

CONCURRING AND DISSENTING OPINION BY GINOZA, J.

I concur that the District Court of the First Circuit, Honolulu Division (district court) erred by both denying Defendant-Appellant Lewis Daniel Kendall's (Kendall) request to present a closing argument and failing to obtain Kendall's valid waiver of his right to counsel. I write separately because I respectfully disagree with the majority's conclusion that there was insufficient evidence to sustain his conviction for Criminal Littering in violation of Hawaii Revised Statutes (HRS) § 708-829(1) (2014).¹ Accordingly, I would remand for a new trial.

When reviewing the sufficiency of the evidence presented at trial, we must view the evidence in the strongest light for the prosecution and determine if there was substantial evidence to support the conclusion of the trier of fact. State v. Jones, 96 Hawai'i 161, 181, 29 P.3d 351, 371 (2001). "Substantial evidence" is "credible evidence which is of

¹ HRS § 708-829 provides in pertinent part:

§708-829 Criminal littering. (1) A person commits the offense of criminal littering if that person knowingly places, throws, or drops litter on any public or private property or in any public or private waters, except:

(a) In a place designated by the department of health or the county for the disposal of garbage and refuse;

(b) Into a litter receptacle;

(c) Into a litter bag; provided that the bag is disposed of properly into a litter receptacle or in a place designated by the department of health or the county for the disposal of garbage and refuse.

(2) "Litter" means rubbish, refuse, waste material, garbage, trash, offal, or debris of whatever kind or description, and whether or not it is of value, and includes improperly discarded paper, metal, plastic, glass, or solid waste.

(3) Criminal littering is a petty misdemeanor.

sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Id. at 181-82, 29 P.3d at 371-72. "In reviewing whether substantial evidence exists to support a conviction, moreover, due deference must be given to the right of the trier of fact to determine credibility, weigh the evidence, and draw reasonable inferences from the evidence adduced." State v. Lubong, 77 Hawai'i 429, 432, 886 P.2d 766, 769 (App. 1994).

In this case, Plaintiff-Appellee State of Hawai'i (State) must prove beyond a reasonable doubt that Kendall "knowingly place[d], thr[ew], or drop[ped] litter on any public or private property" HRS § 708-829(1). Kendall admits that he threw rice and bread on public property to feed birds, but contends that, because the birds ate the food almost immediately, he was not littering. Deputy Sheriff Raymond Schwartz (Deputy Schwartz) testified that he observed Kendall throwing food onto a public walkway that pedestrians traverse and that Kendall threw "about two scoops of rice approximately and other food articles. Um, I would say between maybe two, two and a half foot radius area. It was spread out." Deputy Schwartz further testified that prior to approaching Kendall, he observed that the birds were actively eating "some of the food at that time[,] " and that after he issued Kendall a ticket, Kendall did not attempt to pick up any of the food remaining on the ground. Conversely, Kendall testified that the birds were completely consuming all of the food he threw on the ground

"either immediately or within just a few seconds[,] and that the birds were scared away due to Deputy Schwartz's intervention. Kendall contends that Deputy Schwartz "did not see how quickly the birds were eating the food." The district court specifically noted that it found Kendall to not be as credible as Deputy Schwartz regarding the interaction between the two. We must defer to the trier of fact's determination of credibility.

After viewing this evidence in a light most favorable to the State, there was substantial evidence that Kendall knowingly threw rice and bread onto the ground, including in an area where pedestrians walked, which was not being consumed immediately. Accordingly, there was sufficient evidence such that this case should be remanded for a new trial.

Yisroel King