**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-1695**

State of Minnesota,
Respondent,

vs.

Michael Buckanaga, Jr.
Appellant.

**Filed February 3, 2009**
**Affirmed in part and remanded**
**Shumaker, Judge**

Becker County District Court
File No. K7-07-237

Lori Swanson, Attorney General, Carla Heyl, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127; and

Michael D. Fritz, Becker County Attorney, Joseph A. Evans, Assistant County Attorney, P.O. Box 476, Detroit Lakes, MN 56502 (for respondent)

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Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and Stauber, Judge.

## U N P U B L I S H E D  O P I N I O N

**SHUMAKER,** Judge

Appellant, convicted of criminal sexual conduct against a 14-year-old girl, contends that the district court erred in granting the state's motion to close the courtroom during the complainant's testimony and in allowing the complainant's prior consistent statements into evidence before the complainant testified. Because the court erred in failing to conduct an evidentiary hearing on the closure issue, we remand for further proceedings. We affirm the evidentiary ruling.

## FACTS

S.W., the 14-year-old female complainant in this criminal sexual conduct prosecution, attended a festival with her family in the gymnasium of the Detroit Lakes Community Center. At one point, she left the gym and went into a hallway to call her boyfriend on her cell phone.

As S.W. talked to her boyfriend, appellant Michael Buckanaga, Jr. approached her and asked if he could use her phone. She let him use the phone, and then he left the area. He came back a few minutes later and asked to use the phone again. S.W. gave it to him. This time he took the phone into a family locker room. S.W. followed Buckanaga into that room and then into a shower room, where he returned her phone.

When S.W. began to leave the shower room, Buckanaga grabbed her and tried to kiss her. She struggled to get away but he held her arms and blocked the exit. He then touched her breasts and buttocks outside her clothing. S.W. attempted unsuccessfully to push him away. He began to take her clothes off, and he asked her if she wanted to have

sex with him. She replied, "No." He was able to pull her pants down and have intercourse with her despite her protestations and efforts to push him away. When he backed away, S.W. left the room and ran upstairs.

The next day in school she wrote a note to her friend, C.G., describing what had happened, saying she had been raped. S.W. also spoke with the student counselor, Laurie Sandness-Boeshans, and told her what had occurred. The police were called, and S.W. told investigating officer David Shawstad about the incident.

When Officer Shawstad interviewed Buckanaga, he gave three versions of his activities, first denying that he was in Detroit Lakes; then admitting he was at the community center but denying that he had talked to S.W.; and finally, admitting that he had kissed S.W. but denying that he had touched her in any sexual way.

The state charged Buckanaga with two counts of criminal sexual conduct in the third degree. He pleaded not guilty and demanded a jury trial.

At the beginning of the trial, the prosecutor told the judge that she wanted to present the testimony of C.G., Laura Sandness-Boeshans, and Officer Shawstad before S.W. testified. Defense counsel objected. But, upon the prosecutor's assurance that S.W. would testify and would be available for cross-examination, the court overruled the objection and permitted the prosecutor to call these witnesses first.

The state also moved in limine to close the courtroom during S.W.'s testimony. Defense counsel's objection was equivocal. Referring to the statute that provides for courtroom closure, counsel said, "Your Honor, I guess our position is that if the statute

provides it, we do not object. If the statute does not provide it, we would object." The court granted the motion.

The jury found Buckanaga guilty as charged, and he appeals the court's rulings as to the courtroom closure and the order in which the state was allowed to call its witnesses.

## D E C I S I O N

*Courtroom Closure*

The court granted the state's motion to close the courtroom during S.W.'s testimony.[1] Buckanaga contends that the court thereby deprived him of his constitutional right to a public trial.

The Sixth Amendment to the Federal Constitution and article 1, section 6, of the state constitution guarantee the accused in a criminal prosecution the right to a public trial. United States Const. Amend VI; Minn. Const. art. I, § 6. However, that right is not absolute. *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 606-09, 102 S. Ct. 2613, 2620-21 (1982). There can be circumstances in which an accused's right to a public trial may be limited. *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 2215 (1984). "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Id.* To justify the denial of access of any member of the public to a criminal trial, the reason must be a "weighty one." *Globe*

[1] The record does not show the breadth of the closure order, that is, who was excluded and who was permitted to be present.

*Newspaper Co.*, 457 U.S. at 606, 102 S. Ct. at 2620. *Waller* created a standard for deciding courtroom closures:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

467 U.S. at 48, 104 S. Ct. at 2216.

"One recognized overriding interest is 'safeguarding the physical and psychological well-being of a minor.'" *State v. Fageroos*, 531 N.W.2d 199, 202 (Minn. 1995) (quoting *Globe Newspaper Co.*, 457 U.S. at 607, 102 S. Ct. at 2620). It is the protection of S.W.'s psychological well-being that appears to have been the overriding interest upon which the court relied in granting the closure motion. The court also relied upon Minn. Stat. § 631.045, which permits the court to exclude spectators from the courtroom during the minor victim's testimony "upon a showing that closure is necessary to protect a witness or ensure fairness in the trial," and after giving "the prosecutor, defendant and members of the public the opportunity to object to the closure before a closure order." Minn. Stat. § 631.045 (2008). Even though this statute provides a general procedure for the court to follow in considering a motion to close the courtroom, "the question of whether closure is proper is ultimately a constitutional issue, not a statutory issue." *Fageroos*, 531 N.W.2d at 201.

"Although protection of minor victims of sexual offenses constitutes a compelling interest, it does not justify closure of the courtroom each and every time a minor testifies.

On the contrary, a case-by-case determination must be made . . . ." *Id.* at 202. The court must consider various factors, including "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Globe Newspaper Co.*, 457 U.S. at 608, 102 S. Ct. at 2621 (footnote omitted). Furthermore, once the court has decided that closure is appropriate, it "must articulate its findings with specificity and detail supporting the need for closure." *Fageroos*, 531 N.W.2d at 202 (citation omitted). Blanket exclusions or findings that are broad, general, or conclusory will not be adequate to justify a closure. *Id.*

The court here did not hold an evidentiary hearing and did not examine S.W. or anyone else. Rather, the court inquired of the prosecutor as to the reasons for a closure. Noting that the defendant's family members and others were in the courtroom, the prosecutor pointed out that S.W. was 14 years old, had no prior courtroom experience, was very nervous, had difficulty talking about the incident when other people were present, and desired not to have others present when she testified. The prosecutor offered her opinion that "there is a substantial likelihood that the presence of other people in the courtroom would interfere with a fair trial in this matter and with her being able to testify completely."

The court then invited the prosecutor to comment on S.W.'s "psychological maturity." The prosecutor responded that, based on speaking to her "on a couple of occasions," S.W. "is a [regular] 14-year-old girl, younger when it comes to these events." The prosecutor also noted that S.W. had difficulty verbalizing and a very hard time verbalizing the incident at issue.

Without making any further independent assessment, the court granted the closure motion "[l]argely because of not hearing any strenuous objection," and observed "that the counselor did note in her testimony that [S.W.] seemed quite subdued and withdrawn and uncomfortable talking about the situation." The court also found that the nature of the crime was such that it would be difficult for a juvenile to discuss; that, during the investigation, S.W. showed a reluctance to talk about the incident; and that S.W. had expressed her desire to testify out of the presence of persons other than the defendant and law-enforcement officers.

It is on this record that we must determine the propriety of the courtroom closure. We note three things at the outset: (1) the court did not appear to consider alternatives to closure; (2) it did not inquire as to the interests of parents or relatives; and (3) it did not appear to balance Buckanaga's constitutional right to a public trial against S.W.'s interest in closure. It also is not clear whether the court allowed the public to object, but that might have occurred. After the prosecutor made her initial argument of the motion, the court asked, "Okay. Anybody else wish to be heard on the subject?" That perhaps was an invitation to anyone in the courtroom to state opposition to the closure.

Although the court's inquiry and ruling reveal that the court was familiar with the closure statute and understood the factors that must be shown to justify a closure, and even though the court made findings as to the reasons for the closure, two concerns compel us to hold that there was an inadequate basis for closing the courtroom during S.W.'s testimony.

Our first concern is that the record fails to show with evidentiary support the type and degree of potential psychological or emotional harm against which S.W. needed safeguarding through courtroom closure. Rather, the factors upon which the court relied in granting the motion, although helpful to create a context, were the ordinary concerns virtually any sex-crime victim—juvenile or adult—likely would have about testifying in public. Being reluctant to discuss the incident, especially in the presence of strangers; having difficulty relating the information; being nervous; not wanting to look back at the trauma, perhaps hoping to forget it altogether, are common characteristics of sex-crime victims. It seems that the caselaw contemplates something more than ordinary victim reactions before closure is justified.

*State v. McRae*, 494 N.W.2d 252 (Minn. 1992), involved a sex crime against a 15-year-old girl. *Id.* at 253. The victim indicated that she was very reluctant to testify and that closing the courtroom would be very helpful. *Id.* at 258. The trial court noted that she appeared "extremely apprehensive about her appearance today," and also indicated that she was only 15 years old. *Id.* Although the trial court had personally interviewed the victim, the supreme court held that there had not been a sufficient showing under *Waller* of the need to close the courtroom. *Id.* at 259.

*Fageroos* also involved a 15-year-old female victim of a sex offense. 531 N.W.2d at 200. The district court closed the courtroom for the victim's testimony without making findings on the record, which is not factually analogous to the instant case. *Id.* at 201. But the supreme court's discussion of *McRae* and a federal case provides some insight into what the courts consider as an insufficient showing of the need for closure. In *Davis*

*v. Reynolds*, the trial court closed the courtroom for the 15-year-old female victim's testimony on the basis of her young age and the prosecutor's argument that she could suffer psychological problems from testifying in open court. 890 F.2d 1105, 1108 (10th Cir. 1989). The court of appeals held that closure was not justified, observing that it was not clear "what specific psychological problems were foreseen, why they would have occurred, or whether those problems would in any way be ameliorated by closing the courtroom." *Id.* at 1110. The court also pointed out that "the trial court failed to inquire into the factual basis for the [prosecutor's] assertion that the witness' emotional and psychological condition warranted the extraordinary precaution of closure." *Id.*

The appellate court in *Davis* also criticized the trial court for making its ruling "[w]ithout taking any evidence concerning the witness' condition, and without interviewing the witness or her parents . . . ." *Id.* at 1108.

Our second concern with the courtroom closure is that the record reflects no consideration of the balancing that is essential to a proper closure ruling.

A person accused of a crime not only has a right to a public trial but also has an abiding pragmatic interest in such a trial, as expressed by the United States Supreme Court:

> Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.

*Globe Newspaper Co.*, 457 U.S. at 606, 102 S. Ct. at 2619-20 (footnotes omitted).

And the Supreme Court in *Waller* stated that public spectators of trials keep the "triers keenly alive to a sense of their responsibility and the importance of their functions . . . ." *Waller*, 467 U.S. at 46, 104 S. Ct. at 2215 (quotations omitted). Furthermore, as the *Waller* Court observed, a public trial encourages witnesses to come forth and testify and it discourages perjury. *Id.*

We note, too, that some of the reasons the prosecutor cited here for closing the courtroom are the very reasons that underlie the right to a public trial. The test of truthfulness often depends on whether a complainant can state her complaint under public scrutiny.

As in *Fageroos*, we must consider the difficult issue of the remedy for the insufficiently supported closure. 531 N.W.2d at 203. Buckanaga urges that the damage has been done and that the appropriate remedy is a reversal and a remand for a new trial because, he contends, "there is nothing in the record that would suggest that the State could produce competent evidence, especially given how much time has passed since trial, which would support the partial closure of the trial." The state argues that, if the basis for closure was insufficient, we should remand for an evidentiary hearing. The *Waller* Court said that "[i]f a remand for a hearing on whether there was a specific basis for closure might remedy the violation of closing the trial without an adequate showing of the need for closure, then the initial remedy is a remand, not a retrial." *McRae*, 494 N.W.2d at 260 (citing *Waller*, 467 U.S. at 49, 104 S. Ct. at 2217).

Because no evidentiary hearing was held on the basis for the closure, it is our view that an opportunity for such a hearing is the appropriate remedy, for that might cure the violation. If, after the hearing, the district court finds no proper basis for closure, Buckanaga is entitled to a new trial. Thus, we remand on this issue for an evidentiary hearing.

*Evidentiary Ruling*

The district court permitted Sandness-Boeshans, Officer Shawstad, and S.W.'s friend, C.G., to testify to S.W.'s prior statements before S.W. testified. Buckanaga argues that these prior statements were inadmissible hearsay improperly admitted as substantive evidence.

Hearsay is defined as a statement made by a declarant, other than while the declarant is testifying, that is offered to prove that the statement is true. Minn. R. Evid. 801(c). Hearsay is not admissible in evidence, except as otherwise provided by the rules of evidence or other law. Minn. R. Evid. 802.

A witness's prior statement can be admissible to impeach the witness if the statement is inconsistent with the witness's trial testimony. *See State v. McDonough*, 631 N.W.2d 373, 388 (Minn. 2001). This is a non-hearsay use of the prior statement because it is not offered to show its truth but rather to show the witness's self-contradiction. Prior consistent statements are treated differently. *See* Minn. R. Evid. 801(d)(1)(B).

Sandness-Boeshans, Officer Shawstad, and C.G. all related statements that S.W. had made to them about the incident and which ultimately were shown to be consistent in all material respects with S.W.'s trial testimony. If a witness testifies and is subject to

cross-examination about her prior statements, then her prior consistent statements are admissible substantively as non-hearsay evidence. Minn. R. Evid. 801(d)(1)(B). But the precondition to the admissibility of the prior statements under this rule is that they have to be helpful to the trier of fact in evaluating the witness's credibility. *Id.* "To be helpful . . . the credibility of the witness must have been challenged." *State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007). Thus, before permitting testimony about a witness's prior consistent statements, the court must determine (1) that the witness's credibility has been challenged and (2) the prior statements, offered to bolster the witness's testimony, would in fact be helpful to the trier of fact in evaluating the witness's credibility. *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997); *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000).

If the witness's credibility has not been challenged before the prior statements are admitted, the statements do not fit under Minn. R. Evid. 801(d)(1)(B) and remain hearsay as statements inadmissible under rule 802 unless some exception can be found. *See Bakken*, 604 N.W.2d at 109 (stating that district court must make a "threshold determination of whether there has been a challenge to the witness's credibility").

It is clear that, before the prior consistent statements were admitted, there had been no evidentiary challenge of S.W.'s credibility, nor could there have been because she had not yet testified. Thus, the court's allowance of evidence of the statements was prima facie error. But that leaves us with the question of when a witness's credibility might be deemed to have been challenged.

At one end of the spectrum is an obvious, direct challenge of credibility through a cross-examination that cites inconsistencies, gaps, vagaries, memory lapses, narrative defects, and the like. At the other end of the spectrum is the mere hypothetical belief that it is enough to conclude credibility is under challenge when the trial might involve only two opposing firsthand witnesses. We reject this notion and hold that rule 801(d)(1)(B) contemplates an affirmative challenge of a witness's credibility before prior consistent statements are admissible to bolster that credibility.

We are inclined to conclude that a challenge to a witness's credibility must be an evidentiary one, and that would always seem logically to require that the witness first testify and then, after the witness's credibility has been challenged, the prior statements may be offered to bolster. Logic dictates that, without the witness's testimony, there is nothing to bolster. But caselaw suggests that credibility can be challenged through opening statements. *See State v. Grecinger*, 569 N.W.2d 189, 193 (Minn. 1997) (stating that a victim's credibility can be attacked during opening statements); *State v. Harris*, 560 N.W.2d 672, 677 n.2 (Minn. 1997) (noting that the defense began attacking the credibility of the defendant's former girlfriend in its opening statement); *State v. Axford*, 417 N.W.2d 88, 90 (Minn. 1987) (finding that defense counsel in his opening statement attacked the victim's credibility).

During his opening statement, Buckanaga's defense counsel explained that "There's no denying that [Buckanaga and S.W.] disagree about what happened in that room." Although this was neither a blatant nor vigorous challenge to S.W.'s credibility, it was a sufficient challenge to support the court's discretionary ruling to allow S.W. to

testify after the three corroborating witnesses. *State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004) (stating that evidentiary rulings rest within the trial court's discretion and the appellate court will not reverse absent a showing of a clear abuse of that discretion). If the parties "disagree" about the facts of an alleged crime, there are various possible explanations for the disagreement: one of the parties is not telling the truth, or inaccurately perceived the event, or was mistaken as to the nature of the event, or has partial or inaccurate recollection of the event. All of those possibilities are "credibility" issues. So, despite its lack of pointedness or forcefulness, the statement that the only two firsthand witnesses to an alleged crime disagree as to the facts of the event at issue is enough to amount to a credibility challenge.

Thus, we are unable to find a clear abuse of discretion in the court's ruling that the prior consistent statements would be received before S.W. testified. We suggest, however, for future guidance that this can be a risky approach to the application of rule 801(d)(1)(B). Absent a showing of a clear abuse of discretion, however, we must affirm this issue.

**Affirmed in part and remanded.**