DISSENTING OPINION OF REIFURTH, J.

Although I agree with the majority's conclusion that the district court erred by admitting into evidence testimony concerning Avilla's performance on the HGN test, I do not agree with the majority's holding that the error was harmless beyond a reasonable doubt. Therefore, I respectfully dissent.

In criminal cases, "a defendant's conviction will not be overturned if the error was harmless beyond a reasonable doubt." *State v. Veikoso*, 126 Hawaiʻi 267, __, 270 P.3d 997, 1006 (2011) (quoting *State v. Machado*, 109 Hawaiʻi 445, 452, 127 P.3d 941, 948 (2006)) (internal quotation marks and brackets omitted).

> The error is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, *the real question becomes whether there is a reasonable possibility that error might have contributed to conviction*.

Machado, 109 Hawaiʻi at 452–53, 127 P.3d at 948–49 (quoting *State v. Haili*, 103 Hawaiʻi 89, 100, 79 P.3d 1263, 1274 (2003)).

Here, the district court, in support of its verdict, explicitly found that Avilla performed poorly on the HGN test, finding, for example, that Avilla's eyes "did not track the stimulus smoothly" and "bounced back and forth when [Officer Cunningham] had the stimulus at 45 degrees." One out of the three total paragraphs constituting the district court's findings of fact is fully dedicated to the results of the HGN test. Because the district court actually relied upon the HGN test when rendering its verdict, there is at least a reasonable possibility that the erroneously admitted evidence contributed to the guilty verdict.

I disagree with the majority's characterization of the remainder of the evidence presented at trial as "overwhelming and compelling evidence" of Avilla's guilt. If we remove the results of the HGN test from consideration, all that remains are Officer Cunningham's observations and subjective characterizations of Avilla's driving and of her physical appearance and demeanor.

While Officer Cunningham's observations standing on their own could constitute strong evidence of Avilla's guilt if believed, we must not, as an appellate court, "usurp the [fact-finder]'s role as the arbiter of guilt or innocence." *See United States v. Smart*, 98 F.3d 1379, 1391 (D.C. Cir. 1996); *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983) ("The danger of the harmless error doctrine is that an appellate court may usurp the jury's function, by merely deleting improper evidence from the record and assessing the sufficiency of the evidence to support the verdict below."). A fact-finder might very well have found that Officer Cunningham's testimony, without the results of the HGN test corroborating and bolstering his observations and conclusions, was insufficient to prove Avilla's guilt beyond a reasonable doubt. *See State v. Witte*, 836 P.2d 1110, 1121-22 (Kan. 1992) (erroneous admission of HGN test results not harmless because the consideration of the scientific HGN test results may have, in the jury's mind, "supported and gave credibility to" other evidence in the case).

Because the district court actually relied upon the results of the HGN test when it found Avilla guilty and because Avilla's performance on the HGN test might have bolstered the remainder of Officer Cunningham's testimony in the eyes of a reasonable fact-finder, I would conclude that "there is a reasonable possibility that [the] error might have contributed to [the] conviction." *Machado*, 109 Hawai‘i at 452-53, 127 P.3d at 948-49 (quoting *Haili*, 103 Hawai‘i at 100, 79 P.3d at 1274). Therefore, I would hold that the district court's error was not harmless beyond a reasonable doubt, vacate the June 9, 2010 Notice of Entry of Judgment and/or Order and Plea/Judgment, and remand for a new trial.