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Gag Order: A Nebraska Judge Bans the Word Rape from his Courtroom

By Dahlia Lithwick

Usually we leave it up to the linguists and philosophers to muse on the crazy relationship between words and their meanings. In the law, words — the important ones, at least — are defined narrowly, and judges, lawyers, and jurors are trusted to understand their meanings. It's precisely because language is so powerful in a courtroom that we treat it so reverently.

Yet a Nebraska district judge, Jeffre Cheuvront, suddenly finds himself in a war of words with attorneys on both sides of a sexual assault trial. More worrisome, he appears to be at war with language itself, and his paradoxical answer is to ban it: Last fall, Cheuvront granted a motion by defense attorneys barring the use of the words rape, sexual assault, victim, assailant, and sexual assault kit from the trial of Pamir Safi — accused of raping Tory Bowen in October 2004.

Safi's first trial resulted in a hung jury last November when jurors deadlocked 7-5. Responding to Cheuvront's initial language ban — which will be in force again when Safi is retried in July — prosecutors upped the ante last month by seeking to have words like sex and intercourse barred from the courtroom as well. The judge denied that motion, evidently on the theory that there would be no words left to describe the sex act at all. The result is that the defense and the prosecution are both left to use the same word — sex — to describe either forcible sexual assault, or benign consensual intercourse. As for the jurors, they'll just have to read the witnesses' eyebrows to sort out the difference.

Bowen met Safi at a Lincoln bar on Oct. 30, 2004. It is undisputed that they shared some drinks, and witnesses saw them leaving together. Bowen claims not to have left willingly and has no memory of the rest of that night. She claims to have woken up naked the next morning with Safi atop her, "having sexual intercourse with her." When she asked him to stop, he did.

Bowen testified for 13 hours at Safi's first trial last October, all without using the words rape or sexual assault. She claims, not unreasonably, that describing what happened to her as sex is almost an assault in itself. "This makes women sick, especially the women who have gone through this," Bowen told the Omaha World-Herald. "They know the difference between sex and rape."

Nebraska law offers judges broad discretion to ban evidence or language that present the danger of "unfair prejudice, confusion of the issues or misleading the jury." And it's not unheard-of for judges to keep certain words out of a courtroom. Words like victim have been increasingly kept out of trials, since they tend to imply that a crime was committed. And as Safi's lawyer, Clarence Mock, explains, the word rape is just as loaded. "It's a legal conclusion for a witness to say, 'I was raped' or 'sexually assaulted.' … That's for a jury to decide." His concern is that the word rape so inflames jurors that they decide a case emotionally and not rationally.

The real question for Judge Cheuvront, then, is whether embedded in the word sex is another "legal conclusion"— that the intercourse was consensual. And it's hard to conclude otherwise. Go ahead, use the word sex in a sentence. Asking a complaining witness to scrub the word rape or assault from her testimony is one thing. Asking that she imply that she agreed to what her alleged assailant was doing to her is something else entirely. To put it another way: If the complaining witness in a rape trial has to describe herself as having had "intercourse" with the defendant, should the complaining witness in a mugging be forced to testify that he was merely giving his attacker a loan?

The fact that judges are not rushing to ban similarly conclusory legal language from trial testimony — presumably one can still say murder or embezzlement on the stand — reflects not just the fraught nature of language but also the fraught nature of rape prosecutions. We as a society still somehow think rape is different — either because we assume the victims are especially fragile or because we assume they are particularly deceitful. Is the word rape truly more inflammatory to a jury than the word robbery? Yes, the question of the victim's consent surely makes a rape trial more complicated than some other kinds of criminal trials. But the fact that the evidence may be more equivocal hardly makes the underlying word more likely to incite blind juror outrage.

Wendy Murphy teaches at the New England School of Law and has spent years studying the relationship between language and the courts. She describes Judge Cheuvront's order as part of a growing trend on the part of the defense bar to scrub the language of trial courts, one that has "really blossomed after the Kobe Bryant trial." The big shifts she's noticing: Whereas defense attorneys once made motions to limit the use of the word victim in trials, there is an uptick in efforts to get rid of the word rape. Moreover, she points out, these strategies used to be directed toward prosecutors, but they are now being directed toward witnesses as well.

Do a Lexis search on the influence of inflammatory language on juror perceptions. Try to find some social science data on the effect of loaded courtroom words on conviction rates. Not much out there, notes Murphy. That's one of the things that makes the Nebraska case so maddening. If judges are going to take it upon themselves to issue blanket orders that would have witnesses testifying that black is white, one might hope that they are trying to remedy some well-documented evidentiary problem.

You needn't be a radical legal feminist to cringe at the idea of judges ordering rape complainants to obliterate from their testimony any language that signifies an assault.

At worst, that judge is ordering her to lie. At best, he is asking her to play at being a human thesaurus: thinking up coded ways to describe to the jury what she believes to have happened. If Mock, Safi's attorney, is correct in stating that "trials are competing narratives of what happened," why should one side have a lock on the narrative language used? Can it really be that the cure for the problem of ambiguous courtroom language is to permit less of it?

And there's another problem underlying Cheuvront's order: Jurors will not be told of it. Not only is the "dangerous" language to be hidden from them, but the fact that it's been hidden will be concealed from them as well. They are not merely too emotional to hear the phrase rape kit. They are also evidently too emotional to know it's been hidden from them in the first place.

Professor Robert Weisberg teaches criminal law at Stanford Law School, and he acknowledges that judges in rape trials face a particularly complicated challenge when it comes to keeping prejudicial or conclusory language from a jury. He has no problem, for instance, with the fact that courts have gradually jettisoned the word victim for the less loaded complainant. The former proves too much. But he cautions that there is no value-neutral word for unwanted sex and that the word intercourse "understates what happens in a rape case." He warns that a blanket ban on the word rape may in fact be the worst solution. A jury instruction from the judge or gentle admonitions that witnesses watch their language throughout the trial is the better, more transparent fix. "That," says Weisberg, "is what judges get paid for."

If we've learned anything from the dreary wars over politically correct language in America, it's that purging ugly words from the lexicon hardly makes the ugly ideas they represent go away. Trials exist to ferret out facts, and papering over those ugly facts with pretty — or even "neutral"— words doesn't just do violence to abstractions like language and meaning. When it's done in a courtroom, the real victim — if I may still use that word — may well be the truth.

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