

CONCURRING OPINION BY NAKAYAMA, J.

I concur with the majority opinion except as to part III.C. I agree that the prosecutor's misstatement of the reasonable doubt standard was improper, however, I believe that the majority makes unwarranted assumptions regarding what the prosecutor implied by his statements.

The rebuttal argument was improper because, as the trial court stated, the duty to prove guilt beyond a reasonable doubt is the standard applied in all criminal prosecutions. It was improper for the prosecutor to appear to differentiate between the guilty and the innocent in the application of the standard. "Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments[.]" State v. Rogan, 91 Hawai'i 405, 413, 984 P.2d 1231, 1239 (1999). The Rogan court articulated the concern that a jury may be influenced by both the prestige and the overall capabilities of the prosecutor's office. Id. at 413, 984 P.2d at 1239. This concern is sufficient to find the prosecutor's rebuttal argument improper. Accordingly, I would cease analysis at the point at which we determined that although the argument was improper, the court's curative instructions sufficiently negated the potential impact.

Further, I disagree completely with the majority as to what the argument of the prosecutor implied. The majority is

going far afield from an analysis of an improper argument regarding the presumption of innocence to inject a supposition that a juror would, upon hearing the argument, not require the government to prove its case, and thereby ignore the court's instructions. To foist this improper motive on the prosecutor in this case for the statement made is patently unfair and completely unnecessary in the analysis of this case.