**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-0566**

State of Minnesota,
Respondent,

vs.

Anthony Lewis Riley,
Appellant.

**Filed February 3, 2009**
**Affirmed**
**Schellhas, Judge**

Stearns County District Court
File No. K5-05-4007

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Janelle Prokopec Kendall, Stearns County Attorney, Room 448, Administration Center, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Marie L. Wolf, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Johnson, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

**SCHELLHAS,** Judge

Appellant challenges the district court's decision on remand that the closure of the courtroom during appellant's trial was justified by overriding interests. Appellant also argues that on remand, the district court failed to consider less restrictive alternatives and failed to support its decision with adequate findings of fact. We affirm.

## FACTS

Officer Nicholas John Riba of the St. Cloud Police Department works with the Minnesota Gang Strike Force, which focuses on gang-related crimes, particularly drug crimes. The St. Cloud Police Department enlists the assistance of confidential informants to participate in controlled drug buys. A.E. was a confidential informant (CI) who worked with the St. Cloud Police Department. In 2005, Riba worked with A.E. to conduct four controlled buys of cocaine from appellant, and appellant was subsequently charged in Stearns County District Court with second-degree controlled substance crime (sale), in violation of Minn. Stat. § 152.022, subds. 1(1), 3(b) (2004). Over appellant's objections at trial, the district court granted the prosecutor's request to close the courtroom during A.E.'s testimony, based on concerns for A.E.'s safety. After A.E.'s testimony, the district court reopened the courtroom. The jury found appellant guilty of second-degree controlled substance crime. The court sentenced him to 72 months' imprisonment. On appeal, we remanded to the district court for a hearing to determine whether there was an adequate basis justifying the closure of the courtroom during the

informant's testimony and, based on its determination, such further action as may be deemed necessary. *State v. Riley*, No. A06-0668 (Minn. App. May 22, 2007) (order op.).

At a hearing held by the district court for this purpose, only Riba testified. Riba recalled that he requested that measures be taken at the trial to protect A.E.'s identity because A.E. and investigators were concerned that if his face were seen or known, he could "face some repercussions out on the street." When asked why it mattered whether someone saw A.E., when his name had already been made public, Riba explained that people on the street were more familiar with "street names" and faces, and might not be able to identify someone, such as A.E., by his real name. Riba testified that at the time of trial, A.E. was still actively working for him and he intended to continue working with A.E. to conduct more controlled buys. A.E. was involved in cases that were pending at the time of the trial, and A.E. worked with Riba to conduct more controlled buys after the trial.

On cross-examination, Riba testified that he was not personally aware of any threats made against A.E. in connection with appellant's case. Upon questioning by the district court about whether there was anything unique about appellant's case or A.E. that justified closure, Riba stated that A.E. was a lifelong resident of the area, had a family and children there, and was well known within the community. Riba testified that because of those circumstances, the prosecution was concerned for the safety of A.E. and his family if his identity was known, and added that A.E. "really didn't have anywhere else to go." Upon further questioning by the court, Riba agreed that if A.E. was from

Minneapolis and only worked in the St. Cloud area for a short time and could "disappear if he wanted to," Riba would not have the same concern.

After the district court's hearing on remand, the court ruled that an adequate basis existed to justify the closure of the courtroom at appellant's trial. This appeal follows.

**D E C I S I O N**

Courtroom closure presents a constitutional issue, *State v. Fageroos*, 531 N.W.2d 199, 201 (Minn. 1995), and thus we review de novo the district court's decision to close the courtroom, *State v. Wicklund*, 589 N.W.2d 793, 797 (Minn. 1999). The United States and Minnesota Constitutions guarantee the right to a public trial for the purpose of ensuring a fair and accurate process. U.S. Const. amend. VI; Minn. Const. art. I § 6. A public trial is required so that the public will see the accused is "not unjustly condemned, and . . . the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210 2215 (1984) (quotations omitted); *see also Fageroos*, 531 N.W.2d at 201 (applying *Waller*) and *State v. McRae*, 494 N.W.2d 252, 259 (Minn. 1992) (applying *Waller*). The right to a public trial is not absolute and "may give way in certain cases to other rights or interests." *Waller*, 467 U.S. at 45, 104 S. Ct. at 2215. But "[s]uch circumstances [are] rare." *Id*. The improper denial of the right to a public trial is structural error, and structural error is "immune from harmless error impact analysis because the right involved is so basic to the concept of a fair trial that a violation of the right cannot be considered harmless." *McRae*, 494 N.W.2d at 260-61 (citing *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 (1991)).

To justify closing a courtroom, a party must

> advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect this interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

*Waller*, 467 U.S. at 45, 104 S. Ct. 2216. A district court is required to make findings adequate to justify closure. *Id*. at 46, 104 S. Ct. at 2215; *McRae*, 494 N.W.2d at 258-60. "The [district] court must articulate its findings with specificity and detail supporting the need for closure." *Fageroos*, 531 N.W.2d at 201 (citing *Waller*, 467 U.S. at 45, 104 S. Ct. at 2216.

Here, the district court on remand identified two interests likely to be prejudiced if A.E.'s testimony was subject to public view: (1) the personal safety of A.E., his family, and his associates; and (2) the integrity of criminal cases, both pending and under investigation. Appellant disputes both interests as justifying closure.

Apart from appellant's other arguments addressed below, appellant cites *State v. Mahkuk*, 736 N.W.2d 675 (Minn. 2007), and argues that the district court's findings on remand cannot be based merely on the assertions of the prosecution. In *Mahkuk*, the supreme court stated that the assertions of a prosecutor were not evidence, and therefore could not support a district court's decision to close a courtroom. 738 N.W.2d at 685. But, appellant does not specify any portion of the district court's findings on remand that are based on the prosecutor's assertions alone. Appellant also argues that Riba's descriptions of A.E.'s concerns about his safety were "hearsay." During the hearing on remand, Riba was asked whether A.E. expressed any concerns about his safety to Riba.

The district court allowed the question over appellant's hearsay objection. Riba answered only that A.E. asked whether the courtroom would be opened or closed during his testimony and that he wanted the state to "take every measure that [it] possibly could that . . . as few people as possible would see his face." This was appellant's only hearsay objection at the hearing on remand, and the district court did not base its findings in support of closure on Riba's answer to this particular question. Rather, the court based its findings on Riba's statements about his employment of A.E. as a CI, his knowledge of A.E.'s personal situation, and the risks associated with CI work in the area. Thus, if the court erred in allowing the hearsay testimony, the error was harmless. *See State v. Courtney*, 696 N.W.2d 73, 79-80 (Minn. 2005) (refusing to reverse a conviction where any error in admitting hearsay evidence over the defendant's objection was harmless).

Regarding any other unobjected-to hearsay, appellant's failure to object is generally a waiver of his hearsay protections. *State v. Hamilton*, 268 N.W.2d 56, 63 (Minn. 1978). While Minn. R. Crim. P. 31.02 gives this court the discretion to consider plain errors that affect a defendant's substantial rights, *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998), we decline to do so because appellant has not identified the portions of the district court's order that he alleges are based on hearsay.

Also citing *Mahkuk*, appellant argues that the district court erred in its conclusion that concern for A.E.'s safety justified closure. In *Mahkuk*, the supreme court ruled that because there was "no evidence from any witness asserting that a witness had been intimidated or threatened," no evidence as to who was intimidating or threatening witnesses or what the nature of the intimidation or threats were, and no indication as to

which witnesses were intimidated or threatened, the record did not justify closure. 736 N.W.2d at 685. In this case, as the district court observed, Riba "acknowledged that he had no knowledge of any threats directed at the informant in connection with this case or others." But we do not conclude that under *Mahkuk*, evidence of actual threats against a witness must exist to justify courtroom closure to protect a witness's safety, because *Mahkuk* involved witnesses whose identities were already known to the defendant and his associates. 736 N.W.2d at 684. Here, the secrecy of A.E.'s identity was critical to his work as a CI, and the district court credited "the absence of specific threats" in part to "the effectiveness of the efforts of the CI and law enforcement to conceal his identity." Unlike a general lay witness, a CI's identity is protected for the very purpose of avoiding "specific threats" against him. *See State v. Litzau*, 650 N.W.2d 177, 184 (Minn. 2002) (stating that "[t]he state has a legitimate interest in protecting the identity of persons who provide information to law enforcement.").

This case also differs from *Mahkuk* in that at the time of trial, A.E. was likely to return to work as a CI in the St. Cloud area. The district court found that "[g]iven the volume of controlled buys" and the fact that A.E. had been involved in 20 criminal cases, "the CI would be the likely target of retaliation and revenge at the hands of the numerous individuals placed in legal jeopardy due to his undercover efforts." Riba's testimony that he intended to use A.E. as a CI after the trial, along with the district court's findings that A.E. was a lifelong resident of the area, had children and extended family in the area, and, unlike CIs who "lack connections with the area, [A.E.] could not readily or easily relocate or 'disappear' if he wanted to," reflect that A.E.'s future work as a CI would be

in the St. Cloud area. *See Pearson v. James*, 105 F.3d 828, 830 (2d Cir. 1997) (ruling that an undercover officer's "testimony that her undercover activity was continuing in the same neighborhood where she purchased cocaine from the defendant sufficed to indicate the State's strong interest in concealing her identity"), *aff'd*, 131 F.3d 62 (2d Cir. 1997) (en banc). We therefore distinguish this case from *Mahkuk* and determine that the state's interest in protecting "the personal safety of [A.E.], his family and associates" was an overriding interest that was likely to be prejudiced by A.E.'s testimony in open court.

Appellant argues that the protection of A.E.'s identity did not justify closure because A.E.'s name was included on the prosecution's witness list, in the trial transcript, and at trial. Citing *State v. Washington*, 755 N.E.2d 422, 425 (Ohio 2001) and *Salem v. Yukins*, 414 F. Supp. 2d 687, 697 (E.D. Mich. 2006), appellant argues that there is no interest in protecting a CI whose name is known. But, in neither *Washington* nor *Yukins* was the informant known by an identity other than his own; thus, both cases are factually distinguishable from this case in which the district court found that A.E. was not known by his legal name to those who would threaten him. Rather, A.E. was known by his street name and appearance. We agree with the district court that the disclosure of A.E.'s legal name did not diminish the overriding interest in preserving his identity.

Appellant also argues that the district court erred in its conclusion that the state's interest in "the integrity of the criminal cases then pending and still under investigation but not yet charged" was an overriding interest likely to be prejudiced by A.E.'s open testimony. While no Minnesota cases address this issue, courts in other jurisdictions have held that protecting the integrity of ongoing criminal investigations is an overriding

interest that justifies closure. *See, e.g.*, *Ayala v. Speckard*, 131 F.3d 62, 72 (2d Cir. 1997) (describing the state's interest in maintaining the effectiveness of an undercover officer who was returning to undercover work as "an extremely substantial interest"); *People v. Akaydin*, 685 N.Y.S.2d 737, 737 (N.Y. App. Div. 1999) (affirming closure that was "necessary to protect the safety of the officers and the integrity of their ongoing investigations"); *People v. Jefferson*, 670 N.Y.S.2d. 239, 242 (N.Y. App. Div. 1998) (affirming closure without an evidentiary hearing or evidence of specific threats, where the confidential informant was "still involved in gathering information in a . . . drug community" and where "a strong possibility existed that not only the safety of the informant but also the validity of other cases might be compromised").

Here, the district court stated on remand that "[i]t is important that the public, and particularly people involved in illicit drug sales, not know the identity of CI's since such knowledge would compromise their effectiveness and may lead to 'repercussions out on the street.'" The court found that A.E.'s identification "would immediately place the suspects [of cases under investigation] on notice of the fact that law enforcement was investigating their activities." The court's findings support the conclusion that the integrity of pending criminal investigations would likely be prejudiced if the courtroom remained open to the public during A.E.'s testimony. Given the facts of this case, we conclude that preserving the integrity of pending criminal cases and investigations was an "overriding interest" that justified closure in this case.

Appellant argues that "closure of a trial based on generalized concerns by an informant would allow closure in virtually every trial involving informants." As the

*Mahkuk* court observed, "closure of a trial based on generalized gang expert testimony would allow closure in virtually every trial involving allegations of gang involvement." 736 N.W.2d at 685. But, our decision here does not establish a per se rule that would allow closure whenever a CI testifies. *See People v. Ramos*, 685 N.E.2d 492, 496 (N.Y. 1997) (stating the court's reluctance to establish a per se rule that would permit closure whenever an undercover officer testified). Our decision is particular to the facts of this case in which A.E. was a long-time resident of the St. Cloud area, lived in the area with his family, had no place else to go, and was expected by law enforcement to continue to be involved in a number of pending criminal cases in the area. As the district court noted, it might have reached a different conclusion had A.E. been a resident of another region and not involved in so many investigations in the area.

To satisfy a defendant's Sixth Amendment right, the closure of a trial "must be no broader than necessary to protect" the overriding interest. *Waller*, 467 U.S. at 48, 104 S. Ct. at 2216. Appellant disputes the district court's conclusion that "the closure in this case was no broader than necessary to conceal the physical identity of the CI and protect the State's interests." Appellant argues that at his trial, the court "failed to consider any options available to it" that would have allowed it to more properly balance the state's interests against appellant's right to a public trial. But, on remand the district court did consider alternative options. First, the court addressed partial closure, i.e. only allowing persons to remain in the courtroom if their presence would not compromise the state's interests, and reasoned that this alternative was "not feasible" given that only court staff and the litigants were in the courtroom at the time of closure. Second, the court

addressed appellant's suggestion of a "screening device" to conceal A.E.'s identity, and concluded that such a device might prejudice appellant's right to a fair trial unless it allowed the jury, appellant, and counsel to view A.E.'s body language, facial expressions, and demeanor during testimony, and may have caused undue speculation among the jury about their safety or other matters "not germane to the defendant's guilt or innocence." Third, the court addressed screening only those spectators who arrived during A.E.'s testimony, as only court staff and the litigants were in the courtroom at that time, but found that this would have been "too disruptive to the trial process," and the effectiveness of this screening would likely depend on the spectator's honest answers to the screening questions. The court's findings show that it considered possible alternatives and had reasonable bases for determining that they were impracticable. Appellant's argument that the district court's findings are inadequate under *Waller* and *McRae* is without merit.

We conclude that the safety of the CI and the integrity of future criminal investigations were overriding interests that justified the closure of appellant's trial in this case. We also conclude that the closure was no broader than necessary to protect the overriding interests and that the district court made adequate findings on remand to justify the closure.

**Affirmed.**