708-9 (Colo. App. 2001) (citing § 18-1-901(3)(d), C.R.S. 2008, which defines “deadly physical force”).

Here, defendant admitted that she shot the victim and argued only that she believed her life was in danger. She did not argue that she did not intend to shoot or kill the victim, and she presented no evidence that would tend to show that she did not intend to cause the victim’s death. To the contrary, the evidence that defendant intended to shoot the victim, that she shot him in the chest with a 9 millimeter semi-automatic weapon at close range, and that she did not seek medical attention for him when he collapsed almost immediately thereafter tended to show an intent to kill.

We conclude there was no error, let alone plain error, when the trial court did not give a self-defense instruction regarding the use of ordinary physical force.

IV. Prosecutorial Misconduct

Defendant contends that the prosecutor violated her right to due process and to a fair and impartial jury during opening statement, closing argument, and examination of witnesses. Because defendant also suggests that the trial court erred when it

permitted witnesses to respond to improper questions from the prosecutor, we will also review whether it was error for the trial court to do so. We perceive no reversible errors.

A. Law of Prosecutorial Misconduct

The supreme court has repeatedly stated that a prosecutor, while free to strike hard blows, is not free to strike foul ones.

Domingo-Gomez v. People, 125 P.3d 1043, 1048 (Colo. 2005). A prosecutor must avoid using improper methods designed to obtain an unjust result, or risk reversal. *Domingo-Gomez*, 125 P.3d at 1048.

“The Colorado Rules of Professional Conduct (C.R.P.C.) adopted by [the Supreme Court of Colorado] and the ABA Standards . . . require that counsel avoid statements of personal opinion, personal knowledge, or inflammatory comments. C.R.P.C. Rule 3.4(e) requires that counsel not ‘state a personal opinion as to the justness of a cause, the credibility of a witness . . . or the guilt or innocence of an accused.’” *Domingo-Gomez*, 125 P.3d at 1049.

Thus, a prosecutor should refrain from argument that would distract the jury from its duty to decide the case based on all the evidence by “injecting issues broader than the guilt or innocence of

the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." *People v. Adams*, 708 P.2d 813, 816 (Colo. App. 1985) (quoting ABA Standards for Criminal Justice 3-5.8(d) (2d ed. 1982)).

B. Use of the Word "Lie"

In *Domingo-Gomez*, the supreme court held that it is improper for a lawyer to assert his or her opinion that a witness is lying. The court reasoned that the word "lie" necessarily reflects the personal opinion of the speaker and "has the dangerous potential of swaying the jury from [its] duty to determine the accused's guilt or innocence on the evidence properly presented at trial." *Domingo-Gomez*, 125 P.3d at 1050. The court reiterated that counsel may properly argue from reasonable inferences anchored in the facts in evidence about the truthfulness of a witness's testimony. The propriety of counsel's statements depends on the language used, the context in which the statements were made, and any other relevant factors. However, as a general rule, questions about whether a witness or the defendant lied in an out-of-court statement are categorically improper, and denying an objection and

a permitting such questions to be answered is an abuse of discretion. *See Liggett v. People*, 135 P.3d 725, 733 (Colo. 2006).

C. Standard of Review

An appellate court may reverse for prosecutorial misconduct when a prosecutor engages in repeated misconduct that deprives a defendant of a fair trial or “repeatedly expresses personal opinions about the credibility of witnesses or evidence, or when the evidence against a defendant is conflicting and inconclusive and the prosecutor continually appeals to the jurors’ sentiments.” *People v. Walters*, 148 P.3d 331, 335 (Colo. App. 2006) (citing *Domingo-Gomez*, 125 P.3d at 1051; *Harris v. People*, 888 P.2d 259, 265 (Colo. 1995)).

Where a defendant raises a contemporaneous objection, we review the trial court’s evidentiary ruling for an abuse of discretion. *People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002); *People v. Jaramillo*, 183 P.3d 665, 668 (Colo. App. 2008). If we find that the trial court abused its discretion in admitting or excluding evidence, we next determine whether the error was harmless or warrants reversal. An error is harmless where “viewing the evidence as a whole, [the court concludes] the error did not substantially

influence the verdict or impair the fairness of the trial.” *Liggett*, 135 P.3d at 733 (citing *Medina v. People*, 114 P.3d 845, 857 (Colo. 2005)).

When a defendant does not make a contemporaneous objection during opening statement or closing argument, we review only for plain error. *People v. Walters*, 148 P.3d at 335.

Prosecutorial misconduct amounts to plain error when it is flagrant or glaringly or egregiously improper. *Walters*, 148 P.3d at 335.

D. Preservation of the Issues

Defendant contends that questions posed by the prosecutor to the codefendant, a friend of the victim, a detective, and the victim’s ex-wife constituted misconduct that prejudiced her right to due process and a fair and impartial jury. She asserts that she preserved the issue as to each of the witnesses, and, thus, that any error requires reversal unless we conclude that the error was harmless beyond a reasonable doubt.

Defendant challenges but did not object to statements the prosecutor made in opening statement and closing argument. She also challenges questions asked of witnesses and testimony from witnesses to which she objected and others to which she did not

object. Citing *People v. Pratt*, 759 P.2d 676, 686 n.5 (Colo. 1988), as support, she asserts that when she did object, the objections preserved the issue as to the questions to which she did not object. We conclude otherwise.

In *Pratt*, the defendant, the owner of a nursing home, was charged with accessory to third degree assault based on an employee's assault of a patient. On cross-examination of several witnesses, the prosecution asked about an audit related to alleged fraudulent activity by nursing home administrators and about an alleged order by the defendant to tie up one of the patients each night.

As to the alleged fraudulent activity, the prosecution first presented the issue to the court in chambers. The defendant objected several times that the audit information was not indicative of truthfulness and that the prosecution had not established a good faith basis for the questions. The court overruled the objection and, on one occasion, told the defendant she had already objected and that that was sufficient under the rules. In a footnote, the supreme court explained that objections made in a pretrial motion or in chambers preserved the issue and that formal objections in the

presence of the jury satisfied the purposes of the contemporaneous objection rule. *Pratt*, 759 P.2d at 685 n.5.

As to the alleged restraint of another patient, the defendant objected the first time the question was asked in open court and, based on the supreme court's discussion of the issue, it appears the objection was overruled. In the same footnote, the supreme court stated that the issue was preserved.

E. Prosecutor's Use of and Witness's Testimony Regarding "Lies"

In his opening statement, the prosecutor told the jury it would see a videotape of defendant's conversation with Detective Derek Graham on January 3 and would hear "lie after lie after lie after lie from [defendant] about what happened to [the victim]." The prosecutor also stated that the jury would see a second videotape from January 16 where defendant told the "same lies, same lies" until she later confessed to killing the victim.

Not only did defense counsel not object to the prosecutor's statements, he, too, addressed the videotapes in his opening statement, saying, "[Defendant] does lie to people about what happened to [the victim]. She lies because she's afraid of what's going to happen to her if she tells the truth." Defense counsel

stated that defendant's "bad decisions" after the shooting are not at issue in this case, and "the issue in this case is time of shooting."

The prosecutor's statements referred to videotapes of defendant during police interviews and while waiting in the interview room. On January 3, 2003, when the victim was missing but not known to be dead, defendant said she had received a text message from the victim, who was in Las Vegas. In a later interview, after the victim's body had been discovered, defendant first said she knew nothing about the victim's death, but later admitted to shooting him. One of the tapes also showed defendant admitting she had not been truthful during the earlier interviews, admitting she shot the victim, and claiming she did so in self-defense.

The prosecutor showed the videotapes during Detective Graham's testimony. During his testimony, without objection the detective testified

- defendant had said she was telling him the complete truth;

- he confronted defendant, saying he did not believe everything she was telling him, and she again responded that she was telling him everything she knew;
- he told defendant he did not think she was telling the truth;
- defendant told him she had been honest about everything she had told him to that point;
- although defendant had been lying to him up to that point, as an investigative technique, he told her she had always been honest with him;
- she lied to him about having been at Wal-Mart on the evening of the murder;
- she did not tell the truth to a person who called her on her cell phone while she was in the interview room;
- she lied about whether the codefendant had ever taken any pictures of her at his residence;
- she lied when he pressed her for more information while she was still denying she had shot the victim; and

- as to whether he had ever questioned anyone who tried harder than defendant to be convincing, she “was right up there” and had tried very hard to convince him she was not lying.

As we have previously noted, defendant’s position at trial was that she had shot and killed the victim, but did so in self-defense. She does not now contend that her statements during the police interviews were truthful.

In his closing statement, the prosecutor made several statements regarding defendant’s videotaped interviews. The prosecutor asserted “you could hardly keep count of all the lies told in two interviews” and “defendant realized she couldn’t keep lying to Derek Graham.”

Defendant contends that she preserved these issues when she objected on grounds of relevance to the question the prosecutor posed to the codefendant and objected on grounds of an improper opinion regarding defendant’s credibility to the victim’s friend’s unsolicited testimony that she did not believe defendant when she told her that the victim had put a gun to her head.

We first conclude that, because defendant made both objections after the prosecutor's opening statement, they did not preserve the issue of misconduct as to anything said in the prosecutor's opening. We next conclude that, because the court sustained the objection to the friend's spontaneous comment, it would not have been futile for defendant to make additional objections when similar testimony was later presented. Therefore, the objection did not preserve the issue of improper opinion testimony by the detective. Because the objection did not address prosecutorial misconduct, it did not preserve the issue of whether the prosecutor engaged in misconduct when questioning the detective or making closing argument. Accordingly, we review each of these issues for plain error.

We conclude that, in this context, the prosecutor's use of variations of the word "lie" during opening and closing were not of the sort that would mislead the jury to an unjust result and did not suggest the prosecutor had personal knowledge of the truth or falsity of defendant's statements.

The videotapes showed defendant making contradictory statements and eventually admitting she had not been truthful;

and, in opening statement, defense counsel also used the word “lie” when acknowledging defendant’s false statements. Thus, the prosecutor’s use of the word “lie” constituted fair comment on defendant’s credibility when talking to the police and was not designed to inflame the passions of the jury. *See Domingo-Gomez*, 125 P.3d at 1049. Although the truthfulness of defendant’s statement that she shot the victim in self-defense, fearing for her life, was in issue, the prosecutor’s use of the word “lies” in reference to the statements defendant made before she confessed to shooting and killing the victim do not constitute plain error. In the absence of an objection, we have reviewed for plain error and found none.

F. Denigrating the Defense

Defendant also asserts that the prosecutor denigrated her arguments when he asked Detective Graham what defendant was “rambling on about” and to explain what defendant was “going on about” when she tried to explain why she did not call the police after the shooting. During closing argument, the prosecutor stated that defense counsel “bandied about” when addressing a report that showed the victim was charged with domestic abuse of an ex-spouse.

The prosecutor also characterized defendant's actions after she admitted that she shot the victim:

Crocodile tears. Ladies and gentlemen, did you see her later in the interview? Once it's out, she puts her feet up, kicks back, telling her story. And when it comes time for pictures it's some sort of shot for Vogue magazine. The defendant is a survivor. The defendant killed a man. The defendant figured they're buying this self-defense story.

While the term "crocodile tears" might suggest a personal opinion, it does not have the same degree of rhetorical power as the word "lied" to necessarily imply that it is the personal opinion of the prosecutor. *Domingo-Gomez*, 125 P.3d at 1051 (holding that use of word "untruthful" was not improper under the circumstances and is less harmful than the word "lied"). The prosecutor's remarks were comments on defendant's credibility in light of her admissions that her two previous stories were untruthful. Under these circumstances, we conclude that it was not improper for the prosecutor to use such language.

G. Statements Regarding Drug Use

During his rebuttal closing argument the prosecutor also asserted that "if [the codefendant] had not come forward, this woman right here would be on the streets . . . dealing drugs to [the

victim's] customers and her old customers that he had taken away from her.”

Defendant alleges that this statement improperly appealed to the passions and prejudices of the jury by inviting them to convict her to protect the community from drug dealing she might commit were she released. Although the prosecutor's statement might be construed in that manner, we conclude that it can be more readily construed as a statement of what would have happened in the past had the codefendant not come forward, and, in that context, as a reference to defendant's motive. Defendant admitted that she sold drugs and that the victim had taken several customers away from her. The prosecution theorized that defendant planned to kill the victim in order sell methamphetamine to the victim's customers, which one witness stated could produce “thousands of dollars just in a week.” Therefore, the prosecutor's statement was based on the evidence and reasonable inferences therefrom, and we find no misconduct to justify reversal.

H. Codefendant's Testimony

During direct examination of the codefendant, the prosecutor asked whether he was suspicious when defendant asked to borrow

a gun. The court overruled defendant's relevance objection, and the witness said he "didn't know." We reject defendant's contention that this objection "preserved a relevancy objection to all similar types of evidence."

We conclude that defendant preserved only the issue of whether the codefendant's suspicions were relevant, but not whether it was misconduct for the prosecutor to ask the question. As to relevance, we conclude that the court abused its discretion when it overruled the objection, but that the witness's response that he did not know what his suspicions were rendered the error harmless. As to the unpreserved issue of prosecutorial misconduct, we perceive no plain error.

I. Victim's Friend's Testimony

During direct examination of the victim's friend, the prosecutor asked the witness what her suspicions were when defendant told her that the victim had put a gun to her head. The witness added, "I didn't – I didn't believe it." Defense counsel objected on the ground that the credibility of defendant's out-of-court comment to the victim's friend is a jury determination. The court sustained the objection. During cross-examination, defense

counsel asked the witness if she was suspicious of anything during her conversation with defendant, and the witness stated, “I felt something was wrong.” On redirect examination, the prosecutor asked the witness why she had been suspicious and the witness stated, “I didn’t believe her.” Defense counsel objected, but the trial court overruled the objection, stating, “[S]he’s already answered.” The witness then stated, “I thought [defendant] did something to [the victim].”

“[N]either a lay nor expert witness may give opinion testimony that a witness was telling the truth on a specific occasion.” *People v. Koon*, 724 P.2d 1367, 1370-71 (Colo. App. 1986); *see also Liggett*, 135 P.3d at 731. The admission of testimony that another witness or the defendant is or was being truthful or untruthful on a particular occasion is properly excluded. *Liggett*, 135 P.3d at 731.

The defendant objected to the question about why the friend was suspicious of defendant and the trial court properly sustained the objection and instructed the jury to disregard the witness’s remark. Nonetheless, defense counsel later asked the witness about the same suspicions on cross-examination. *See People v. Evans*, 987 P.2d 845, (Colo. App. 1998) (holding defendant opened

door to redirect testimony by asking related questions on cross-examination), *overruled on other grounds by People v. Lefebre*, 5 P.3d 295, 302 (Colo. 2000). Therefore, there was no error when the trial court permitted the prosecutor to address the same issue on redirect examination.

J. Victim's Ex-Wife's Testimony

During direct examination , the prosecutor asked the victim's ex-wife about discussions regarding the victim beating her, but the ex-wife interrupted and stated "that would be a lie." Defendant did not object to the ex-wife's statement.

We conclude that defendant did not preserve an objection to the ex-wife's opinion that defendant lied in an out-of-court statement. Unlike in *Pratt*, defendant made no previous objection relating to this specific issue. Accordingly, we review for plain error.

Upon a review of the record, we find that although the witness should not have opined as to the veracity of defendant's alleged statement, the statement did not so undermine the fundamental fairness of the trial that serious doubt is cast on the reliability of the judgment of conviction. Defendant later introduced evidence that the ex-wife had filed a complaint of domestic abuse against the

victim, which undermined the witness's credibility on this matter. We conclude that it was not plain error to permit the witness to answer the prosecutor's question.

V. Substitute Counsel

Defendant contends that the trial court abused its discretion when it declined to grant her request for appointment of substitute counsel. We disagree.

The right to counsel is considered essential to a fair trial and is guaranteed under the Sixth Amendment to the United States Constitution. *People v. Arguello*, 772 P.2d 87, 92 (Colo. 1989). However, “[t]he right to counsel guarantees only competent representation, and does not necessarily include ‘a meaningful attorney-client relationship.’” *Arguello*, 772 P.2d at 92 (quoting *Morris v. Slappy*, 461 U.S. 1, 14 (1983)).

A defendant's requests for discharge and substitution of court-appointed counsel are addressed to the sound discretion of the trial court, and we will not reverse its disposition absent an abuse of discretion. *People v. Jenkins*, 83 P.3d 1122, 1125 (Colo. App. 2003).

When an indigent defendant moves to discharge counsel, the trial court must inquire into the reasons for his or her dissatisfaction to determine whether good cause exists to substitute counsel. *Jenkins*, 83 P.3d at 1126; *People v. Haynie*, 826 P.2d 371, 374 (Colo. App. 1991). The court is obligated to substitute new counsel if the defendant can establish good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which would lead to an apparently unjust verdict. *Arguello*, 772 P.2d at 94. The court may deny a defendant's request if it has a reasonable basis for concluding that the attorney-client relationship has not so deteriorated that counsel could not provide effective assistance. *Jenkins*, 83 P.3d at 1126.

Here, defendant submitted a letter to the trial court stating she did not want her lead court-appointed counsel to continue to represent her, and the trial court conducted a conflict hearing to determine the reasons for defendant's request. When the trial court asked defendant why she had requested new counsel, defendant stated that lead counsel "rolled his eyes" when she asked what a preliminary hearing was, that there was "a communication breakdown," and that she could not ask counsel to explain

anything because “he makes [her] feel stupid.” Defendant stated that counsel had erroneously told the district attorney that she would accept a plea offer, and that the district attorney was upset when she did not accept one. Defendant explained, “It’s more of a personality thing. You know, our personalities don’t [match].” The trial court determined that there was no lack of performance or preparation by lead counsel sufficient to grant defendant’s request to substitute counsel.

We conclude that the trial court was within its discretion when it denied defendant’s request for substitution of counsel. Defendant did not establish that a complete breakdown of communication or a conflict of interest had occurred. Moreover, the trial court stated, and defendant agreed, that the lead counsel was a good attorney and adequately prepared for trial. Therefore, the trial court had a reasonable basis for denying defendant’s request for substitution of counsel, and we find no abuse of discretion.

VI. Sufficiency of the Evidence

Defendant contends that the evidence is insufficient to support the jury’s verdict finding her guilty of second degree murder. We disagree.

An appellate court reviewing a challenge to the sufficiency of evidence must determine whether any rational trier of fact might accept the evidence, taken as a whole and in the light most favorable to the prosecution, as sufficient to support a finding of guilt beyond a reasonable doubt. *People v. Atencio*, 140 P.3d 73, 75 (Colo. App. 2005). In applying this standard, we must afford the prosecution every reasonable inference which can be fairly drawn from the evidence. *Atencio*, 140 P.3d at 75; *People v. Cole*, 926 P.2d 164, 167 (Colo. App. 1996). We may not set aside a verdict merely because the trier of fact could have drawn a different conclusion from the same evidence. *People v. Baca*, 109 P.3d 1005, 1007 (Colo. App. 2004).

A. Knowingly

Defendant contends that the prosecution failed to prove that she knowingly caused the victim's death beyond a reasonable doubt. We disagree.

A person acts knowingly when he or she is aware that his or her conduct is practically certain to cause the result. § 18-1-501(6), C.R.S. 2008. The prosecution may provide direct evidence of a defendant's subjective awareness, or such awareness may be

inferred from his or her conduct and surrounding circumstances.

Mata-Medina v. People, 71 P.3d 973, 978 (Colo. 2003) (citing *People v. Dist. Court*, 652 P.2d 582, 586 (Colo. 1982)).

In *People v. Mingo*, 196 Colo. 315, 584 P.2d 632 (1978), the supreme court held that the defendant's conduct and surrounding circumstances provided sufficient evidence that he knowingly caused the victim's death. The evidence showed that the defendant deliberately shot the victim at a close proximity, and there was no evidence or indication that the shooting was accidental or inadvertent. *Mingo*, 196 Colo. at 318, 584 P.2d at 634. The court stated, "[I]t is obvious that a jury could reasonably conclude that discharging a gun from a distance of three feet creates such a high probability of death that death was practically certain, not merely a probable result." *Mingo*, 196 Colo. at 318, 584 P.2d at 634.

Here, we conclude that the evidence, when considered as a whole and in the light most favorable to the prosecution, was sufficient to support the finding that defendant knowingly caused the victim's death. Defendant admitted in her videotaped statement that she deliberately shot the victim. The victim was shot in the chest with a 9 millimeter handgun. Therefore, a jury could

reasonably conclude that defendant was aware that her conduct was practically certain to cause the victim's death.

B. Self-defense

Defendant next contends that the prosecution failed to disprove her claim of self-defense beyond a reasonable doubt. We disagree.

A defendant raises the affirmative defense of self-defense when he or she presents some credible evidence on the issue. *People v. Bergerud*, ___ P.3d ___, ___ (Colo. App. No. 06CA0013, Sept. 18, 2008) (citing § 18-1-407(1), C.R.S. 2008). Once properly raised, the issue of self-defense becomes a jury question and the prosecution must disprove it beyond a reasonable doubt. *Bergerud*, ___ P.3d at ___ (citing § 18-1-407(2), C.R.S. 2008; *Vega v. People*, 893 P.2d 107, 111 (Colo. 1995)); *People v. Turner*, 680 P.2d 1290, 1292 (Colo. App. 1983).

The determination of the credibility of witnesses is solely the function of the fact finder. *People v. Franklin*, 645 P.2d 1, 14 (Colo. 1982). The fact finder also considers and determines what weight should be given to all parts of the evidence, including resolving conflicts, inconsistencies, and disputes in the evidence. *Kogan v.*

People, 756 P.2d 945, 950 (Colo. 1988), *abrogated on other grounds* by *Erickson v. People*, 951 P.2d 919, 923 (Colo. 1998).

Here, as noted above, the court instructed the jury on self-defense. Defendant presented evidence through her statements to police that she acted in self-defense, and the prosecution presented evidence that defendant was the aggressor. The jury was entitled to reject defendant's evidence. Moreover, defendant's conduct after she shot the victim could lead a reasonable jury to conclude beyond a reasonable doubt that she intended to kill the victim and did not act in self-defense. Defendant did not immediately report the shooting to the police or seek medical attention for the victim. Instead, she concealed the victim's body and initially told law enforcement that the victim was in Las Vegas.

We conclude that the evidence as a whole and in the light most favorable to the prosecution is sufficient to support a jury finding that defendant did not shoot the victim in self-defense.

VII. Cumulative Error

Defendant contends that cumulative error occurred during her hearing such that she did not receive a fair trial. We disagree.

A defendant has a constitutional right to a fair trial. *People v. Roy*, 723 P.2d 1345, 1349 (Colo. 1986). Under the cumulative error doctrine, “individual errors, though themselves harmless, may in the aggregate result in an unfair trial.” *People v. Grant*, 174 P.3d 798, 813 (Colo. App. 2007) (citing *Jenkins*, 83 P.3d at 1130). A defendant must show that numerous errors were committed, not merely alleged, before he or she is entitled to reversal of the conviction on this theory. *Grant*, 174 P.3d at 813; *People v. Rivers*, 727 P.2d 394, 401 (Colo. App. 1986).

Here, we conclude that defendant’s right to a fair trial was not violated. Having concluded the court committed no errors, we reject defendant’s contention that there was cumulative error. Therefore, we decline to reverse defendant’s conviction on these grounds.

The judgment is affirmed.

JUDGE TAUBMAN and JUDGE CONNELLY concur.