DISSENTING OPINION OF ACOBA, J.

On June 5, 2002, the Intermediate Court of Appeals (ICA) affirmed, by summary disposition order, the October 24, 2000 judgment of the district court of the first circuit (the court) convicting and sentencing Petitioner/Defendant-Appellant Lawrence Paul Hearn (Petitioner) of driving under the influence of intoxicating liquor (DUI), Hawai‘i Revised Statutes (HRS) § 291-4(a)(1) (Supp. 2000). See State v. Hearn, No. 23924 (Haw. Ct. App. June 5, 2002) (SDO).

After Petitioner had rear-ended a vehicle, he was arrested by a police officer who testified that Petitioner had an odor of alcohol, swayed slightly and, in the opinion of the officer, failed the field sobriety tests (FSTs). At trial, Petitioner was precluded from using the 1984 National Highway Traffic Safety Administration (NHTSA) instruction manual entitled "Improved Sobriety Testing" to impeach the arresting officer as to his administration of the tests and to assess the reliability of the test results.

The ICA agreed with Petitioner that he should have been permitted to use the manual in an attempt to impeach the officer, because "the manual provided the proper techniques for administering [FSTs] . . . and the arresting officer was trained in administering the FSTs pursuant to NHTSA guidelines." SDO at 2. However, the ICA concluded "that there [was] substantial

evidence in the record to support the district court's conclusion that [Petitioner] was driving [under the influence]." SDO at 2.

Petitioner filed his application for a writ of certiorari on July 5, 2002. In his application, Petitioner maintains that the ICA erred because (1) "[t]he ICA applied a substantial evidence standard to a trial error of constitutional [instead of harmless error analysis] magnitude," and (2) "the ICA passed upon the credibility of the arresting officer in holding that the error [in prohibiting Petitioner from] impeach[ing] the arresting officer as to the FSTs had no effect on the officer's credibility" as to the officer's testimony of other DUI indicia.

As to his first point, Petitioner relies on State v. Balisbisana, 83 Hawai'i 109, 924 P.2d 1215 (1996), in which this court held that "[d]enial of a defendant's constitutionally protected opportunity to impeach a witness . . . is subject to harmless error analysis . . . [and w]hether such an error is harmless in a particular case depends upon a host of factors[.]" Id. at 117, 924 P.2d at 1223 (citations omitted).

As to his second point, Petitioner maintains that "it is totally speculative whether a successful impeachment of the arresting officer as to the FSTs would have caused the district court to discredit the officer's testimony as to his observations of [Petitioner] beyond the FSTs." (Emphasis omitted.)

A finding of DUI may be based on circumstantial evidence. See Spock v. Administrative Dir. of the Courts, 96 Hawai'i 190, 193, 29 P.3d 380, 383 (2001) (holding that other

evidence was sufficient to support finding that driver was driving under influence of intoxicating liquor, irrespective of admissibility of alcohol breath test results). The court relied on the FSTs to establish proof of the offense beyond a reasonable doubt, indicating that it took into consideration with other factors, "the aspects of the field sobriety test pointed out by the officer in the walk and turn and the one leg stand." Inasmuch as (1) the court as fact finder did rely on the FSTs, (2) Defendant was entitled to impeach the officer with respect to the FSTs but was precluded from doing so, and (3) it is apparent that the court's reliance on the FSTs was not separable from its ultimate finding and conclusion of guilt, the ICA gravely erred in holding that other evidence supported the court's decision.

It could be argued that the 1984 Manual was excluded because there may have been a subsequent edition or different standards utilized by the police department. Such an argument was not considered by the trial court, however, nor was it raised on appeal. Although the court asked about the date of the manuscript, see majority opinion at 2 n.1, all discussion by the court and the litigants revolved primarily around whether the manuscript was an original, or a duplicate copy. As this court does not consider issues not presented before a trial court, see State v. Rodrigues, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) ("[i]t is a generally accepted rule that issues not raised at the trial level will not be considered on appeal" (citing State v. DeSilva, 64 Haw. 40, 41, 636 P.2d 728, 729 (1981) and State v.

Hook, 60 Haw. 197, 204, 587 P.2d 1224, 1229 (1978)), we need not address this issue.

However, assuming arguendo that this contention was raised by the parties, an analysis of the two tests demonstrates that they are virtually the same.[1] See R.E. Erwin, Defense of Drunk Driving Cases § 10.06 (3d ed. 2002). Both tests describe

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[1] Both the 1984 and 1995 FSTs consist of three sub-tests each: horizontal gaze nystagmus (HGN) test, walk-and-turn test, and one-leg stand test. The instructions and standardized clues or scoring factors are substantially the same for both the 1984 and 1995 FSTs. Both the 1984 and 1995 HGN tests require the suspect to follow a stimulus with his or her eyes, as the officer "move[s] the stimulus smoothly." R.E. Erwin, Defense of Drunk Driving Cases § 10.06[2] (3d ed. 2002) [hereinafter Defense]. The only difference in the two tests, albeit minor, is that the 1984 HGN test instructs the officer to check the suspect's right eye first, while the 1995 HGN test directs the officer to start the test with the suspect's left eye. However, the standardized clues or scoring factors to look for are nearly identical, as both versions of the tests essentially delineate these three factors or clues: (1) lack of smooth pursuit, (2) distinct nystagmus at maximum deviation, and (3) onset of nystagmus prior to 45 degrees. See Erwin, Defense, supra, § 10.06[2].

As to the 1984 and 1995 walk-and-turn tests, the instructions and the standardized clues are nearly identical. Both tests require the suspect "to take 9 heel-to-toe steps down the line, to turn, and to take 9 heel-to-toe steps up the line." Erwin, Defense, supra, § 10.06[3]. In addition, the suspect is directed "to keep the arms at the sides, to watch the feet, to count the steps aloud, and not to stop walking until the test is completed." Erwin, Defense, supra, § 10.06[3]. Both the 1984 and 1995 walk-and-turn tests describe nearly identical factors or clues to look for, which include: loses balance during the instructions, i.e., feet break away from the heel-toe stance; starts walking too soon; stops while walking; misses heel-to-toe while walking; raises arms from side while walking (six inches or more); steps off line; turns improperly; and takes the wrong number of steps. See Erwin, Defense, supra, § 10.06[3].

The 1984 and 1995 one-leg stance tests are also nearly identical in their instructions and standardized clues or scoring factors. In both tests, the suspect is instructed "to stand on one foot, with the other foot held straight about six inches off the ground. . . ." Erwin, Defense, supra, § 10.06[4]. At the same time, the suspect is required to "count for 30 seconds in the following manner: 'one thousand and one,' 'one thousand and two,' until told to stop." Erwin, Defense, supra, § 10.06[4]. The only apparent difference is that, in the 1984 test, the suspect must "count rapidly from 1001 to 1030," instead of counting for 30 seconds. Erwin, Defense, supra, § 10.99[2]. However, the manner of counting in the 1984 test is the same as that in the 1995 test. Also, in both tests, the officer is directed to ask the suspect whether he or she understands the individual tasks. As to the standardized clues or scoring factors, both the 1984 and the 1995 one-leg stance tests are nearly identical. The clues or factors the officer is required to look for are that the suspect: sways, puts foot down, hops, or raises arms from the side (six inches or more). See Erwin, Defense, supra, § 10.06[4].

essentially the same factors or clues, and no obvious distinctions can be made so that the year of the test would have made a difference as to admissibility of the 1984 manual.

The trial court excluded the 1984 manual because (1) it was a photocopy of the original, and (2) the testifying officer was unable to recognize it. Under Hawai‘i Rules of Evidence 1003, a duplicate is admissible unless a "genuine question is raised as to the authenticity of the original[.]" Here, the only question raised by the prosecution was as to the date of the manual, which was included in the photocopied duplicate. Thus, no genuine question was raised as to the authenticity of the manual and it should have been admitted. In addition, as the officer testified that the FST procedures were standardized by the NHTSA and the court relied upon his testimony, Defendant was entitled to cross-examine the officer in regards to the national standards outlined in the 1984 manual.

Defendant had a right to impeach the officer with the national standards established by the NHTSA, but this right was denied. Accordingly, the ICA's June 5, 2002 SDO affirming the district court's October 24, 2000 judgment should be reversed, and the district court's said judgment convicting and sentencing Petitioner for DUI should be vacated and the case remanded for a new trial.