NO. 25466

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAII, Plaintiff-Appellee, v.
KELLY DICKSON, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
SOUTH KOHALA DIVISION
(REPORT NO. G-76229)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Kelly Dickson (Dickson) appeals from the Judgment orally entered by Judge Jeffrey Choi on October 9, 2002, and filed on October 13, 2003, convicting her of Attempted Theft in the Fourth Degree, Hawaii Revised Statutes (HRS) §§ 705-500(1)(b)[1], 708-830(1)[2] and 708-833[3], and sentencing her to jail for two days and to pay twenty-five dollars to the Criminal Injuries Compensation Fund. On October 10, 2002, the court entered

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[1] Hawaii Revised Statutes (HRS) § 705-500(1)(b) provides, in relevant part, as follows: "A person is guilty of an attempt to commit a crime if the person: . . . [i]ntentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime."

[2] HRS § 708-830(1) provides, in relevant part, as follows: "A person commits a theft if the person does any of the following: . . . Obtains or exerts unauthorized control over property. A person obtains, or exerts control over, the property of another with intent to deprive the other of the property."

[3] HRS § 708-833 provides, in relevant part, as follows:

> (1) A person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of $100.
>
> (2) Theft in the fourth degree is a petty misdemeanor.

an "Order Granting Ex Parte Motion to Stay Sentence Pending Appeal." We affirm.

BACKGROUND

On March 20, 2002, Plaintiff-Appellee State of Hawai‘i (State) charged Dickson with "obtaining or exerting unauthorized control over the property of another, with intent to deprive the other of the property, and the value of the property did not exceed $100, thereby committing the offense of Attempted Theft in the Fourth Degree, in violation of [Sections] 705-500(1)(b), 708-830(1), and 708-833, [HRS], as amended." Dickson was accused of intentionally "attempting to put plants belonging to OUTRIGGER WAIKOLOA BEACH HOTEL [(Outrigger)] in her waiting car, which, under the circumstances as she believed them to be, constituted a substantial step in the course of conduct intended to culminate in her commission of the crime of Theft in the Fourth Degree[.]"

A trial was held on October 9, 2002. Aaron Sumic (Sumic), a laborer at the Outrigger, was called as the State's first witness. Sumic testified that on August 2, 2001, around 10:30 a.m., he observed a gray van parked in an unauthorized area and not in the designated loading zone area. This was suspicious because of prior thefts from the Outrigger's nursery. Sumic stated that upon sight of the van, he notified his supervisor, Michael Fong (Fong), for further instructions. According to Sumic, during

their investigation, "we heard a noise like a dragging noise, dragging a plant, and I kinda -- kinda looked where the noise was coming from, and we noticed a lady pulling a -- dragging a plant." After identifying Dickson as the woman dragging the plant, Sumic stated that "when we seen [sic] her then she went to a -- she left the big plant, and then she went to another plant, one that you can carry, and she was walking to the van with the plant in her hand."

Upon cross-examination, Sumic testified that the van's door was open and he did not see anything inside of the van. Whereupon the court asked, "How close did the ficus get to the van?" Sumic stated that the plant, a ficus palm, came within "about maybe fifteen feet" of the van. Sumic further stated that "the plant that she was carrying, she were [sic] heading right to to [sic] her van, then when I called her, she turned around and looked at me and threw the plant in the bushes. Put it away real quick."

As its next and final witness, the State called Fong, the grounds supervisor at the Outrigger. Fong verified that both he and Sumic heard noises and witnessed Dickson "dragging a ficus palm." According to Fong, because Dickson did not have permission to take any of the plants away from the Outrigger's nursery, he called security while Sumic approached Dickson.

On cross-examination, Fong stated that he had previously observed Dickson making deliveries to the hotel in the loading dock area. Fong supported Sumic's testimony that Dickson threw the plant aside when she noticed that her actions were being observed.

Upon recross examination, Fong clarified the location of the ficus palm. According to Fong, the ficus ended up being out on the walkway near where Dickson stopped when Sumic called to her.

Dickson was the only witness for the defense. Dickson testified that she was an employee for Airborne Express, contracted by Max's Delivery to make deliveries. Dickson testified that on August 2, 2001, she was delivering paychecks to the Outrigger. Dickson testified, "I remember looking around at the plants, because I innocently went inside while waiting for the loading dock to open up. I just was looking around. I wasn't dragging any ten-foot ficus plants or putting 'em in my van[.]" Dickson also testified that after asking one of the workers if the plants would ever go on sale, she "went and waited for the loading dock to open and did my delivery. And the next day, I drive up to the loading dock, which is right straight ahead, wasn't full that day, and the policeman comes and tells me I'm arrested."

On October 9, 2002, Judge Choi found Dickson guilty of Attempted Theft in the Fourth Degree. Judge Choi decided that Dickson was "[b]ald face lying." In Judge Choi's opinion, Dickson

did not show any remorse, which led to his statement, "Not only do I find the defendant guilty, probably the first time I've ever had a first-time theft charge in something of this, admittedly, lesser magnitude, in terms of the value of the items, where I've -- I'm considering sending her to jail. Not for a long time, but perhaps. It's warranted."

POINT OF ERROR

Dickson contends that the trial court erred when it convicted Dickson without any substantial evidence indicating that "her conduct constituted a 'substantial step' in a course of conduct intended to culminate in the commission of Theft in the Fourth Degree."

STANDARD OF REVIEW

Sufficiency of the Evidence

When examining the sufficiency of the evidence, the appellate court must apply "the same standard that a trial court applies . . . namely, whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, the evidence is sufficient to support a prima facie case so that a reasonable mind might fairly conclude guilt beyond a reasonable doubt." State v. Dow, 96 Hawai‘i 320, 323, 30 P.3d 926, 929 (2001). To satisfy the requirement of sufficient evidence, substantial evidence is

required for "every material element of the offense charged. Substantial evidence . . . is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Id. See also State v. Jenkins, 93 Hawai'i 87, 997 P.2d 13 (2000).

According to HRS § 705-500(1)(b) (1993), "[a] person is guilty of an attempt to commit a crime if the person: . . . [i]ntentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime." A person commits the crime of theft when the "person obtains, or exerts control over, the property of another with the intent to deprive the other of the property." HRS § 708-830(1) (1993). "[I]t is an elementary principle of law that intent may be proved by circumstantial evidence; that the element of intent can rarely be shown by direct evidence; and it may be shown by reasonable inference arising from the circumstances surrounding the act. The mind of an alleged offender may be read from his [or her] acts, conduct, and inferences fairly drawn from all the circumstances." State v. Yabusaki, 58 Haw. 404, 409, 570 P.2d 844, 847 (1977).

When the appellate court reviews a trial court's decision, "the fact finder [is given due deference] to determine

credibility, weigh the evidence, and draw justifiable inferences of fact." Jenkins, 93 Hawai‘i at 99, 997 P.2d at 25. See also State v. Silva, 67 Haw. 581, 698 P.2d 293 (1985). The appellate court determines whether or not substantial evidence supports the trial court's findings and whether the trial court's valid findings support the trial court's relevant conclusions. Lono v. State, 63 Haw. 470, 474, 629 P.2d 630, 633 (1981).

It has been held that "the testimony of a single witness, if found by the trier of fact to have been credible, will suffice." State v. Eastman, 81 Hawai‘i 131, 141, 913 P.2d 57, 67 (1996) (citing State v. Ibuos, 75 Haw. 118, 123, 857 P.2d 576, 578-79 (1993)) (the testimony of "merely one percipient witness" satisfies the substantial evidence requirement needed to support a criminal conviction). In addition, it is well established that, "the trier of fact . . . may draw all reasonable and legitimate inferences and deductions from the evidence, and the findings of the trial court will not be disturbed unless clearly erroneous." Id. at 139, 913 P.2d at 65.

> A finding of fact is clearly erroneous when (1) the record lacks substantial evidence in support of the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made. State v. Okumura, 78 Hawaii 383, 392, 894 P.2d 80, 89 (1995) (citations and internal quotation marks omitted). "The circuit court's conclusions of law are reviewed under the right/wrong standard." State v. Pattioay, 78 Hawaii 455, 459, 896 P.2d 911, 915 (1995) (citation omitted).

State v. Locquiao, 100 Hawai‘i 195, 203, 58 P.3d 1242, 1250 (2002) (citation omitted).

DISCUSSION

The testimonies of Sumic and Fong satisfied the substantial evidence requirement supporting the trial court's ultimate decision that Dickson was guilty of Attempted Theft in the Fourth Degree.

CONCLUSION

Accordingly, we affirm the Judgment orally entered by Judge Jeffrey Choi on October 9, 2002, and filed on October 13, 2003, convicting Defendant-Appellant Kelly Dickson of Attempted Theft in the Fourth Degree, HRS §§ 705-500(1)(b), 708-830(1), and 708-833, and sentencing her to jail for two days and to pay twenty-five dollars to the Criminal Injuries Compensation Fund.

DATED: Honolulu, Hawai‘i, November 14, 2003.

On the briefs:

Jon N. Ikenaga,
Deputy Public Defender,
for Defendant-Appellant.

Chief Judge

Janet R. Garcia,
Deputy Prosecuting Attorney,
County of Hawai‘i,
for Plaintiff-Appellee.

Associate Judge

Associate Judge