DISSENTING OPINION BY LEVINSON, J.,
WITH WHOM RAMIL, J., JOINS

The defendant-appellant Darrell T. Spratling appeals from the judgment, conviction, and sentence of the district court of the first circuit with respect to one count of assault in the third degree, pursuant to Hawai‘i Revised Statutes (HRS) § 707-712(1) (1993).[1] On appeal, Spratling raises four points of error: (1) that the oral charge failed to state an essential element of the offense; (2) that the colloquy regarding waiver of jury trial was insufficient; (3) that the district court's questioning of witnesses during Spratling's bench trial was excessive; and (4) that the evidence was insufficient to sustain his conviction. Inasmuch as Spratling's first point of error is both meritorious and outcome-dispositive of the present appeal under State v. Elliott, 77 Hawai‘i 309, 884 P.2d 372 (1994), and State v. Jendrusch, 58 Haw. 279, 567 P.2d 1242 (1977), I would reverse the district court's judgment of conviction and sentence and therefore respectfully dissent from the opinion of the court.

---

[1] HRS § 707-712 provides:

> **Assault in the Third Degree.** (1) A person commits the offense of assault in the third degree if the person:
>
> (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
>
> (b) Negligently causes bodily injury to another person with a dangerous instrument.
>
> (2) Assault in the third degree is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

(Emphases added.)

I. BACKGROUND

A. Factual Synopsis

Due to the nature of my resolution of this matter, the facts can be briefly stated. Sprattling was convicted after a two-day bench trial, which commenced on February 2, 1999, and concluded on March 16, 1999. At trial, the complainant, Calistro Cuson III ("Calistro"), testified that, while removing a shopping cart from a parking stall at Pearlridge Mall so that his wife, Melinda Cuson ("Melinda"), could park their vehicle, Sprattling drove into and parked in the stall. As Sprattling was getting out his truck, Calistro asked Sprattling, "What are you doing? We're going to park." The district court found that Calistro and Sprattling then became embroiled in "a confrontation of some sort," during which "[Calistro] was pushed and . . . fell backwards over the curb and sustained certain injuries." The injuries included "embarrassment," chest pains, and breathing problems. On the day following the confrontation, Calistro sought medical attention. Although Calistro testified that he did not actually observe Sprattling's hands make contact with his body, he did testify that, just after falling, he looked up to see Sprattling standing over him, arms outstretched, with palms faced outward.

Melinda also testified. She confirmed that a confrontation between Sprattling and Calistro had occurred in the parking lot at Pearlridge Mall. She testified that she actually observed Sprattling push Calistro.

Sprattling presented a justification defense, in support of which he adduced the testimony both of himself and of his spouse, Carla Sprattling. Sprattling claimed that he pushed Calistro in self-defense. The district court found that

Sprattling's version of the confrontation made no sense and, therefore, found that his testimony was not credible.

The district court found Sprattling guilty of assault in the third degree. On April 14, 1999, the district court entered judgment and sentenced Sprattling to one year of probation. On April 30, 1999, Sprattling filed a timely notice of appeal.

B. The Oral Charge

At a pretrial appearance occurring on January 13, 1999, Sprattling's counsel waived the reading of the charge. However, at the outset of Sprattling's bench trial on February 22, 1999, Sprattling's counsel "ask[ed] that the Prosecution arraign the defendant." The Deputy Prosecuting Attorney (DPA) orally charged Sprattling as follows:

> On or about December 20th (twentieth), 1998, in the City and County of Honolulu, you did intentionally, knowingly, or recklessly cause injury to another person, to wit, Calistro Cuson III, thereby committing the offense of Assault in the Third Degree in violation of Section 707-712(1) of the Hawaii Revised Statutes.[2]

(Emphasis added.) Sprattling then pled not guilty, and the district court commenced Sprattling's bench trial.

II. STANDARD OF REVIEW

> It is well settled that an "accusation must sufficiently allege all of the essential elements of the offense charged," a requirement that "obtains whether an accusation is in the nature of an oral charge, . . . indictment, or complaint[.]" . . . Jendrusch, 58 Haw. [at] 281, 567 P.2d [at] 1244 . . . . Put differently, the sufficiency of the charging instrument is measured, inter alia, by "whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he [or she] must be prepared to meet[.]" State v. Wells, 78 Hawai'i 373, 379-80, 894 P.2d 70, 76-77 (1995) (citations and internal quotation marks omitted) (brackets in original).

---

[2] My independent review of the audio tape recording of the proceeding at which the oral charge was recited establishes that the court reporter's transcription of the oral charge, as set forth above, is accurate.

> "A charge defective in this regard amounts to a failure to state an offense, and a conviction based upon it cannot be sustained, for that would constitute a denial of due process." Jendrusch, 58 Haw. at 281, 567 P.2d at 1244 (citations omitted). "Whether an indictment [or complaint or oral charge] sets forth all the essential elements of [a charged] offense . . . is a question of law," which we review under the de novo, or "right/wrong," standard. Wells, 78 Hawai'i at 379, 894 P.2d at 76 (citations omitted).

State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996) (some brackets added and some in original). Inasmuch as Sprattling challenges the sufficiency of the oral charge for the first time on appeal, our construction of the oral charge in this matter is subject to the "Motta/Wells post-conviction liberal construction rule." Id.; see also Elliott, 77 Hawai'i at 311, 884 P.2d at 374 (1994) (applying the Motta/Wells post-conviction liberal construction rule to an oral charge challenged for the first time on appeal). Accordingly, this court "[will] not 'reverse a conviction based upon a defective indictment [or complaint or oral charge] unless the defendant can show [either] prejudice or that the indictment [or complaint or oral charge] cannot within reason be construed to charge a crime.'" Merino, 81 Hawai'i at 212, 915 P.2d at 686 (quoting Wells, 78 Hawai'i at 381, 894 P.2d at 78 (quoting State v. Motta, 66 Haw. 89, 91, 657 P.2d 1019, 1020 (1983))) (some brackets added and some in original) (emphasis added); see also Elliott, 77 Hawai'i at 311, 884 P.2d
at 374.

III. DISCUSSION

Sprattling contends that the oral charge in the present matter, see supra part I.B., failed to allege "bodily injury," an essential element of the offense of which he stands convicted. He argues that, inasmuch as the unmodified word "injury" is not

coextensive with "bodily injury" and cannot, within reason, and in light of the oral charge in its entirety, be construed to mean "bodily injury," it follows, a fortiori, that the oral charge "cannot be reasonably construed to charge the offense for which [he] was convicted." Accordingly, Sprattling submits that his conviction must be reversed. I agree. However, before addressing Sprattling's meritorious claim, I review a few of the general principles that would control my resolution of this matter.

A. General Principles Regarding An Oral Charge, Complaint, or Indictment Challenged For The First Time On Appeal

> The failure of an accusation to charge an offense may be raised "at any time during the pendency of the proceedings[.]" HRPP 12(b)(2) (1995); see also []Motta, 66 Haw. [at] 90, 657 P.2d [at] 1019-20 . . . . However this court has
>
> > adopted the rule [hereinafter, the "Motta[/]Wells post-conviction liberal construction rule"] followed in most federal courts of liberally construing indictments [and complaints and oral charges] challenged for the first time on appeal. Motta, 66 Haw. at [90]-91, 657 P.2d at 1020. Elaborating on this standard, this court [will] "not reverse a conviction based upon a defective indictment [or complaint or oral charge] unless the defendant can show prejudice or that the indictment [or complaint or oral charge] cannot within reason be construed to charge a crime." Id.
>
> Wells, 78 Haw. at 381, 894 P.2d at 78.

Merino, 81 Hawai'i at 212, 915 P.2d at 686 (some brackets added and some in original).

We have sketched the Motta/Wells post-conviction liberal construction rule, as originally developed in the federal courts, as follows:

> The [Court of Appeals for the] Second Circuit has expressed this post-conviction liberal construction rule as follows:
>
> > Technically, a claim that the indictment does not charge an offense may be raised on a motion in arrest of judgment. . . . But the courts of the United States long

> ago withdrew their hospitality toward technical claims of invalidity of an indictment first raised after trial, absent a clear showing of substantial prejudice to the accused -- such as a showing that the indictment is "so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had."
>
> U.S. v. Thompson, 356 F.2d [216,] 226 [(2d. Cir. 1965)]. The Ninth Circuit has said that although such defects are never waived, indictments which are tardily challenged are liberally construed in favor of validity. . . . [W]hen an indictment is not challenged before the verdict, it is to be upheld on appeal if "'the necessary facts appear in any form or by fair construction can be found within the terms of the indictment.'"
>
> U.S. v. Pheaster, 544 F.2d [353,] 361 [(9th Cir. 1976)], citing Kaneshiro v. U.S., 445 F.2d [1266,] 1269, quoting Hagner v. U.S., 285 U.S. 427, 433 . . . (1932). In similar vein, the Sixth Circuit has recently said that "unless the defendant can show prejudice, a conviction will not be reversed where the indictment is challenged only after conviction unless the indictment cannot within reason be construed to charge a crime." U.S. v. Hart, 640 F.2d [856,] 857-58 [(6th Cir. 1981)]. See also U.S. v. Previte, 648 F.2d [73,] 80 [(1st Cir. 1981)].

Motta, 66 Haw. at 90-91, 657 P.2d at 1020 (some ellipsis points and brackets added and some in original); see also Wells, 78 Hawai'i at 381, 894 P.2d at 78.

In Jendrusch, we explained the constitutional due process[3] implications of a defective accusation as follows:

> The accusation must sufficiently allege all of the essential elements of the offense charged. Territory v. Henriques, 21 Haw. 50 (1912); Dolack v. United States, 376 F.2d 756 (9th Cir. 1967); cf. HRS [§] 702-205. This requirement obtains whether an accusation is in the nature of an oral charge, . . . indictment, or complaint, and the omission of an essential element of the crime charged is a defect in substance rather than of form. A charge defective in this regard amounts to a failure to state an offense, and a conviction based upon it cannot be sustained, United States

[3] Article I, section 5 of the Hawai`i Constitution (1978) provides in relevant part that "[n]o person shall be deprived of life, liberty, or property without due process of law[.]" The fourteenth amendment to the United States Constitution provides in relevant part that "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

> v. Beard, 414 F.2d 1014 (3rd Cir. 1969); Carlson v. United States, 296 F.2d 909 (9th Cir. 1961), for that would constitute a denial of due process. Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960). This requirement may not be waived or dispensed with, United States v. Tornabene, 222 F.2d 875 (3rd Cir. 1955), and the defect is ground for reversal, even when raised for the first time on appeal. . . .Beard, supra; Carlson . . . , supra. See also United States v. Clark, 412 F.2d 885 (5th Cir. 1969). . . .

Jendrusch, 58 Haw. at 281, 567 P.2d at 1244; see also Elliot, 77 Hawai‘i at 312, 884 P.2d at 375 (quoting the same (citations omitted)); cf. State v. Israel, 78 Hawai‘i 66, 73, 890 P.2d 303, 310 (1995) (quoting the same, relying on Elliott and Jendrusch, and holding that prosecution failed to state an offense in a complaint that purported to charge "felony" offense, where language of complaint was insufficient to ensure that court had before it all facts necessary to find probable cause, as required by grand jury clause of article I, section 10 of the Hawai‘i Constitution[4]).

The failure sufficiently to allege the essential elements of an offense in an oral charge, complaint, or indictment constitutes a denial of liberty without due process of law, which results from the failure to invoke the subject matter jurisdiction of the court. 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 Israel, 78 Hawai‘i at 73, 890 P.2d at 310 (quoting Elliott, 77 Hawai‘i at 311, 884 P.2d at 374 ((quoting Jendrusch, 58 Haw. at 281, 567 P.2d at 1244));

---

[4] Article I, section 10 of the Hawai`i Constitution (1978 & 1982) provides in relevant part that "[n]o person shall be held to answer for a criminal or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law[.]"

Elliott, 77 Hawai‘i 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)).

Accordingly, as in the case of any jurisdictional defect, Hawai‘i Rules of Penal Procedure (HRPP) Rule 12(b)(2) (1995) provides in relevant part that the failure to "charge an offense . . . shall be noticed by the court at any time during the pendency of the proceedings," as distinguished from other "defenses and objections based on defects in the charge," such as those that are mere matters of form, which "must be raised prior to trial" or risk being waived. Thus, inasmuch as the failure to state an offense is a substantive jurisdictional defect in a criminal proceeding, it is axiomatic that the defect cannot be waived either by the defendant or by the prosecution. See Jendrusch, 58 Haw. at 281, 567 P.2d at 1244 ("this requirement [i.e., that an offense must be charged] may not be waived or dispensed with").

In order not to be substantively defective, an accusation, in whatever form it is issued, must allege all of the essential elements of the offense:

> [j]ust as the [prosecution] must prove beyond a reasonable doubt all of the essential elements of the offense charged, the [prosecution] is also required to sufficiently allege them and that requirement is not satisfied by the fact that the accused actually knew them and was not misled by the failure to sufficiently allege all of them.

Israel, 78 Hawai‘i at 73, 890 P.2d at 310 (quoting State v. Tuua, 3 Haw. App. 287, 293, 649 P.2d 1180, 1184-85 (1982) (citations omitted)) (some brackets added and some in original); cf. HRPP Rule 5(b)(1) (1996) (requiring that an accused be formally arraigned and that a complaint be filed or an oral charge recited where the accusation is the commission of a non-felony offense). Where an accusation is defective because it does not state all the elements of the offense, the court does not have subject matter jurisdiction. See Koa Gora, 37 Haw. at 6; Goto, 27 Haw. at 102. That being the case, reversal of a conviction obtained on such a defective accusation does not require a showing of prejudice. See Elliot, 77 Hawai‘i at 311, 884 P.2d at 374 (agreeing with the ICA that inasmuch as defendant could not demonstrate and did not assert prejudice where element omitted from an oral charge, "[t]he question, then, is whether the oral charges can be reasonably construed to charge [the defendant] with the offenses [of which the defendant was convicted]" (some brackets added and some in original) (citation and quotation signals omitted)); State v. Yonaha, 68 Haw. 585, 586-87, 723 P.2d 185, 186-87 (1986) (conviction obtained on oral charge reversed for failure to state element of intent; prejudice not addressed); State v. Faulkner, 61 Haw. 177, 177-78, 599 P.2d 285, 285-86 (1979) (same); State v. Borochov, 86 Hawai‘i 183, 193, 948 P.2d 604, 614 (App. 1997) (reversing conviction because charge could not be reasonably construed to state an offense).

Hence, we have consistently articulated the Motta/Wells post-conviction liberal construction rule in the disjunctive, i.e., that a conviction obtained on a defective accusation will be reversed only where a defendant either demonstrates prejudice or that the accusation, as worded, cannot reasonably be construed to state the essential elements of an offense. Thus, implicit in the Motta/Wells post-conviction liberal construction rule is the proposition that prejudice, insofar as it may result from a lack of notice of the charges, need not be proved if the defendant can demonstrate that an accusation fails to state an offense.[5] See Merino, 81 Hawai‘i at 192, 915 P.2d at 672; Wells, 78 Hawai‘i at 381, 894 P.2d at 78; Elliot, 77 Hawai‘i at 311-312, 884 P.2d at 374-375; Motta, 66 Haw. at 91, 657 P.2d at 1020; Faulkner, 61 Haw. at 177-78, 599 P.2d at 285-86; Jendrusch, 58 Haw. at 281, 567 P.2d at 1244. Consequently, the failure to state an offense in an accusation that, nonetheless, results in a conviction, constitutes a defect that, in itself, requires reversal. This is because the defect, as I have noted, is not one of mere form, which is waivable, nor simply one of notice, which may be deemed harmless if a defendant was actually aware of the nature of the accusation against him or her, but, rather, is one of substantive subject matter jurisdiction, "which may not be waived or dispensed with," see Jendrusch, 58 Haw. at 281, 567 P.2d at 1244, and that is per se prejudicial, see Motta, 66 Haw. at 91, 657

[5] In this connection, I note that, in Thompson, supra, a decision upon which this court relied in Motta, the United States Court of Appeals for the Second Circuit suggested that the failure to state an offense is, in and of itself, per se prejudicial. Thompson, 356 F.2d at 226 (conviction resulting from an accusation challenged for the first time on appeal will not be reversed, "absent a clear showing of prejudice -- such as a showing that the indictment is 'so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had'" (emphasis added)) (as quoted in Motta, 66 Haw. at 91, 657 P.2d at 1020).

P.2d at 1020 (quoting Thompson, 356 F.2d at 226)).

Nonetheless, the prosecution urges, without citation to authority, that we should infer from Sprattling's trial strategy -- specifically, his invocation of self-defense -- that he "construed the injury [alleged] as being to the [complainant's] body and not to [the complainant's] emotions or reputation." On the basis of this inference, the prosecution argues that we should construe "injury," as alleged in the oral charge, to mean "bodily injury" because Sprattling, himself, actually construed the accusation as such. However, inasmuch as the failure to state an offense not only generates the question whether a defendant possessed a sufficient understanding of the charges at the outset of the proceedings -- a defect that is harmless if it does not prejudice the defendant -- but also deprives the trial court of subject matter jurisdiction, the lack of which is prejudicial as a per se matter, the prosecution's argument is without merit. See Motta, 66 Haw. at 91, 657 P.2d at 1020 (quoting Thompson, 356 F.2d at 226 (failure to state an offense is prejudicial)); see also Elliott, 77 Hawai‘i at 311, 884 P.2d at 374 (showing of prejudice resulting from lack of notice not required and reversal of conviction granted on failure of oral charge to state an offense); Yonaha, 68 Haw. at 586-87, 723 P.2d at 186-87 (reversing conviction for failure of charge to state an offense); Borochov, 86 Hawai‘i at 193, 948 P.2d at 614 (same); Koa Gora, 37 Haw. at 6 (failure to state an offense is jurisdictional issue); Goto, 27 Haw. at 102 (same).

Thus, consistent with the disjunctive character of the Motta/Wells post-conviction liberal construction rule, I would hold that Sprattling may impeach the sufficiency of the oral charge on the sole ground that it omitted an essential element of

the offense of which he was later convicted. Therefore, inasmuch as Sprattling does not claim and need not establish prejudice, his conviction must be reversed upon his demonstration that "the [oral charge] cannot within reason be construed to charge a crime." Elliott, 77 Hawai'i at 311, 884 P.2d at 374 (quoting Motta, 66 Haw. at 91, 657 P.2d at 1020 (brackets added)). Put differently, if the oral charge in the present matter cannot be construed to charge an offense, then the trial court lacked subject matter jurisdiction over the proceeding and Sprattling's conviction is a nullity.

B. The Oral Charge Failed To State An Offense.

I now address the question whether the oral charge in the present case was fatally defective under the "reasonable construction" prong of the Motta/Wells post-conviction liberal construction rule. As I have indicated, Sprattling was convicted of third degree assault, in violation of HRS § 707-712(1). HRS § 707-712(1)(a) provides that "[a] person commits the offense of assault in the third degree if the person . . . [i]ntentionally, knowingly, or recklessly causes bodily injury to another person[,]" see supra note 1. (Emphasis added.) "Bodily injury," in turn, is statutorily defined as "physical pain, illness, or any impairment of physical condition." HRS § 707-700 (1993) (emphases added). Thus, pursuant to HRS § 702-205 (1993),[6] the "result[] of conduct" that HRS § 707-712 seeks to avoid is "bodily injury" (emphasis added), and it is this specific result that, as an "element" of the offense, see supra note 1, a defendant, by his or her conduct, must intentionally, knowingly,

[6] HRS § 702-205 provides in relevant part that "[t]he elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct[] as . . . [a]re specified by the definition of the offense[.]"

or recklessly cause in order to be held penally liable for committing assault in the third degree. Accordingly, the offense of third degree assault requires as an element of the offense -- and, therefore, as an allegation in the oral charge -- that Sprattling intentionally, knowingly, or recklessly caused a specific result: bodily injury to another person.

Given the disparity between the specific statutory definition of "bodily injury," which is restricted to "physical pain, illness, or any impairment of physical condition," see HRS § 707-700, and the plain meaning of "injury,"[7] which generally extends to any harm, detriment, or damage, be it physical or mental, to another person's body, mind, purse, or rights, the two terms cannot, without more, be reasonably construed as synonymous. Thus, inasmuch as the oral charge in the present matter simply alleged that Sprattling caused an undefined injury to Calistro, Sprattling stood accused of causing some unspecified harm, detriment, or damage to Calistro's body, mind, purse, or rights. Therefore, absent some further factual detail, the oral charge failed to accuse Sprattling of causing the requisite result of conduct expressly prescribed by the statutory definition of third degree assault, to wit, a bodily injury -- physical in nature rather than emotional, monetary, or otherwise. That being so, the allegation that "injury" was caused did not charge the "result of conduct" element, see supra note 7, of third degree assault, see supra note 1.

---

[7] The Oxford English Dictionary ("OED") advises that current definitions of "injury" include "[w]rongful action or treatment; violation or infringement of another's rights; suffering or mischief wilfully and unjustly inflicted"; or, alternatively, "[h]urt or loss caused to or sustained by a person or thing; harm, detriment, damage." VII OED 981 (2d ed. 1989).

Furthermore, inasmuch as the general term "injury" is not synonymous with the more specific "bodily injury," the oral charge, as the prosecution inartfully recited it, is simply not reasonably susceptible to a construction that encompasses the required scienter. The accusation that Sprattling intended, knew, or recklessly disregarded a substantial and unjustifiable risk that his conduct would cause some diffuse and undifferentiated harm, detriment, or damage to Calistro's body, mind, purse, or rights cannot, within reason, be construed to allege with sufficient specificity that Sprattling intended, knew, or recklessly disregarded a substantial and unjustifiable risk that his conduct would cause physical pain or illness to Calistro or otherwise impair Calistro's physical condition.

Thus, even more egregious than the decisions in which we have applied the reasonable construction prong of the Motta/Wells post-conviction liberal construction rule to reverse convictions obtained via accusations that failed only to state the requisite state of mind, the oral charge in the present matter failed to state either the requisite state of mind or the result of conduct element of third degree assault. Cf. Elliott, 77 Hawai'i at 311-13, 884 P.2d at 374-75; Yonaha, 68 Haw. at 586-87, 723 P.2d at 185-86; Faulkner, 61 Haw. at 177-78, 599 P.2d at 285-86 (holding that oral charge alleging "you did attempt to commit theft of the property or services of another[, the] value of which is less than $50" did not allege essential element of intent of criminal attempt).

"Where the statute sets forth with reasonable clarity all essential elements of the crime intended to be punished, and fully defines the offense in unmistakable terms readily comprehensible to persons of common understanding, a charge drawn

on the language of the statute is sufficient." Merino, 81 Hawai'i at 214-15, 915 P.2d at 688-89 (quoting State v. Schroeder, 76 Hawai'i 517, 529, 880 P.2d 192, 204 (1994) (quotation signals omitted) (quoting State v. Torres, 66 Haw. 281, 288-89, 660 P.2d 522, 527 (1983))); see also Jendrusch, 58 Haw. at 283, 567 P.2d at 1245. The language of HRS § 707-712(1), see supra note 1, expressly recites all of the essential elements of third degree assault. Accordingly, an accusation that simply tracked the language of HRS § 707-712(1), see supra note 1, would have been sufficient to state the offense of third degree assault. The deputy prosecutor in the present matter, however, did not recite the language of the statute. Instead, the prosecutor omitted a material term from the statutory definition of the offense.

Such an omission, however, might have been cured had the deputy prosecutor articulated with specificity the type of "injury" that Sprattling caused or, alternatively, the mechanism of causation. For example, an allegation that the alleged "injury" was chest pain or breathing difficulty would have permitted a construction of the alleged "injury" as a "bodily injury." Similarly, had the accusation that Sprattling "caused injury" been modified by the additional factual allegation that the injury was caused by pushing Calistro, it would then have been possible, within reason, to construe "injury" as specifically alleging "bodily injury" on the basis of the physical nature of the injury's causation. The deputy prosecutor in the present matter, however, did not modify the allegation of "injury" with any factual detail from which one could, within reason, construe the oral charge as alleging "bodily injury."

Nevertheless, the prosecution urges that we should take into consideration the fact that "the charge set forth the criminal, not civil, offense of assault and incorporated the phrase 'cause injury to another person'" in order to facilitate a "reasonable construction . . . [of the oral charge that] would identify the nature of the injury as being to the [complainant's] physical being; i.e., a 'bodily injury.'" Moreover, the prosecution argues that "[t]he inclusion of the statutory section . . . of the offense further identifies the nature of the injury as 'bodily' and nothing else."

In Motta, we cited United States v. Pheaster, 544 F.2d 353, 361 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977), with approval for the proposition that, when a criminal charge "is not challenged before the verdict, it is to be upheld on appeal if the necessary facts appear in any form or by fair construction can be found within the terms of the [charge]." Motta, 66 Haw. at 91, 657 P.2d at 1020 (quoting Pheaster, 544 F.2d at 361 (internal quotation signals omitted)). We subsequently held in Elliott that, even under the Motta/Wells post-conviction liberal construction rule, "statutory references in [an] oral charge ... [do] not cure the omission of essential elements in the ... charge." Elliott, 77 Hawai'i at 312, 884 P.2d at 375 (emphasis added). Thus, the deputy prosecutor's recitation in the present matter of the statutory reference to third degree assault in the oral charge cannot serve as a proxy for the prosecution's obligation, at the very least, to allege facts that, by fair construction, could be construed to charge all of the essential elements of the offense. Indeed, "[t]o allow a mere statutory reference to cure the omission of essential elements would completely vitiate the rule of law

developed in Jendrusch, Motta, and Yonaha." Elliot, 77 Hawai'i at 311, 884 P.2d at 374.

In summary, the question before us in the present case is whether the operative accusatory language recited in the prosecution's oral charge against Sprattling was reasonably susceptible to a construction that would narrow the general allegation that Sprattling intentionally, knowingly, or recklessly caused "injury" to a specific allegation that Sprattling intentionally, knowingly, or recklessly caused "bodily injury." I would hold, under the circumstances of the present matter, that the answer is "no." I would therefore hold that the prosecution's oral charge failed to state an offense because it failed to allege the essential element of result of conduct, see supra note 7, of third degree assault, see supra note 1. That being so, I would hold that the trial court lacked subject matter jurisdiction over the proceeding and that Sprattling's conviction must be reversed.

C. The Majority Opinion's Achilles' Heel

The majority agrees with me that the Motta/Wells post-conviction liberal construction rule controls our construction of the oral charge in the present matter. Majority opinion at 10-11. Similarly, the majority does not dispute that an accusation that fails to state all the essential elements of an offense is jurisdictionally deficient. Where the majority parts company with me, however, is in insisting that a defendant demonstrate "prejudice" before such a jurisdictional defect would warrant reversal of a resulting conviction. See majority opinion at 14-16.

Thus, the majority opinion converts the disjunctive Motta/Wells post-conviction liberal construction rule into a conjunctive rule that requires the defendant to demonstrate both "prejudice" -- by which the majority means "actual prejudice" resulting from a lack of notice, which infects a defendant's ability to put forth a defense, see id. at 16 -- and that the accusation cannot, within reason, be construed to state an offense. Never have we so articulated the rule, nor ever have we so applied the rule. I decline to do so now.

Indeed, our cases applying the Motta/Wells post-conviction liberal construction rule can be segregated into two groups: (1) those cases in which both prongs were either satisfied or not, see e.g., Merino, 81 Hawai‘i at 212-13, 915 P.2d at 686-87 (accusation was not prejudicial and could be construed to state an offense); Motta, 66 Haw. at 94, 657 P.2d at 1022 (same); Faulkner, 61 Hawai‘i at 178, 599 P.2d at 286 (accusation did not state an offense and was not sufficient to inform defendant of the nature of the accusation); Jendrusch, 58 Haw. at 280-81; 567 P.2d at 1244 (accusation prejudicial and could not be construed to state an offense), and (2) those cases in which only the reasonable construction prong was satisfied, see e.g., Elliott, 77 Hawai‘i at 311-13, 884 P.2d at 374-76 (no actual prejudice but conviction reversed because accusation could not be construed to state an offense); Yonaha, 68 Haw. at 586-87; 723 P.2d at 185-86 (conviction reversed because accusation could not be construed to state an offense; prejudice not addressed). In no case has this court held, as the majority would hold here, that, although the accusation -- as the oral charge here -- cannot be reasonably construed to charge an offense, a conviction obtained thereon must nonetheless stand unless the defendant can

establish that he or she suffered actual "prejudice." In other words, we have never held that a lack of actual prejudice justified the affirmance of a conviction obtained on a jurisdictionally defective accusation that could not be reasonably construed to charge an offense. Elliott, moreover, stands for the directly contrary proposition. See Elliott, 77 Hawai'i at 311; 884 P.2d at 374.

This is because the jurisdictional defect inherent in an accusation omitting an essential element of an offense is, in and of itself, substantially prejudicial as a per se matter. The accusation is substantially prejudicial, not because it fails to notify the defendant of the charges against him or her, but because it fails to allege an offense within the statutorily conferred subject matter jurisdiction of the court and, therefore, nullifies any subsequent proceedings against the defendant. What the majority misapprehends is that the Motta/Wells post-conviction liberal construction rule is not simply animated by a concern that our criminal justice system must avoid convicting an accused pursuant to a Kafkaesque proceeding, in which the accused is never adequately informed of the conduct for which he or she is being criminally prosecuted, but also by a concern that we must avoid convicting an accused pursuant to a Manichaean proceeding, in which the jurisdiction of the court is never established. To permit a conviction to stand simply because "might makes right" in this particular case would demean the integrity of our courts and embed a maxim that has no place in the criminal law of Hawai'i.[8]

[8] In this regard, I note that our criminal justice system is accusatory and not inquisitorial in nature. See e.g., Rogers v. Richmond, 365 U.S. 534, 541 (1961) (our system is "an accusatorial and not an inquisitorial system -- (continued...)

The majority opinion further asserts that the omission of the word "bodily" is not material to an accusation purporting to charge third degree assault. Majority opinion at 12-16. Despite the fact that the term "bodily injury" is a statutorily defined term, and, therefore, a legal term of art, while the term "injury" is neither, the majority asserts that the mere allegation that Sprattling caused "injury" was sufficient to allege that Sprattling had engaged in conduct that fell within the statutorily defined offense of third degree assault. To achieve this construction of "injury," the majority apparently relies on the prosecution's recital of the statutory caption -- i.e., the statutory name and numeration -- of the offense that it sought to charge. See id. at 14 ("While the prosecution, in this case, omitted the qualifying term "bodily," the deletion did not alter the charge or otherwise fail to specify the offense for which Sprattling was charged such that he could not reasonably construe the charge of assault in the third degree.").

Inasmuch as I am unwilling to overrule Elliott and its progeny sub silentio, I cannot rely on such bootstrapping to fashion a reasonable construction of the oral charge. See Elliott, 77 Hawai'i at 311-12, 884 P.2d at 374-75 ("[w]e cannot agree . . . that the statutory reference was sufficient, in accordance with the liberal rule of construction[,] . . . to provide the necessary element missing from the charges so as to

---

[8](...continued)
a system in which the State must establish guilt by evidence independently and freely secured"). The state acts through the prosecutor, who serves both as a minister of justice and as a quasi-judicial officer. It is therefore the state's responsibility to charge a defendant correctly. In this connection, we have ruled that the absence of the prosecutor's signature on a complaint rendered the complaint fatally defective and the resulting judgment of conviction null and void. State v. Knoeppel, 71 Haw. 168, 785 P.2d 1321 (1990).

sufficiently state the offenses charged"); see also Wells, 78 Hawai'i at 383, 894 P.2d at 80 ("an omission of an essential element from an indictment cannot be cured by merely citing the statute"); Israel, 78 Haw. at 75, 890 P.2d at 312 (relying on Elliott and holding that "where one offense requires the actual commission of a second underlying offense, in order to sufficiently charge the offense, it is incumbent upon the [prosecution] to allege the essential elements of the underlying offense; identification of the offense by name or statutory reference will not suffice"). Although an accusation drawn on the language of the statute defining the offense is sufficient -- so long as all the elements of the offense are completely defined by the statute, see e.g. Merino, 81 Hawai'i at 214-15, 915 P.2d at 688-89 -- it is not, and cannot, be sufficient simply to recite the statutory caption, without any specific factual allegation that the accused engaged in conduct constituting the offense therein defined. To hold to the contrary, as the majority does, not only overrules Elliot, but also stands for the proposition that a recitation of a statutory caption could, standing alone, suffice to allege the essential elements of the offense unless a defendant could demonstrate that he or she did not understand the nature and cause of the accusation.

I cannot agree with the majority, however, for a more systemic reason. If, in the context of the present matter, the recitation that Sprattling, by causing "injury," did "commit the offense of Assault in the Third Degree, in violation of [HRS] § 707-712(1)," is held to charge all the elements of the offense because the reference to "Assault in the Third Degree" sufficiently apprised Sprattling that he stood accused of causing, specifically, "bodily injury," as defined by HRS § 707-

700, then a similar accusation that merely alleges that an accused has caused "bodily injury . . . , thereby committing the offense of Assault in the First Degree, in violation of HRS § 707-710," would, likewise, sufficiently allege of all the essential elements of first degree assault. The omission of the word "serious" from the allegation that "bodily injury" was caused would, pursuant to the majority's analysis, not be material, because the statutory reference to "assault in the first degree" would sufficiently apprise the defendant that he or she stood accused of causing "serious bodily injury," because the "word ['serious'] alone is not an essential element of the offense; it modifies '[bodily] injury.'" See majority opinion at 12. The absurd result would be that the prosecution could, by alleging that a defendant engaged in conduct constituting an offense of a lesser class and grade, secure a legally sufficient conviction of an offense of a greater class and grade. I do not believe that the inclusion in a charge of a statutorily defined term -- be it "serious bodily injury" or "bodily injury" -- that constitutes an essential element of an offense is not critical to the charge. If the legislature had not intended the language to be critical, then it would not have troubled itself with statutorily defining it.

By omitting the word "bodily" from its recitation of the oral charge in the present matter, the prosecution did not accuse Sprattling of causing the result-of-conduct element of third degree assault and, consequently, did not accuse him of committing an offense defined by the penal code. His subsequent conviction of an offense therein defined should, therefore, be reversed.

IV. CONCLUSION

Based on the foregoing analysis, I would reverse the district court's judgment of conviction and sentence.