CONCURRING OPINION BY ACOBA, J.

I concur in reversal, but on the ground that the oral charge herein was "so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had[,]" State v. Motta, 66 Haw. 89, 94, 657 P.2d 1019, 1022 (1983) (internal quotation marks and citation omitted); and thus, the court lacked subject matter jurisdiction over the instant case.

I.

Defendant-Appellant Sean K. Hitchcock (Appellant) was charged via complaint with violating Revised Ordinance of Honolulu (ROH) Park Rules and Regulations § 10-1.2(a). ROH § 10-1.2(a)(13) provides:

> **Sec. 10-1.2 Park rules and regulations.**
> (a) Within the limits of any public park, it is unlawful for any person to:
> . . . .
> (13) Camp at any park not designated as a campground[.]

(Emphases added.) The record indicates that Appellant was orally charged as follows:

> [Appellant], on January 14, 2009, within the limits of a public park, you did intentionally, knowingly or recklessly camp in any area not designated as a campground thereby committing the offense of illegal camping in violation of Section 10-1.2(a)(14) of the [ROH].

(Emphasis added.) On appeal, Appellant argues, inter alia, that the charge failed to specify an essential element of ROH § 10-1.2(a)(13), that "the camping occur 'at any park not designated as a campground[,]'" and "contained language fatally different from the ordinance, when it alleged that the camping occurred 'in any area not designated as a campground.'" (Brackets omitted.) (Some emphasis in original, some added.) Thus, according to

Appellant, the oral charge "failed to state an offense under the pertinent ordinance [Plaintiff-Appellee State of Hawaiʻi (Appellee)] was proceeding under." On the other hand, Appellee contends that, "[w]here a defendant's challenge to a charge is brought for the first time on appeal, the charge is 'liberally construed in favor of validity' and a conviction thereon will not be reversed without the defendant's showing of prejudice[.]"

II.

"The failure to allege an essential element of an offense renders a charge fatally defective." State v. Borochov, 86 Hawaiʻi 183, 193, 948 P.2d 604, 614 (App. 1997) (citations omitted). As indicated in State v. Cummings, 101 Hawaiʻi 139, 142, 63 P.3d 1109, 1112 (2003), a charge that fails to state an offense contains within it a substantive jurisdictional defect, thereby rendering any subsequent trial, judgment of conviction, or sentence a nullity.

> In other words, an oral charge, complaint, or indictment that does not state an offense contains within it a substantive jurisdictional defect, rather than simply a defect in form, which renders any subsequent trial, judgment of conviction, or sentence a nullity. See [State v.] Israel, 78 Hawaiʻi [66,] 73, 890 P.2d [303,] 310 [(1995)] (quoting [State v.] Elliott, 77 Hawaiʻi [309,] 311, 884 P.2d [372,] 374 [(1994)] (quoting [State v.] Jendrusch, 58 Haw. [279,] 281, 567 P.2d [1242,] 1244 [(1977)])); Elliott, 77 Hawaiʻi at 312, 884 P.2d at 375 ("the omission of an essential element of the crime charged is a defect in substance rather than form" (quoting Jendrusch, 58 Haw. at 281, 567 P.2d at 1244)); Territory v. Koa Gora, 37 Haw. 1, 6 (1944) (failure to state an offense is a "jurisdictional point"); Territory v. Goto, 27 Haw. 65, 102 (1923) (Peters, C.J., concurring) ("[f]ailure of an indictment[,] [complaint, or oral charge] to state facts sufficient to constitute an offense against the law is jurisdictional[;] . . . an indictment[,] [complaint, or oral charge] . . . is essential to the court's jurisdiction," (brackets added)); HRS § 806-34 (1993) (explaining that an indictment may state an offense "with so much detail of time, place, and circumstances and such particulars as to the person (if any) against whom, and the thing (if any) in respect to which the

> offense was committed, as are necessary[,]" inter alia, "to show that the court has jurisdiction, and to give the accused reasonable notice of the facts").

(Emphasis added.)

III.

Because Appellant challenges the sufficiency of the charge for the first time on appeal, the "liberal construction standard" applies. See Motta, 66 Haw. at 91, 657 P.2d at 1020. In Motta, the defendant appealed his jury conviction for burglary in the second degree. Id. at 90, 657 P.2d at 1019. The defendant argued that the grand jury indictment against him failed to allege an essential element in charging the offense of burglary, and therefore, his conviction should be reversed. Id. Motta held that because the defendant "failed to raise any objection to the indictment until after trial, it must be liberally construed."[1] Id. According to Motta, "[o]ur adoption of this liberal construction standard for post-conviction challenges to indictments means we will not reverse a conviction based upon a defective indictment unless the defendant can show prejudice or that the indictment cannot within reason be construed to charge a crime." Id. at 91, 657 P.2d at 1020.

IV.

A.

In my view, the oral charge "cannot within reason be construed to charge a crime." Id. (citations omitted). As recounted, Appellant was charged with camping "within the limits

[1] In Elliott, 77 Hawaiʻi at 311, 884, P.2d at 374, this court extended the liberal construction standard to post-conviction challenges to oral charges as well. Accordingly, the liberal construction standard is applicable in the instant case.

of a public park, . . . in any area not designated as a campground[,] thereby committing the offense of illegal camping in violation of Section 10-1.2(a)(13) of the [ROH]." (Emphases added.) By all fair and reasonable constructions, the charge utterly failed to state that camping is prohibited where the entire park itself is not designated as a campground, as seemingly intended by ROH 10-1.2(a)(13). Rather, the charge alleges that Appellant camped in an area "within the limits of a public park" that was not designated as a campground. The phrase "within the limits of a public park" cannot be construed reasonably to charge the offense of camping in a park which itself was not designated as a campground. Furthermore, camping in an area within the park that was not designated as a campground is not a crime under the ordinance. Appellant was apparently charged in this way, because had the oral charge tracked the language of the ordinance, it would have had to be read as "within the limits of a public park, you did intentionally, knowingly or recklessly camp in any park not designated as a campground[.]" The charge as actually made reflects an alteration of the ordinance and an attempt to cure its glaring incomprehensibility.[2] Here, the charge is "so obviously defective that by no reasonable construction can it be

[2] Arguably the ordinance is not understandable. As it reads, ROH § 10-1.2(a)(13) prohibits "[w]ithin the limits of any public park, . . . [c]amp[ing] at any park not designated as a campground[.]" (Emphases added.) The phrase "at any park" is ambiguous insofar as it follows the introductory phrase "within the limits of any public park[.]" The ordinance suggests that there are parks within public parks which are not designated as campgrounds. The ordinance also suggests that the introductory phrase refers to a different park than that described in the phrase which follows.

said to charge the offense for which conviction was had[.]" Id. at 94, 657 P.2d at 1022.

I therefore respectfully disagree with the majority's apparent conclusion that the oral charge can within reason be construed to charge a crime. The majority acknowledges that "the prosecution used the word 'area' instead of 'park[.]'" Majority opinion at 20. Because ROH § 10-1.2(a)(13) requires that the "park" itself was not designated as a campground, the charge omitted an element of the offense.

B.

Inasmuch as an essential element of the offense was absent from the charge, Jendrusch is instructive. In that case, the defendant was convicted of the offense of disorderly conduct in violation of HRS § 711-1101. That statute provided in pertinent part:

> (1) A person commits the offense of disorderly conduct if, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, he:
> [. . . .]
> (b) Makes unreasonable noise; or
> (c) Makes any offensively coarse utterance, gesture, or display, or addresses abusive language to any person present, which is likely to provoke a violent response[.]

58 Haw. at 280, 567 P.2d at 1243 (emphasis added). The defendant had been charged as follows:

> You (Jendrusch) are hereby charged that in the City and County of Honolulu, State of Hawaii, on or about the 14th day of September, 1974, with intent to cause public inconvenience, annoyance or alarm by members of the public or recklessly creating a risk thereof, you did make unreasonable noise or offensively coarse utterance, gesture or display or address abusive language to any person present, thereby committing the offense of Disorderly Conduct in violation of Section 1101(1)(b) of the Hawaii Penal Code.

Id. at 280, 567 P.2d at 1243-44 (emphasis added). The Jendrusch

court stated, inter alia, that "[b]y any fair construction[,] the complaint . . . fail[ed] to state an offense[,]" id. at 280-81, 567 P.2d at 1244 (footnote omitted), because not all of the essential elements of the offense were charged. This court explained that

> [a]n essential element of an offense under this statute is an intent or a reckless disregard on the part of the defendant that his conduct will have a specific result. That consequence which the statute seeks to prevent is actual or threatened physical inconvenience to, or alarm by, a member or members of the public. The intent to produce this particular effect, or recklessly creating a risk thereof, is an essential ingredient of the conduct proscribed by the statute. It was not enough for the complaint to allege that the defendant had engaged in the conduct described in subsections (1)(b) and (1)(c) "with intent to cause public inconvenience, annoyance, or alarm."

Id. at 281-82, 567 P.2d at 1244 (quoting HRS § 711-1101) (emphases added) (footnote omitted).

In the instant case, Appellant was convicted of violating ROH § 10-1.2(a)(13), which requires proof beyond a reasonable doubt that defendant camped "at any park not designated as a campground[.]" In other words, the specific result "which the [ordinance] seeks to prevent[,]" Jendrusch, 58 Haw. at 281, 567 P.2d at 1244, is camping at a park not designated as a campground, not in an area of a park not designated as a campground. Hence, "[i]t was not enough for the [oral charge] to allege that the [Appellant] had engaged in" camping in an area not designated as a campground. Id. at 282, 567 P.2d at 1244.[3] Notably, neither does the ordinance seek to

[3] While Jendrusch was decided before Motta, the Motta court rejected the conclusion of the Intermediate Court of Appeals (ICA) in State v. Tuua, 3 Haw. App. 287, 649 P.2d 1180 (1982), that Jendrusch had disfavored the liberal construction approach. Motta, 66 Haw. at 91, 657 P.2d at 1020. The Motta court stated that, even under the liberal construction standard, "[it] would still find that the charge in Jendrusch was 'so obviously defective that by no reasonable construction can it be said to charge the offense for which (continued...)

prevent camping in a park which is designated as a campground, on days on which the park, or part of it, is closed for maintenance. Thus, Appellant's conduct as adduced in the instant case would not constitute an offense because such conduct cannot be construed as a crime under the ordinance.

Under Jendrusch, contrary to the majority's assertion, the prosecution's alteration of a single word did render the charge so defective that it failed to state an offense under the ordinance inasmuch as the charge failed to allege the conduct which the ordinance seeks to prevent. See majority opinion at 20 ("[I]t cannot be said that the prosecution's alteration of a single word . . . rendered the oral charge so defective that it did not state an offense. (Emphasis in original.)). According to Elliot, although Jendrusch "held that the failure to allege an essential element of an offense made a charge 'fatally defective[,]'" this court had "refined the Jendrusch rule by adopting the 'liberal construction standard' for post-conviction challenges[]" in Motta. Id. at 311-12, 884 P.2d 374-75 (citing Motta, 66 Haw. at 91, 657 P.2d at 1020). Elliot clarified, however, that Motta "expressly noted, . . . that even under that standard, the charge in Jendrusch would be fatally defective for failing to allege an essential element of the offense." Id. at 312, 884 P.2d at 375 (citing Motta, 66 Haw. at 92, 657 P.2d at

[3](...continued)
conviction was had.'" Id.; see also Elliott, 77 Hawaiʻi at 312, 884 P.2d at 375 (noting that, in Motta, this court "expressly noted . . . that even under that standard, the charge in Jendrusch would be fatally defective for failing to allege an essential element of the offense"). As discussed, I would find the oral charge deficient even under the liberal construction standard.

1020-21). Thus, this court reaffirmed that the charge in Jendrusch would be fatally defective even under the liberal construction approach.

Moreover, even consideration of the charge as a whole cannot cure its defect. A similarly defective accusation was invalidated in Elliot, which was decided after Motta. In Elliot, the defendant had been convicted of (1) resisting arrest in violation of HRS § 710-1026(1)(a) (1985)[4], (2) assault against a police officer in violation of HRS § 707-712.5 (Supp. 1992)[5], and (3) disorderly conduct in violation of HRS § 711-1101(1)(b) (1985). 77 Hawaiʻi at 309, 884 P.2d at 372. The oral charge stated with respect to resisting arrest:

> On or about the 28th day of June, 1991 in Kona, County and State of Hawaiʻi, [defendant] attempted to prevent a Peace Officer acting under color of his official authority from effecting an arrest by using or threatening to use physical force against the peace officer or another thereby committing the offense of resisting arrest in violation of Section 710-1026(1)(a) [HRS] as amended.

Id. at 310, 884 P.2d at 373 (emphasis in original) (brackets

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[4] At the time, HRS § 710-1026(1)(a) provided in pertinent part:

> **Resisting arrest**. (1) A person commits the offense of resisting arrest if he intentionally prevents a peace officer acting under color of his official authority from effecting an arrest by:
> (a) Using or threatening to use physical force against the peace officer or another[.]

Elliott, 77 Hawaiʻi at 310 n.2, 884 P.2d at 373 n.2 (emphasis and brackets in original).

[5] At the time, HRS § 707-712.5(1)(a) provided in pertinent part:

> **Assault against a police officer.** (1) A person commits the offense of assault against a police officer if the person:
> (a) Intentionally, knowingly, or recklessly causes bodily injury to a police officer who is engaged in the performance of duty[.]

Id. at 310 n.3, 884 P.2d at 373 n.3 (brackets and emphasis in original).

omitted). The oral charge with respect to the alleged assault on the police officer stated:

> On or about the 28th day of June, 1991 in Kona, County and State of Hawaiʻi [defendant] intentionally, knowingly or recklessly caused bodily injury to Officer Belinda Kahiwa by biting her thereby committing the offense of assault in the third degree, assault of police office [sic] violation of Section 707-712.5 [HRS] as amended.

Id. (brackets omitted) (emphasis in original).

The defendant argued that the resisting arrest charge "failed to allege that [the defendant] 'intentionally prevented' a police officer acting under color of authority from effectuating an arrest[.]" Id. at 311, 884 P.2d at 374 (brackets omitted). As to the assault charge, the defendant argued that "the State failed to allege that the assault was against 'a police officer who was engaged in the performance of duty.'" Id. (brackets omitted).

As to the resisting arrest count, Elliot concluded that "the requisite state of mind was omitted from the charge and [there was] no way in which [this court] could reasonably construe it to charge resisting arrest or any included offense." Id. at 313, 884 P.2d 376 (citation omitted). As to the assault charge, Elliot noted that "[o]ne way in which an otherwise deficient count can be reasonably construed to charge a crime is by examination of the charge as a whole." Id. at 312, 884 P.2d 375. However, Elliot determined that although the resisting arrest charge referred to a "Peace Officer," such reference was not sufficient to supply the element "police officer . . . engaged in the performance of duty[,]" missing from the companion assault charge. Id. Elliot reasoned that the "Peace Officer"

referenced in the resisting arrest charge could have been referring to an officer different from the one identified by name in the assault on a police officer charge. Id. Ultimately, the Elliot court decided that both the resisting arrest charge and the assault charge had to be reversed. Id. at 313, 884 P.2d 376.

Preliminarily, Elliot establishes that although this court must construe the charge liberally, where the charge cannot be construed to allege all essential elements of the offense, the conviction based on that charge must be reversed. In Elliot, it was evident that as to the resisting arrest charge, the charge could not be construed to have alleged the intent element. Additionally, Elliot also determined that the reference to a "Peace Officer" in the resisting arrest charge, which connotes an officer engaged in the performance of duty, was not sufficient to supply that element in the companion charge of assault on a police officer.

In the instant case, as recounted, the oral charge failed to allege the essential element "at any park not designated as a campground." See supra. Unlike in Elliot, here, there is nothing remotely in the charge as a whole from which it could be argued that that essential element might be supplied. Thus, while under the liberal construction standard there is a presumption of validity, "[e]xamin[ing] . . . the charge as a whole[,]" id. at 312, 884 P.2d 375, including the phrase "within the limits of a public park," does nothing to connote that the park was not designated as a campground.

C.

State v. Sprattling, 99 Hawaiʻi 312, 55 P.3d 276 (2002), is not to the contrary. In Sprattling, the defendant argued that "the oral charge . . . failed to allege [an essential element of the offense,] 'bodily injury[,]' and, instead, simply alleged injury." Id. at 317, 55 P.3d at 281. The defendant had been convicted of assault in the third degree, which required that the defendant "[i]ntentionally, knowingly, or recklessly cause[d] bodily injury to another person; or [] [n]egligently cause[d] bodily injury to another person with a dangerous instrument." Id. at 314 n.1, 55 P.3d at 278 n.1 (quoting HRS § 707-712(1) (1993)) (emphases added). According to the defendant, "the word 'injury' [was] insufficient to state an essential element of the offense because the definition of 'bodily injury' specifies a particular type of injury, whereas 'injury' has a broader definition." Id.

The Sprattling court rejected the defendant's argument because (1) "[t]he word 'bodily' alone is not an essential element of the offense; it modifies 'injury[,]'" id. at 319, 55 P.3d at 283 and (2) "[t]he word 'assault,'" the crime with which the defendant had been charged, "by definition implies bodily injury[.]" Id. In the instant case, unlike in Sprattling, it was not merely a modifying word which was omitted inasmuch as the charge failed to allege that the park itself was not designated as a campground. Moreover, neither the crime of illegal camping nor the phrase "within the limits of a park," ROH 10-1.2(a)(13), or any other phrase "by its definition implies" the necessary

element of camping in a park that is not designated as a campground. Sprattling, 99 Hawaiʻi at 319, 55 P.3d at 283.

Nevertheless, the majority maintains that, "[b]y indicating that the conduct for which [Appellant] was charged had to have occurred within the limits of a public park, the oral charge can be read (and liberally construed) as indicating that [Appellant] was illegally camping in a park that was not designated as a campground[,]" as opposed to merely an area within the park. Majority opinion at 20 (emphasis in original). However, in some instances, camping may be allowed in certain designated areas within the limits of a public park. For example, in the instant case, as noted by the majority, "the record indicates that there are areas in [the park] where camping is permitted[.]" Id. at 27 (emphasis added). "Although Officer Carino testified that there are signs in the park saying 'no camping,' he later admitted that certain areas in the park are 'designated for camping[.]'" Id. (emphasis added). In fact, "[Appellant's] tent was in one of the appropriate camping areas on the night in question." Id. The majority further acknowledges that the record indicates that at the time of trial, the City had been issuing Appellant permits to camp in the park. Id.

The foregoing reveals that there are public parks, as in the instant case, within which certain areas are designated for camping. Thus, contrary to the majority's assertion, the phrase "within the limits of a public park" does not "indicat[e] that [Appellant] was illegally camping in a park [itself] . . .

not designated as a campground," as opposed to merely an area within the park. Id. at 20 (emphasis in original). Employing practical considerations and common sense, the charge indicates, just as it reads, that Appellant was illegally camping in an area within the limits of a public park that was not designated as a campground. However, such camping is not an offense under the ordinance with which Appellant was charged.[6] But illegally camping in an area within a park may be a violation of a camping permit under ROH § 10-1.3(c). Hence, the anomalous result is that the words of the oral charge under ROH § 10-1.2(a)(13), sustained by the majority, would charge (and it would seem appropriately so) a violation of a different ordinance, ROH § 10-1.3(c), cementing the proposition that the oral charge in the instant case cannot reasonably be construed as alleging the offense designated in ROH § 10-1.2(a)(13).

V.

As previously stated, "an oral charge, complaint, or indictment that does not state an offense contains within it a

[6] Indeed, the majority acknowledges that Appellant's conduct as characterized by Officer Carino may be a violation of another ordinance, ROH § 10-1.3(c), which prohibits violation of a camping permit terms. Majority opinion at 34. This contradicts the majority's view that

> it would be absurd for [Appellant] (or anyone) to believe he was being charged with camping merely in an area of a park not designated as a campground when Officer Carino specifically stated that the basis for his citation of [Appellant] was [Appellant's] presence in the beach park at a time the park was not designated as a campground.

Majority opinion at 22 (emphasis in original). The foregoing analysis indicates that it would not be absurd for Appellant (or anyone) to believe he was being charged with camping in an area of the park which was not designated as a campground. Appellant could have reasonably believed that, although he had been camping in the area of the park designated for camping, because he understood that the park was closed for maintenance on that day, he was illegally camping in that designated area. However, as noted before, such would not be a crime under the language in ROH § 10-1.3(c).

substantive jurisdictional defect, rather than simply a defect in form, which renders any subsequent trial, judgment of conviction, or sentence a nullity." Cummings, 101 Hawaiʻi at 142, 63 P.3d at 1112 (citations omitted) (emphasis added). Because the charge in the instant case cannot be construed reasonably to charge the offense for which Appellant was convicted, prejudice, surprise, or a resulting hampered defense is irrelevant. See Elliot, 77 Hawaiʻi at 311, 884 P.2d at 374 (stating that because the defendant "ha[d] not indicated how she was surprised or prejudiced by the omissions in [the oral charge] . . . , and the record does not show that she was hampered in her defense, the question, then, [was] whether the oral charges can reasonably be construed to charge [the defendant] with the offenses" with which she was charged (brackets omitted)) (emphasis added). Hence, there is no need to consider in the alternative, whether Appellant has shown he was prejudiced by the defective charge.

VI.

Because I agree that Appellant's conviction should be reversed, I concur in the result reached by the majority. I would hold, however, that the oral charge "cannot within reason be construed to charge a crime." Motta, 66 Haw. at 91, 657 P.2d at 1020. Because the oral charge cannot be construed reasonably to have charged the offense, the court lacked subject matter jurisdiction over the instant case.[7]

[7] In light of this analysis, I would not reach the remaining issues raised by Appellant.