DISSENT BY DUFFY, J., IN WHICH ACOBA, J., JOINS

I respectfully dissent and would accept Togiaso Duran's (Duran) application for a writ of certiorari. For reasons similar to those discussed in the dissent in State v. Winfrey, No. 28737 (Order Affirming Judgment On Appeal) (Dec. 22, 2009) (Duffy, J., dissenting, with whom Acoba, J., joins), I believe that it was plain error for the district court to convict Duran of excessive speeding in violation of Hawai'i Revised Statutes (HRS) section 291C-105(a)(1) where the prosecution presented insufficient evidence of such a violation.

In order to obtain a conviction under HRS section 291C-105(a)(1), the prosecution must prove beyond a reasonable doubt that: (1) Duran 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) (2007).

In State v. Assaye, 121 Hawai'i 204, 216 P.3d 1227 (2009), this court held that when an officer uses a laser gun to determine the speed of the defendant's vehicle,

> the prosecution must prove that the laser gun's accuracy was tested according to procedures recommended by the manufacturer. See [State v. Manewa, 115 Hawai'i 343, 354, 167 P.3d 336, 347 (2007)]. Insofar as an officer's training is concerned, we hold that the same burden of proof is applied to the issue of whether the officer is qualified by training and experience to operate the particular laser gun; namely, whether the nature and extent of an officer's training in the operation of a laser gun meets the requirements indicated by the manufacturer. See [State v. Ito, 90 Hawai'i 225, 244, 978 P.2d 191, 210 (App. 1999)]. Therefore, without a showing of the nature and extent of the "certifi[cation]," testimony showing merely that a user is "certified" to operate a laser gun through instruction given by a "certified" instructor is insufficient to prove that

> the user is qualified by training and experience to operate the laser gun. See id.

Id. at 215, 216 P.3d at 1238 (footnote omitted). In that case, the prosecution failed to show that the training the officer received "me[t] the requirements of the manufacturer of the laser gun." Id. at 216, 216 P.3d at 1239 (internal quotation marks omitted). Accordingly, this court held that "the prosecution did not provide a sufficient foundation for the admission of [the officer's] testimony regarding the speed reading given by his laser gun." Id. Because no other evidence was introduced to show the speed at which the defendant's vehicle was traveling, this court held that the prosecution did not adduce "sufficient evidence to prove every element of the offense beyond a reasonable doubt." Id. (quoting Manewa, 115 Hawai'i at 358, 167 P.3d at 351) (brackets omitted).

In the present case, the only evidence offered by the prosecution concerning the speed of Duran's vehicle was the testimony of Officer Shermon Dowkin (Officer Dowkin) that Duran's vehicle was traveling at 68 miles per hour. Officer Dowkin's testimony was based upon a reading obtained from his LTI 20/20 Laser Gun (laser gun). Though Officer Dowkin testified that he was trained on how to calibrate the laser gun, he did not testify that "the laser gun's accuracy was tested according to procedures recommended by the manufacturer." Assaye, 121 Hawai'i at 215, 216 P.3d at 1238. Absent such testimony, the prosecution failed

to lay a sufficient foundation for Officer Dowkin's testimony regarding the speed reading given by the laser gun. The prosecution did not present any other evidence of the speed at which Duran's vehicle was traveling. Accordingly, the prosecution failed to adduce "sufficient evidence to prove every element of the offense beyond a reasonable doubt." Id. at 216, 216 P.3d at 1239; see also HRS § 291C-105(a)(1) (2007).

Unlike the defendant in Assaye, Duran neither objected to, nor moved to strike Officer Dowkin's testimony regarding the laser gun. Id. at 206-07, 209, 216 P.3d at 1229-30, 1232. 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." Hawai'i Rules of Evidence (HRE) Rule 103(d) (1993); see also Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (1977); State v. Richie, 88 Hawai'i 19, 38 n.14, 960 P.2d 1227, 1246 n.14 (1998) (recognizing that this court "may notice errors not raised below under the plain error doctrine.").

> This court has held that it "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights."

State v. Miller, 122 Hawai‘i 92, 100, 223 P.3d 157, 165 (2010) (emphasis in original) (quoting State v. Sawyer, 88 Hawai‘i 325, 330, 966 P.2d 637, 642 (1998)).

As stated above, in order to obtain a conviction under HRS section 291C-105(a)(1), the prosecution was required to prove beyond a reasonable doubt that Duran's vehicle was traveling at thirty miles per hour or more than the applicable speed limit, which it failed to do. 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)). Accordingly, the district court committed plain error by concluding that there was sufficient evidence to convict Duran of excessive speeding in violation of HRS section 291C-105(a)(1), and his conviction should therefore be reversed.

/s/ Simeon R. Acoba, Jr.

/s/ James E. Duffy, Jr.