

CONCURRING AND DISSENTING OPINION BY LEONARD, J.

I agree that the judgment entered against Defendant-Appellant Brian Edward Shelton (**Shelton**) must be set aside and, therefore, I concur, in part, in the disposition of this case. However, under State v. Wheeler, 121 Hawai'i 383, 219 P.3d 1170 (2009), the charge herein was clearly deficient, failing to allege all of the essential elements of the offense charged; the defective charge constituted a denial of due process and deprived the Circuit Court of jurisdiction over the case. See id. at 395, 219 P.3d at 1182 (information in charge against Wheeler did not provide him with fair notice of an essential element of the offense); State v. Cummings, 101 Hawai'i 139, 145, 63 P.3d 1109, 1115 (2003); State v. Sprattling, 99 Hawai'i 312, 327, 55 P.3d 276, 291 (2002); State v. Jendrusch, 58 Haw. 279, 567 P.2d 1242 (1977).

In Wheeler, as an objection was raised in the trial court, the supreme court specifically declined to address whether the result would have been different under a liberal construction standard. Wheeler, at 400 n.19, 219 P.3d 1187 n.19. Here, the liberal construction standard applies because Shelton raises an objection to the charge for the first time on appeal. State v. Tominiko, No. SCWC-29535, 2011 WL 4375245, slip op. at 16 (Aug. 26, 2011) (quoting State v. Motta, 66 Haw. 89, 90, 657 P.2d 1019, 1019 (1983)). Shelton does not assert that he was prejudiced, and therefore "the critical question is whether the charge can be construed to charge a crime." Id. at \_\_, slip op. at 17. While Tominiko clearly holds that the charging document (or oral charge) must be read (or considered) as a whole, and liberally construed, I cannot read that case, or the prior cases cited by the majority, for the proposition that a defendant is provided fair notice of a charge by way of the prosecution's presentation of evidence of an element of the offense that is wholly absent from the charge. Even under the liberal construction standard, the charge against Shelton cannot be reasonably construed to

"charge the offense for which the conviction was had." Motta, 66 Haw. at 92, 657 P.2d at 1021 (citation and internal quotation marks omitted); Wheeler, 121 Hawai'i at 392, 219 P.3d at 1179.

Accordingly, I would vacate and remand for the entry of an order dismissing without prejudice.

Associate Judge