

DISSENTING OPINION BY DUFFY, J.,
IN WHICH ACOBA, J., JOINS

I respectfully dissent. While I agree that Winfrey failed to properly preserve his objection to the testimony of Officer Lopes regarding the speed check test results of her vehicle, her testimony was inadmissible hearsay, and the district court's reliance on that testimony as the sole evidence of a material element of Winfrey's alleged offense constituted plain error.

As we have previously stated, generally, "an issue not preserved at trial is deemed to be waived." State v. Miyazaki, 64 Haw. 611, 616, 645 P.2d 1340, 1344 (1982). However, this court may "tak[e] notice of plain errors affecting substantial rights although they were not brought to the attention of the court." HRE Rule 103(d); see also State v. Richie, 88 Hawai'i 19, 38 n.14, 960 P.2d 1227, 1246 n.14 (1998); State v. Fields, 115 Hawai'i 503, 528, 168 P.3d 955, 980 (2007) (recognizing this court's "inherent power to notice plain error sua sponte").

It is well established that "[t]he defendant's right to have each element of an offense proven beyond a reasonable doubt is a constitutionally and statutorily protected right." State v. Murray, 116 Hawai'i 3, 10, 169 P.3d 955, 962 (2007) (footnote omitted) (citing State v. Maelega, 80 Hawai'i 172, 178, 907 P.2d 758, 764 (1995); State v. Lima, 64 Haw. 470, 474, 643 P.2d 536, 539 (1982); State v. Iosefa, 77 Hawai'i 177, 182, 880 P.2d 1224, 1229 (App. 1994)). Winfrey's conviction under HRS section 291C-

105(a)(1) required the prosecution to prove beyond a reasonable doubt that: (1) Winfrey drove a motor vehicle (2) at a speed exceeding the applicable state or county speed limit (3) by thirty miles per hour or more. See HRS § 291C-105(a)(1).

To prove that Officer Lopes accurately measured Winfrey's speed as exceeding the applicable speed limit, the prosecution was required to establish that the measuring instrument (the speedometer in Officer Lopes' vehicle) was accurate. See State v. Wallace, 80 Hawai'i 382, 407, 910 P.2d 695, 720 (1996); State v. Manewa, 115 Hawai'i 343, 353-54, 167 P.3d 336, 346-47 (2007).

This court has recognized a fundamental evidentiary rule that

"before the result of a test made out of court may be introduced into evidence, a foundation must be laid showing that the test result can be relied on as a substantive fact." State v. Kemper, 80 Hawai'i 102, 105, 905 P.2d 77, 80 (App. 1995) (citation and internal quotation marks omitted). Part of the foundational prerequisite for the reliability of a test result is a showing that the measuring instrument is "in proper working order." See State v. Thompson, 72 Haw. 262, 263, 814 P.2d 393, 395 (1991) (citation and internal quotation marks omitted); Kemper, 80 Hawai'i at 105, 905 P.2d at 80.

Wallace, 80 Hawai'i at 407, 910 P.2d at 720.

In this case, the prosecution did not submit an authenticated business record into evidence, pursuant to HRE Rule 803(b)(6), to lay the foundation necessary to show that the speed test results could be relied on as substantive fact. Nor did the prosecution lay the necessary foundation for the speed test

results through in-court testimony from Officer Lopes. By her own testimony, Officer Lopes had no personal knowledge of how the speed test worked. As such, Officer Lopes' testimony regarding the accuracy of the speed test results was inadmissible hearsay. See HRE Rule 602 (1993) ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); HRE Rule 801(3) (Supp. 2008) ("‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

Officer Lopes' testimony was the only evidence produced by the prosecution to establish the accuracy of her vehicle's speedometer. This court has previously stated that

[t]he test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. . . .

"Substantial evidence" as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion.

Fields, 115 Hawai'i at 511-12, 168 P.3d at 963-64 (quoting State v. Batson, 73 Haw. 236, 248-49, 831 P.2d 924, 931 (1992)).

In this case, the record contains only inadmissible evidence, rather than "credible evidence," to establish the reliability of Officer Lopes' speedometer. As stated previously, the prosecution had to establish the reliability of Officer

Lopes' speedometer to prove a material element of Winfrey's alleged offense. The record before this court lacks substantial evidence to support the district court's conclusion that Winfrey's vehicle exceeded the applicable speed limit and violated HRS section 291C-105(a)(1).

Accordingly, the district court committed plain error by concluding that there was sufficient evidence to convict Winfrey, and the ICA erred in affirming the district court's conviction. As such, Winfrey's conviction should be reversed.