

The Discursive Construction of Evidence in Police Interviews: Case Study of a Rape Suspect

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This article presents an analysis of the discursive construction of evidence in an English police interview with a rape suspect. The analytic findings differ from previous research on police–suspect interview discourse, in that here the interviewers actively lead an interviewee to produce defence evidence. The article seeks to make the following contributions: (i) it demonstrates the interactional mechanisms through which the interviewers co-construct the interviewee’s own version of events, and highlights the potential legal ramifications by focusing on the construction of one key evidential aspect, namely, consent; (ii) it lends weight to the hypothesis that interviewer agendas are strongly determinative of interview outcomes in terms of the evidential account produced, while making the important new contribution of showing that this is not simply a case of police interviewers being inevitably prosecution-focused; and (iii) it aims to provoke further investigation into the significance of interviewer discursive influence in cases where consent is at issue, against a backdrop of increasing numbers of rape cases being discontinued by the police at this early stage of the criminal justice process.

INTRODUCTION

The discursive influence of an interviewer over an interviewee’s turns has long been recognized in a variety of contexts (Greatbatch 1988), as have the asymmetric power relations in such institutional encounters (Fairclough 1989). It is therefore perhaps not surprising that research on police–suspect interviews has tended to reveal something of a ‘prosecution bias’, with interviews focusing on the interviewers’ prosecution-driven agenda to the detriment of the interviewee (Auburn *et al.* 1995; Heydon 2005: 116ff). However, in one interview analysed as part of a wider project (Haworth 2009), something different occurs. Here there is a distinct shift in interviewer discursive behaviour, and the interview correspondingly shifts from building a prosecution case to pursuing and actively shaping a defence account. This interview is with a man accused of rape, and the case against him was subsequently dropped.

Through detailed analysis of this interview, this article seeks to make the following contributions. First, it builds on the existing literature by not only

demonstrating the discursive influence of police interviewers over interviewees' accounts, but also highlighting the potential legal ramifications by focusing on the construction of one key evidential aspect of a case. Secondly, the existence of this 'opposite' case lends weight to the hypothesis that interviewer agendas are strongly determinative of interview outcomes in terms of the evidential account produced, while making the important new contribution of showing that this is not simply a case of police interviewers being inevitably prosecution-focused. Thirdly, it is hoped to provoke further investigation into the significance of interviewer discursive influence in cases where consent is at issue. In such cases, participants' accounts are often the only available evidence, hence the even greater significance of this influence. The fact that this case study reveals a 'defence bias' in an interview with a rape suspect may, of course, be coincidental. However, it correlates worryingly with statistics showing that in England and Wales (E&W), despite a rise in reporting rates, the number of rape allegations which the police pass to the Crown Prosecution Service (CPS) is falling.¹ There is therefore currently renewed focus on the police institutional processes which lead to so many cases being dropped at this stage of the criminal justice process.² This article seeks to demonstrate the potential for detailed linguistic analysis of interview discourse to make a meaningful contribution regarding this pressing social issue.

RESEARCH BACKGROUND

Police–suspect interviews in E&W have a unique institutional context and function, and are governed by a tight legislative and regulatory framework, all of which has a discernible influence over the discourse. To start with the obvious, valid grounds must exist for suspecting the interviewee of being guilty of a crime. The basic purpose of the interview is to gather information from that person relating to the police investigation; the days are now gone (in E&W at least) where the sole focus was to elicit a confession. It is also the police's only opportunity to test hypotheses of guilt—and potential defences—with their suspect.

Since the introduction of the Police and Criminal Evidence Act 1984 (PACE), standard procedure is for all E&W police–suspect interviews to be audio recorded, then for a 'Record of Taped Interview' (ROTI) to be produced. The tapes and ROTI form part of the package of evidence passed to the CPS who then decides whether to bring charges against the interviewee. If the matter proceeds to court, the interview tapes and ROTI are formally presented as evidence. The version which emerges from the interviewee during the interview thus has serious consequences for the future course of the case. This takes on even greater import in E&W due to s.34 of the Criminal Justice and Public Order Act (CJPOA) 1994, which provides that (negative) inferences can be drawn at trial if elements of a person's defence were not mentioned at the earlier interview stage.

This use of interview data as prosecution evidence in court, especially the application of s.34 CJPOA 1994, is based on the commonly accepted view within the legal world that the interview is an interviewee's opportunity to put forward 'their side of the story'; to give their own version of events in their own words. Yet even a cursory review of relevant linguistic research should prompt a rethink as to whether this can really be the case.

A wealth of research has been conducted on contexts which involve interview or question-answer formats, such as news interviews (Greatbatch 1988; Heritage and Greatbatch 1991), job interviews (Button 1992; Roberts and Campbell 2005), the courtroom (Atkinson and Drew 1979; Harris 1984), and doctor-patient interaction (Silverman 1987; Wodak 1997), reflecting the prevalence of this format in institutional contexts (Tracy and Robles 2009). The asymmetrical discursive dynamic of an interview means that the participant pre-allocated the role of questioner will inevitably have a large degree of control over the structure and topics of the exchange (Greatbatch 1986; Drew and Heritage 1992: 47-50). Indeed, professional-lay interaction has been shown frequently to be a manifestation of the control of individuals through specific organizations and organizational practices, with lay participants placed in a typically weaker position both institutionally and discursively (Fairclough 1989; van Dijk 1993). A key success of the literature in this area has been in demonstrating how those inequalities are not just reinforced but often created and perpetuated discursively (Thornborrow 2002).

In judicial contexts, various studies have shown that the interests of the interviewer tend to predominate, especially in formal interview records: Komter (2002) on Dutch police-suspect interview records; Rock (2001) on E&W witness statements; Heydon (2005) on Australian police-suspect interviews; Blommaert (2001) on Belgian interviews with asylum seekers; and Haworth (2010) on E&W police-suspect interviews.

Nevertheless, although a questioner largely controls the interaction, the details of what happened can only come from the other participant, the responder. They are thus mutually dependent in creating the account that will represent the official institutional outcome of the interaction. In an analysis of police-suspect interviews, Auburn *et al.* (1995) identifies a 'preferred version' which 'is taken into the interview as an as yet unformed project by the police officer or officers'. This is 'one version of events but one which is privileged by the police. Nevertheless, gaining agreement to this version, as an intersubjectively agreed version of "what happened" will, more often than not, require negotiation and argumentation by the participants' (Auburn *et al.* 1995: 357). Similarly, in a study of 'narrative transformation' in E&W police-suspect interviews, Johnson (2008) illustrates how 'narrative resources are shared and negotiated to produce an authoritative account of "the facts"' (Johnson 2008: 328). She describes how 'interviewers attempt to move [the suspect] from an identity in which culpability is resisted to one where it is recognized and acknowledged' (Johnson 2008: 330-1).

In all these prior studies, interviewer influence and the process of narrative co-construction are shown to operate generally to the detriment of

the interviewee. In the interview to be presented here, however, the opposite happens: the same process of co-construction transforms the interviewee's account in a way that *reduces* his culpability. This study thus marks a departure from prior research while casting new light on those previous findings.

METHODOLOGY

The analysis presented here is part of a wider project that addresses a number of aspects of police interview discourse (Haworth 2009). This project espouses Sarangi and Roberts' belief 'that discourse analytic and sociolinguistic studies of workplace communication should be grounded in an ethics of practical relevance' (Sarangi and Roberts 1999: 2). It is therefore considered essential that the linguistic analysis is sufficiently grounded in, and related to, the context to which it is being applied. The institutional and legal framework which underpins this interview is thus seen as an integral part of the analysis undertaken here, and is therefore described in some detail below. Evaluation of the legal significance of aspects of the discourse is informed by the author's experience as a criminal barrister, as well as input from practicing police interviewers who have attended the author's interviewer training courses.

With regard to the analytic framework, the approach taken is to view linguistic theories and frameworks as a 'toolkit', from which the most appropriate tool for the task in hand is chosen. Thus, the 'problem' comes first, and then the best method of solving it is selected. This allows for a multi-method approach, while being mindful of the dangers of 'methodological eclecticism' (Sarangi and Roberts 1999: 26). Further, the analytic approach is data-driven. Although the research questions of the wider project predetermined an analytical focus on certain factors (such as the influence of the interview's role as evidence), it did not presuppose how they would be manifest in the data. The specific linguistic features to be analysed were therefore determined only after the data had been gathered and considered.

Several linguistic features were identified as of particular significance in the construction of interviewees' accounts. The main analytic focus is on the sequential organization of turns (Sacks *et al.* 1974), including features such as topic selection and control (Greatbatch 1986), interruption and overlap, discourse markers (Schiffrin 1987), and formulations (Heritage and Watson 1979). Additional features include question types (Harris 1984) and narrative structure (Labov 1977). Collectively, these features enable close consideration of the relative position of each discursive participant in terms of their contribution to the emerging account.

Formulations (Heritage and Watson 1979), a third-part turn after a question-answer sequence in which the interviewer summarizes the interviewee's immediately prior talk, appear to be a particularly important interactional resource for the police interviewer (Heydon 2005: 28; Stokoe and Edwards 2008: 97–8; see also Drew 1992: 506–7 and Cotterill 2003: 150 on courtroom discourse). Through these turns, questioners can select the elements of the

responder's talk that they wish to make prominent, while minimizing and rejecting other parts. While this can perform a useful function in focusing the talk on what is institutionally most relevant (Stokoe and Edwards 2008), they also enable the interviewer to refocus and recast the interviewee's account in a way which is very difficult for the interviewee to counteract, especially since they ostensibly consist of the interviewee's own words. They are therefore a powerful resource for moving the account produced in a police interview towards the interviewer's agenda.

DATA

For the wider project, official police interview audio tapes were collected from five different police forces. Initially, a small number of interviews were selected from each force to form a representative data sample for qualitative analysis, and were transcribed according to a simplified version of Jefferson's (2004) transcription conventions. It soon became apparent that the particular offence involved and the legal framework being applied were significant factors in structuring the discourse. The applicable legal framework depends not only on the criminal offence, but also on the individual set of facts in each case. For example, two interviews may both concern the offence of criminal damage, but in one, the relevant legal framework may relate to identification and in the other, criminal intent. It was therefore decided to conduct case studies. This allows a 'thick description' of the interrelation of multiple layers of the discourse context, from the micro-level structure of the interaction to the particular circumstances of the case, and beyond to the wider criminal justice and social context.

The case study approach provides particularly rich results for the interview discussed here. Close analysis of the trajectory of the entire interaction reveals the turn-by-turn intricacies of the interviewers' influence over the account produced by the interviewee, and enables this to be linked to the specific institutional goals underpinning this interaction. Significantly, it also reveals a change in the interviewers' position as the interaction progresses. The identification of this 'shift', and the tracing of the corresponding shift in the interviewee's account from one of guilt to innocence, is an important contribution to our understanding of the production of linguistic evidence in the police interview.

BACKGROUND TO INTERVIEW

In this interview, a man (IE) is being questioned on suspicion of rape. The complainant, 'Caroline' (C), is a friend of IE's who had been staying at his flat. They both agree that they spent the previous evening together, and that sex took place. They also agree that there was a falling out which culminated in C leaving the flat. C claims that this was because the sex took place against her will. IE maintains that the sex was consensual, but that afterwards they had

a row about something else, which led to C becoming upset and leaving. Both had been drinking. There are two interviewers: IR1 (male) conducts virtually all of the questioning; IR2 (female) only asks a short series of questions at the end. There is also a duty solicitor present, who takes no part in the interaction for the main body of the interview. The interview took place in England in 2005, and is 29 min in duration. It is the only interview conducted with this suspect in relation to this offence.

The legal definition of rape applicable at the time is contained in the Sexual Offences Act (SOA) 2003, the relevant parts of which are as follows:

'1 Rape

- (1) A person (A) commits an offence if—
 - (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
 - (b) B does not consent to the penetration, and
 - (c) A does not reasonably believe that B consents.

- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

74 "Consent"

For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.'

The facts of this case throw up a thorny legal issue, namely, the question of consent and voluntary intoxication. The legal position is that '[i]f, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendant's state of mind, if intercourse takes place, this would be rape' (*R v Bree* [2007] EWCA Crim 256, 34 per Sir Igor Judge P). The level of C's drink and drug intake is therefore directly relevant to the determination of guilt or innocence. Further, there is an important element of *mens rea* involved: alongside a complainant's mental capacity, guilt or innocence also depends on the accused's subjective understanding of the situation [s.1(1)(c) and (2)]. This means that a successful conviction requires the prosecution to establish what was going on in the defendant's mind at the relevant time; an intrinsically challenging task. An interview with a suspect is therefore a significant opportunity for collecting, indeed *creating*, evidence of this element of an offence. (See [Edwards 2008](#) on *mens rea* evidence as a topic in police interviews; but note that the test applicable here is different to the 'reasonable man' test which underlies much of that analysis—see [Temkin and Ashworth 2004](#): 340–2.)

ANALYSIS

For the majority of this interview, we see a prosecution-driven approach from IR1. However, there is then a discernible shift away from a 'Guilty scenario' and towards a more defence-oriented agenda. One of the ways in which this shift is apparent is in the appearance of questions which are specifically helpful to the Defence, addressing points which are noticeably absent in the interview up to that point. The analysis is therefore presented in two parts, in order to highlight the differences in the evidence produced in each of these phases.

Pre-shift: co-construction

We will begin by examining how IE's version of events is actively negotiated and constructed between the participants. The extent of the IRs' influence over this emerging account can be observed firstly through the use of formulations (Heritage and Watson 1979).

Example 1

| | |
|--|------------------------------|
| IR1: okay just describe yourself for me. what sort of build are you | 253 |
| and size. | 254 |
| IE: me I- I'm a little un I'm stocky. (.) and (.) [small] and stocky yeah. [(???)] | 255 |
| IR1: | [yeah] [what 256 |
| sort of] what sort of height. | 257 |
| (.) | 258 |
| IE: I'm five foot five and a half. | 259 |
| IR1: and what- what do you weigh. | 260 |
| IE: I weighhh (-) I think it's about eleven and a half [stone (???)] | 261 |
| IR1: | [eleven and a half stone 262 |
| so] you're n- you're not fat, you're not stocky, you're quite proportionate | 263 |
| [build.] | 264 |
| IE: [yeah.] | 265 |

This sequence contains a summary by IR1 of IE's self-description, but one which directly contradicts what IE actually said: 'I'm stocky' (255) becomes 'you're not stocky' (263). Presenting this as a formulation or "'so" summariser' (Cotterill 2003: 150) rather than a direct contradiction or expression of IR1's opinion, makes it very difficult for IE to challenge, especially as it gives the (false) impression that IR1 is merely repeating IE's own description. In addition, structuring the turn as a statement inviting only a yes/no response further restricts IE's opportunity to correct the assertion. Thus IR1 here appropriates and recasts IE's portrayal of himself, yet IE simply agrees with this (265).

This relatively mundane example shows how this mechanism results in IE's account being subtly shaped by the IRs. We shall now consider how this affects the main goal of the interaction, namely, establishing whether the necessary elements exist for IE to be guilty of an offence.

Pre-shift: offence construction

Throughout the first ('pre-shift') part of the interview, IR1's turns are clearly directed at establishing the points necessary for building a prosecution case. In a sense, the offence is actively being constructed through the interaction (cf. Baldwin 1993: 327 on the 'construction of proof'). In Example 2, IE has just given an extended description of the whole evening (104–58), which included a wide variety of topics including a trip to the pub and the supermarket, details of the sexual activity which IE says took place (including kissing and verbal exchanges), and the presence of C's dog. This long account is then distilled into the following formulation by IR1:

Example 2

| | | |
|------|---|-----|
| IR1: | okay. (.) so y- you maintain then, (.) at the moment that, (.) you've (.) had | 163 |
| | sexual intercourse with Caroline, | 164 |
| IE: | yeah | 165 |
| IR1: | <u>with</u> consent, | 166 |
| IE: | <u>with</u> consent, (.) I didn't ejaculate but that [does]n't matter [(does it)] | 167 |
| IR1: | [no.] [doesn't | 168 |
| | matter no.] and she's (.) fully (.) agreed to that has she. | 169 |
| IE: | she fully agreed to it yeah I mean there's p- if she'd been screaming | 170 |
| | shouting there's people above me or people below me. | 171 |
| IR1: | (okay.) | 172 |

The 'okay...so' marks what follows as a summary of IE's account (Johnson 2002), yet IR1 omits the vast majority of the information just relayed by IE, instead only including the parts which match elements of the offence. Indeed IR1 checks each element on the 'prosecution checklist' separately, first establishing whether he accepts that sex took place [163-5; s.1(1)(a) SOA 2003], then moving on to the question of consent [166; s.1(1)(b) SOA 2003].

IE seems to defer to IR1's control over his own account. He does repeat a detail which he had reported but which IR1 did not include in his formulation, namely, that he did not ejaculate (167). But he immediately qualifies this and apparently defers to IR1's right to determine the relevance of his own utterances with 'but that doesn't matter (does it)' (167). The implication is that such a detail, which is perfectly relevant to a detailed description of a sexual encounter, does not matter specifically to the question of whether or

not the sex amounted to an offence. Thus both participants here acknowledge that relevance in this interview relates purely to the offence elements, and that interviewers have the sole right (and knowledge) to determine that. The extent to which this is ingrained in the whole exchange can be seen in the way that IR1 starts saying 'no' *before* IE asks if it matters (168)—IE's addition of a detail followed by 'but' (167) seems to be enough for IR1 to understand that IE is inviting him to monitor its relevance. This implies that this is an underlying mechanism of the whole exchange, with the further troubling implication that for much of the time IE may be self-monitoring, and not mentioning details because he has already decided that they are not relevant to the interviewers.

Pre-shift: (lack of) defence construction

In the 'pre-shift' phase, there is a noticeable absence of attempts by the interviewers to address the specific points that might amount to a defence. The following extract contains the only explanation of the offence offered to IE:

Example 3

| | | |
|------|---|----|
| IR1: | ahhnm (-) d'you know why you were arrested this morning. | 31 |
| IE: | rape apparently. [(?)] | 32 |
| IR1: | [okay.] (.) what do you understand by the word rape. | 33 |
| | (.) | 34 |
| IE: | erm it is, (.) er- it- it's (-) having sex (.) with someone against their <u>wishes</u> | 35 |
| | [basically] | 36 |
| IR1: | [okay that's] that's- that's a (.) good enough generalis[ation] as t- as to | 37 |
| IE: | [mmm] | 38 |
| IR1: | what we're talking about at the moment, | 39 |

Given the range of legal elements involved in the offence of rape, this is clearly inadequate in assisting IE to understand exactly what needs to be established, or indeed disputed, during this interview. IE's response shows an understanding of one basic element of the offence, relating to consent: 'it's (-) having sex (.) with someone against their wishes basically' (35–6). Sure enough, this is an element upon which he places constant emphasis:

Example 4

'we kissed, (.) it was consensual kissing', (121)

Example 5

| | | |
|------|---|-----|
| IR1: | okay (.) she then said that you, (.) pulled her pants down, (.) | 383 |
| IE: | m[hm], | 384 |

| | | |
|------|--|-----|
| IR1: | [and] placed your fingers inside her vagina. (.) is <u>that</u> right. | 385 |
| | (.) | 386 |
| IE: | err, (.) with her <u>consent</u> ... | 387 |

He is of course right to treat consent as significant. Yet despite the numerous occasions on which IE refers to the fact that C was consenting, at this stage the IRs ask no follow-up question aimed at establishing *why* IE believed that was the case, or at ascertaining what steps he may have taken to ensure that she did consent, as specifically mentioned in s.1(2) SOA 2003. The possibility of a valid defence is therefore not properly explored.

From a defence perspective, IE has been left to second-guess the exact elements of the offence, what ‘consent’ really means in this context, and thus what *else* he needs to say to maintain his innocence. What IE *does* say reveals the assumptions he appears to be making about what being guilty of rape entails. Unfortunately for him, most of those assumptions are wrong. One assumption he appears to make is that lack of consent would involve physical, vocal resistance on her part. This can be seen in Example 2 above (170–1). There is no room here to discuss the ‘rape myth’ that lack of consent should take the form of screaming, shouting, and physical resistance (see instead Ehrlich 2001: 62–93); we shall limit ourselves here to the observation that at this stage, IE puts forward no further evidence for his belief in her consent than this. This alone is an indication that IE might be guilty according to s.1 SOA 2003. But he also provides further evidence against himself at this stage of the interview.

Pre-shift: capacity to consent

A key part of IE’s portrayal of C is his constant emphasis on her drinking and drug-taking. This appears to be part of an attempt to portray her as someone who should not be believed, as evidenced by related attempts to depict her as unstable and untrustworthy. But this is highly problematic for his defence: if C is too drunk or mentally impaired, she could legally be deemed to have been incapable of consent (s.74 SOA 2003). The following example demonstrates how IE brings in C’s substance (ab)use as a key theme in the interaction. This is the first information given by IE when invited to give his version of events:

Example 6

| | | |
|------|---|-----|
| IR1: | ... what’s happened. | 103 |
| IE: | erm, (.) we’d been <u>drinking</u> basically, (.) erm Caroline possibly | 104 |
| | have been using drugs, she <u>does</u> , (.) she got some slimming pill- pills on | 105 |
| | the black market wherever, (.) aaaaand she came (along w-) <u>I</u> didn’t | 106 |
| | particularly want to go out. ... | 107 |

IE is asked a very open question (103) which could be answered in any number of ways, so the information he chooses to begin with is significant.

Labovian narrative theory tells us to expect a narrator to begin with a summary ('abstract') of what the story is about, in order to alert the listener to the 'point' of what follows (1977: 363). So IE's choice of opening here strongly suggests that his 'story' of that evening is about drinking and her drug use (and *not* any form of sexual interaction).

This theme is developed as the interview progresses, with IE placing constant emphasis on C's drinking and drug-taking, even speculating that she must have taken 'dodgy slimming pills' on the grounds that 'she started going a bit strange in the pub' (236–42). This does considerable damage to his defence, since it implies that she was definitely affected by whatever she had drunk/taken, and that he was fully aware of this. This not only indicates that she did not have the legal capacity to consent, but also undermines the likelihood that his belief in her capacity to consent would be deemed to have been reasonable [s. 1(1)(c) and (2) SOA 2003].

THE SHIFT

Thus far, IE's method of defence has been to a large degree counter-productive, and much of his talk could provide evidence to support a prosecution. Yet the interviewers have noticeably not (yet) picked up on points which might be helpful to the Defence. In the latter stages of the interview, however, a rather different picture emerges. A shift in the IRs' position away from the 'Guilty scenario' directly results in the production of a more defence-oriented version, as different aspects gain prominence due to the IRs' change in focus in their questioning. This section demonstrates how a change in interviewer behaviour can result in legally significant changes to an interviewee's story.

Post-shift: co-construction

First, we continue to observe features of discursive co-construction, but now these operate to *support* IE's account.

Example 7

- | | | |
|------|--|-----|
| IR1: | okay. (-) and that (.) as she left you tried to give her a kiss and cuddle | 514 |
| | again but she [didn't want that] | 515 |
| IE: | [yes I] did! because she was upset and I said <u>look</u> why don't | 516 |
| | you stay it's pouring with rain outside. (.) and I kinda like put my arms | 517 |
| | round her and she was kinda like really upset it was the <u>row</u> that upset | 518 |
| | her. | 519 |
| IR1: | yep (-) and not- not the sexual intercourse (??) | 520 |
| IE: | <u>no</u> it was a- it was a ruck!... | 521 |

For IE, the significant event which triggered this entire sequence of events is not the sexual activity, but their row (518–9). But when IE has mentioned this

previously, it has not been picked up by IR1. Yet in this sequence, IR1 actively contributes to building it into part of a valid defence narrative. He now acknowledges it as a topic, and produces the agreement token 'yep' (520), after which there is a short pause. IE does not take up the opportunity to continue his account, thereby leaving the significance of this point unstated. Instead of moving on, IR1 produces a collaborative continuer (signalled by 'and...') which makes the evidentially more important implication explicit: 'and not not the sexual intercourse' (520). The collaborative nature of this turn is indicated by its construction which 'maintain[s] the progressivity of the talk... across a change in speakers' (Lerner 2004: 226). Co-construction of an interviewee's account by an interviewer is fraught with potential danger for an interviewee given the (usual) difference in their agendas. However, if an interviewer moves towards *agreeing* with an interviewee's version of events, such a collaborator can instead become a powerful factor in the interviewee's favour.

Post-shift: (lack of) offence construction

The shift in IR1's position is also indicated by his formulation in the following sequence.

Example 8

- | | | |
|------|--|------------|
| IE: | and then I inserted my penis at <u>no</u> point did she say (no I don't) want any | 469 |
| | of that, (.) the only time that happened was, (.) when, (.) (??) said it's | 470 |
| | <u>sore</u> . (.) [whatever] it's sore (.) and, (.) and I I immediately withdrew and | 471 |
| IR1 | [yeah] | 472 |
| | I didn't ejaculate inside her. | 473 |
| IR1: | okay.= | 474 |
| IE: | =yeah. | 475 |
| IR1: | did you say to her that you were going to- (.) give it to her up the ass | 476 |
| IE: | no I did [not. (.) no.] | 477 |
| IR1: | [to use her phraseology.] (.) no?= =no. | 478 479 |
| IR1: | right. were you wearing a condom at all. | 480 |
| IE: | er, was I wearing a condom, (.) she did have a condom but I wasn't | 481 |
| | wearing one no. | 482 |
| IR1: | you weren't wearing [one.] | 483 |
| IE: | [no.] | 484 |
| IR1: | so (.) when you, (-) had entered her you said (.) that she said she was | 485 |
| | sore so you (.) stopped almost immediately? | 486 |
| IE: | yeah. | 487 |

At this stage, IE is responding to a series of propositions put to him by IR1 based on C's statement. This extract commences with the end of an account by IE of the sexual activity which took place (469–73), which contains elements which support his account of consensual sex (especially 'I immediately withdrew', 471). IR1 then asks a couple of follow-up questions, the second of which establishes that IE was not wearing a condom, despite the fact that C had one (480–2). This has connotations of recklessness, disregard of C's wishes, and even impulsiveness, all of which is surely relevant to the allegation being made. IR1 then produces a formulation of this sequence (signalled once again by 'so', 485), but instead of picking up on these potentially negative aspects, he selects the point which *supports* IE's position (485–6, echoing 470–1). Formulations are generally a way for interviewers to select the parts of an interviewee's account which they consider to be most salient evidentially, and so IR1's choice of what to include here, and especially what to omit, is significant.

IR1 has thus moved towards a position which is much more favourable to IE, with potential prosecution points being neglected rather than defence as earlier. We will now examine the consequences of this change by focusing on two sequences which elicit new information directly relevant to the offence framework, and which dramatically alter the position for IE.

Post-shift: defence construction

In the following two sequences, significant evidence emerges which strongly supports IE's defence but is only 'uncovered' due to the persistence of IRs 1 and 2 in pursuing them, and almost despite IE himself. In the first example, IR1 has just been asking, once again, about how drunk they both were in some detail, before summarizing the overall position by explicitly stating that 'it comes down to an issue of consent really' (577–9). He follows this with:

Example 9

| | | |
|------|---|-----|
| IR1: | now are you telling <u>me</u> that (.) at the time of the intercourse, (.) that the | 582 |
| | time of that intercourse took place that (.) Caroline was consenting | 583 |
| | to it? | 584 |

IR1 has already asked whether C was consenting on numerous occasions, and IE has also repeatedly emphasized the consensual nature of what took place, so the repetition of this question at first appears unnecessary. But the interview so far has left doubt as to whether C was in a fit state to give meaningful consent. By asking this question immediately after a discussion of how drunk she was, IR1 cues IE to address this in his response. However, IE fails to

make this connection, instead repeating his earlier tactic of giving a bare assertion that she was consenting, combined with using the dog as an indication of his lack of ‘false move’ towards her:

Example 9 (cont’d)

| | | |
|------|---|-----|
| IE: | yes. I had no reason absolutely no reason to believe, (-) that sh- she | 585 |
| | wasn’t consenting. (.) <u>nothing</u> was said, (.) th- little Jack Russell dog was | 586 |
| | by the <u>side</u> of the bed, (.) if there’d been <u>any</u> kind of- (.) r- <u>right</u> by her | 587 |
| | >(on) the side of the bed<, if there’d been <u>any</u> kind of (-) sort of <u>false</u> | 588 |
| | move towards her, (.) th- <u>that</u> little Jack Russell is really protective and | 589 |
| | goes berserk. | 590 |
| IR1: | Okay | 591 |
| IE: | and if she says (.) you know, (.) I mean I- I- so- s- so it’sss (.) I can’t (.) | 592 |
| | you know, | 593 |
| IR1: | Okay | 594 |
| IE: | the dog would have gone crazy. put it like that. | 595 |
| IR1: | (keeping) in mind the fact that she’d been drinking, that [(?) same | 596 |
| IE: | [yeah,] | 597 |
| IR1: | amount as <u>you</u> had, | 598 |
| IE: | yeah, | 599 |
| IR1: | and y- you said you don’t know whether sh- (.) that she was sober | 600 |
| | she may have been a bit drunk, | 601 |
| | (.) | 602 |
| IE: | yeah, she was <u>tipsy</u> perhaps yeah [(cert)ainly], | 603 |
| IR1: | [yep] did you take all | 604 |
| | reasonable steps to ensure that she was willing to have sex with | 605 |
| | you. | 606 |
| IE: | yeah. (.) oh yeah, (.) yeah. (.) ye[s.] | 607 |
| IR1: | [in] what respect. what did you do. | 608 |
| | (.) | 609 |
| IE: | I made her <u>aware</u> I mean (.) >you know I said< (.) is it okay if I get into | 610 |
| | bed kind of thing, and she said yes, fine, (.) and thenn (.) when I kind of | 611 |
| | (-) when I kind of (?) the oral sex (?) say is that okay? (.) and, you know, | 612 |
| | just check out (.) th- that it’s okay with her. | 613 |

In his initial response, then, IE misses the opportunity being presented to him to address a key weakness in his position, but nevertheless answers the question at some length (585–95). But IR1 tries again, this time making the connection explicit in a contextualizing preamble: ‘(keeping) in mind the fact that she’d been drinking’ (596). Further, IR1 describes C’s state as ‘may have

been a bit drunk' (601), which downplays the level of intoxication which IE has been promoting throughout. Yet IE once again accepts IR1's reformulation of his own account ('yeah, she was tipsy perhaps': 603; cf. Example 1, line 265); a move which in itself helps his defence. Repositioning has thus already occurred in the question preface.

The question itself ('did you take all reasonable steps to ensure that she was willing to have sex with you': 604–6) directly reflects the wording of the statute [s.1(2) SOA 2003], demonstrating IR1's institutional agenda here. Yet again, IE's response to this opportunity contains no (legally relevant) supporting information, consisting solely of the repeated affirmative 'yeah. (.) oh yeah, (.) yeah. (.) yes.' (607).

By this point IR1 has provided IE with several opportunities to raise any points in his defence. This is in itself perhaps surprising, in that it marks a contrast with previous analyses of police–suspect interviews (see above). What happens next marks an even further departure. IR1 pursues this potential defence still further, this time asking for specific details: 'in what respect. what did you do.' (608). The construction of the question (as opposed to, for example, 'did you do anything?') not only provides a cue that some kind of action is expected, it also contains the implication that IE did do something—despite all his previous responses. Sure enough, IE now meets that expectation and provides details which were not present in his previous accounts: 'I said (.) is it okay if I get into bed kind of thing, and she said yes, fine, (.) and then (.) when I kind of (–) when I kind of (?) the oral sex (?) say is that okay? (.) and, you know, just check out (.) th- that it's okay with her' (610–3). These reported exchanges between IE and C are crucial to the Defence, but only emerge after this persistent pursuit of this point by IR1.

It could be argued that this represents an interviewer doing their job well, ensuring that potential defences have an opportunity to be aired for the purposes of s.34 CJPOA 1994. However, I would argue that this goes beyond that. It is possible to view IR1's turns here as amounting to feedback that certain details are missing from the account IE has given so far, thus directly causing him to edit those details into it. But did IE fail to mention these details before because he did not think they were relevant, because he had somehow forgotten them until prompted, or, more controversially, because they did not actually happen but he is now embellishing his account in response to the strong hints embedded in IR1's line of questioning? Immediately prior to this, IE had asserted with regard to the question of consent that 'nothing was said' (586—IE's emphasis). Yet this inconsistency goes unchallenged here.

Post-shift: capacity to consent

In the final example, once again information supporting the defence case emerges for the first time, but this time during questioning by IR2.

Example 10

| | | |
|------|---|-------------------|
| IR2: | did (.) she take anything (-) when she got back to your flat. | 727 |
| | other than (.) alcohol. | 728 |
| IE: | she's been taking tablets for a while. she's got like I said some black market (.) slimming tablets. (.) (she) might or might not (have), (.) I don't really know. | 729 730 731 |
| IR2: | Right | 732 |
| IE: | she- (.) she uses (.) erm, (.) I don't know how much she actually u- uses, cos I think she fibs about that. but she uses kind of (.) I know at the weekend she was using last weekend she was using cocaine. | 733 734 735 |
| | (.) | 736 |
| IR2: | right. | 737 |
| IE: | (you know?) | 738 |
| IR2: | but did she take anything in your flat. | 739 |
| | (.) | 740 |
| IE: | not that I saw, [no.] | 741 |
| IR2: | [not] (.) not | 742 |
| IE: | oh! yeah- e- oh- she took a cipralex which is her anti-depressant. (-) mhm, (-) I've seen her take <u>that</u> in my flat, whether it was <u>that</u> day or whatever. (-) she didn't take it for a long time so I do notice. | 743 744 745 |
| | ... | ... |
| IR2: | but she didn't take any, (-) illegal drugs (.) today (.) <u>yesterday</u> that you knew of? | 775 776 |
| IE: | (you don't-) I- I- (.) you don't know with her I really [don't. er- I- didn't see-] | 777 778 |
| IR2: | [no. not in your present.] | 779 |
| IE: | not in my presence no I mean she's often come round to my place stoned or whatever you know. (-) happy shall we say | 780 781 |

IE has made constant reference to C's drug-taking, but, largely due to his habit of including this as general characterization rather than talking specifically about the previous night, it has not yet been established exactly what she had taken at the relevant time. What *is* clear is that it is IE who has repeatedly raised this as a factor, and has thus made it a prominent part of his account and of his portrayal of the evening. As discussed above, this potentially causes him a great deal of trouble due to the legal position on intoxication and consent. What IE eventually concedes in this exchange, however, is that C had almost certainly not taken any drugs that night. His reluctance to give up this information, and indeed his attempts to minimize it, are rather startling given the positive legal consequences for him.

First, in response to IR2's question about what C took 'when she got back to your flat' (727), IE avoids answering the question and speaks generally once again: 'she's been taking tablets *for a while*' (729); 'she uses' (733, 734); and also speaks about other occasions: '*last weekend* she was using cocaine' (735). Left at this point, this could easily have been taken as indirect confirmation that she used drugs that evening. However, IR2 does not leave it there, but repeats her question: 'but did she take anything in your flat.' (739). (See [Trinch and Berk-Seligson 2002](#): 403–7 for similar examples of interviewers shifting interviewees away from a 'generic-time narrative' and towards providing specific, institutionally valid details.)

In response to this repeated yes/no interrogative, IE again resists supplying a simple yes/no answer, instead qualifying his reply with 'not that I saw' (741). But he immediately issues a correction: 'oh! yeah- e- oh- she took a cipralex' (743), the initial exclamation and intonation suggesting relief and/or enthusiasm at being able to provide a positive response after all. But the continuation of this turn reveals that he is once again talking generally rather than of the relevant time: 'I've seen her take that in my flat, whether it was that day or whatever.' (744–5). There follows a discussion of that drug (not shown here), after which IR2 returns to pinning IE down as to what exactly C had taken, this time moving away from the prescription medicine and on to other substances: 'but she didn't take any, (-) illegal drugs (.) today (.) yesterday that you knew of?' (775–6). This proposal of a negative statement is a highly restrictive question type ([Harris 1984](#)) which invites a simple confirmation from IE, yet still he resists giving this answer, instead leaving the possibility of her having taken illegal drugs still open: 'you don't know with her' (777).

Having once again not received a straight answer, IR2 effectively provides her own: 'no. not in your present.' (779), which picks up the most helpful part of IE's previous utterance ('I didn't see-', 778) while glossing over the rest and adding the rather important 'no', which did not occur in IE's reply. IE then repeats the answer supplied by IR2: 'not in my presence no' (780), a response which reveals much about the ability of interviewers to prompt specific utterances from an interviewee. But he immediately qualifies this once again with further general description: 'I mean she's often come round to my place stoned or whatever' (780–1).

IE's responses here—claiming lack of knowledge, responding with details which support an alternative narrative of events—resemble the indirect defensive strategies used by witnesses facing courtroom cross-examination identified by [Drew \(1992\)](#). It is perhaps not surprising that a suspect being questioned by police might resemble cross-examination, but in a strange reversal here, it is the version being pursued by the police that amounts to a defence narrative, not the other way round.

Overall, then, during the majority of the interview, IE fails to construct an effective defence for himself, instead actively drawing attention to, and even exaggerating, points which are legally damaging to him. Yet towards the end, the IRs' discursive behaviour directly leads to a more favourable account being

produced by IE. In this latter stage, IE now tells us that he *did* positively check that C was consenting, and that she had not taken drugs. He does still raise several aspects which are problematic for his defence, but these are not pursued by the IRs and so are effectively minimized. As already mentioned, the case against IE was subsequently dropped.

DISCUSSION

The analysis presented here has demonstrated the discursive influence of an interviewer over an interviewee's account, revealed through the use of features such as formulations, topic control, and question structure, and amplified through the intrinsic power which comes with their institutional position and knowledge. It has also demonstrated the direct effect of this on the nature and quality of the evidence produced in this case. The discourse processes highlighted here are, of course, not new from the perspective of linguists, yet the existence of this influence is almost entirely unrecognized within the judicial process. Case studies such as this, where the linguistic analysis can be closely linked with the legal ramifications, can hopefully contribute to making the linguistic findings accessible and meaningful to the right professional audiences.

For most of the interview, the account which emerges from this process contains much which is harmful to the interviewee's position. But the striking feature of this interview is the shift which takes place, after which several points materialize which are extremely helpful to his defence. This could be interpreted as a positive finding, especially given the 'prosecution bias' identified in prior research. Given the provisions of s.34 CJPOA 1994, defendants in court are reliant on interviewers having covered all relevant aspects—and asked the right questions—at their interview, and so any attempt by interviewers to pursue possible lines of defence is entirely to be encouraged. However, the analysis indicates that here this went beyond testing whether a valid defence might exist and towards actively constructing one. This appears to have been a consequence of the interviewers moving away from the 'Guilty scenario' and towards the view that the interviewee is in fact not guilty. This interview should therefore not be held up as an example of balanced interviewing which meets the needs of both Prosecution and Defence, but rather as an illustration of the tendency of interviews to produce evidence and 'facts' which best fit the scenario upon which the interviewers are currently working. Thus, as the interviewers changed position, so did the interviewee's account and the nature of the resulting evidence. This raises serious questions as to whether such evidence is reliable.

It is, of course, impossible for us to know the truth of the situation; no claim is being made here about the guilt or innocence of this interviewee. Nor is it appropriate to make generalizations from one case study. Nevertheless, it cannot go without comment that this interview concerns an allegation of rape. As mentioned above, recently released figures show that—as in this case—a large

proportion of rape allegations in E&W are not passed on to the CPS for prosecution. This will have an inevitable knock-on effect on conviction rates, and in all likelihood on the willingness of complainants to come forward to the police in the first place, with accusations of anti-complainant bias and the perpetuation of 'rape myths' frequently being levelled at the criminal justice system. In light of this, the shift by these interviewers from a prosecution agenda to a position where they appear not to believe the complainant, and the resultant emergence of strong evidence for the Defence, is of some concern. It is hoped that this article presents a case for a larger-scale investigation into whether the discursive processes identified in this interview are part of a wider systemic problem with institutional approaches to investigating rape allegations.

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NOTES

- 1 <http://www.hmic.gov.uk/publication/rape-monitoring-group-digests-data-and-methodology-2014/>, released 31 January 2014.
- 2 'Rape case referrals to CPS reach five-year low', *BBC News* 27th October 2013, available at: <http://www.bbc.co.uk/news/uk-24692104>; 'Police "culture of disbelief" over rape claims alarms official monitoring group', *The Guardian* 31 January 2014, available at: <http://www.theguardian.com/society/2014/jan/31/rape-claims-police-forces-allegations>

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KEY TO TRANSCRIPTION

(.) short pause.

(-) longer pause (number of dashes indicates relative length).

. stopping fall in tone.

, 'continuing' intonation.

? rising/questioning inflection.

! animated/emphatic tone.

Under speaker emphasis.

[onset of overlap.

] end of overlap.

= latching.

- sharp cut-off of prior word/sound.

(guess) unclear fragment – best guess.

(?) unintelligible fragment.

>< faster pace.