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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

WALTER LEE BELL,

Defendant and Appellant.

A139053

(Contra Costa County
Super. Ct. No. 05-110611-1)

INTRODUCTION

A jury convicted defendant Walter Bell of special circumstance murder. The prosecution’s theory of the case was that Bell, Aaron Marks, and others planned to rob Rylan Fuchs, a marijuana seller, under the pretext of buying four ounces of marijuana from him; Bell shot Fuchs during the botched robbery attempt. The defense was that defendant went with Marks to buy marijuana, did not know Marks planned to rob Fuchs, and Marks shot Fuchs. On appeal, defendant argues the trial court committed three evidentiary errors: (1) refusing to admit evidence of his extrajudicial claims of innocence in a telephone phone call to his then-girlfriend for the purpose of impeaching her testimony and corroborating his own; (2) refusing to admit Marks’s partially inculpatory statements after the shooting to a counselor and to police pursuant to Evidence Code section 1230, the hearsay exception for statements against penal interest; and (3) sustaining a foundation objection to a question defense counsel asked one witness about Marks’s reputation. He also argues the court violated his right to a public trial by

excluding his sisters and mother from the trial during the testimony of another witness. We find no error and affirm.

STATEMENT OF THE CASE

An information filed by the Contra Costa County District Attorney charged defendant with the January 20, 2009 murder of Rylan Fuchs. (Pen. Code, § 187.)¹ The information further alleged defendant personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (b), (c), (d)), and that he committed the murder while he was engaged in, and an accomplice to, the commission and attempted commission of robbery (§ 190.2, subd. (a)(17)). A jury found defendant guilty as charged. Defendant was sentenced to 25 years to life consecutive to life without possibility of parole.

STATEMENT OF FACTS

I. The Prosecution Case

On January 20, 2009 shortly after 9:00 p.m., 17-year-old Rylan Fuchs was shot once in the neck while standing in front of his home on El Capitan Drive in Danville. He was shot from a distance of more than two or three feet. Fuchs's parents heard a bang and went out the front door to investigate. Fuchs's mother called 911. Fuchs was taken to the hospital where he died the next morning.

There was no exit wound. The bullet recovered at the autopsy was a hollow-point .38-caliber bullet that had been chambered in a .38-special or .357-magnum, and was almost certainly fired from a revolver. A hollow-point bullet is designed to kill a human target. It lodged in the left side of the neck after transecting the left carotid artery and jugular vein. Based on the bullet's trajectory and other factors, Fuchs may have been on his knees or bending to the right when shot. The gun was never found.

¹ All further unspecified statutory citations are to the Penal Code.

Contra Costa County Sheriff's deputies and fire department personnel responded to the report of a gunshot injury and set up a crime scene. No drugs or shell casings were found. A cell phone was found sitting on a truck parked in the driveway of Fuchs's home. No weapons or marijuana were found in Fuchs's clothing, which was collected at the hospital.

A. Events Leading Up to the Shooting

Two days before Fuchs was shot, Gene Souza, an acquaintance of Fuchs's, received a call from Aaron Marks, who was looking for marijuana. Souza gave Marks Fuchs's name and telephone number. Marks used a cell phone with a telephone number ending in 1818 to call Souza.

On the afternoon of January 20, 2009, Fuchs and two high school friends, Mitchell Aasen and Tony Mills, were driving around the Danville area. Fuchs was supposed to meet Marks to sell him one-quarter pound of marijuana. Fuchs used his phone to text Marks about arranging a meeting. Fuchs usually only sold marijuana to people he knew. Aasen had safety concerns about Fuchs selling marijuana to Marks by himself, because Marks kept putting off the meeting and changing times. At 8:00 p.m., Aasen took Fuchs home.² Both Aasen and Mills urged him not to go through with the marijuana sale alone.

Shortly before 9:00 p.m. on January 20, Jeffrey Koepp, a classmate and neighbor of Fuchs, left his house to pick up his younger sister at a dance academy in nearby San Ramon. As he turned left onto Greenbrook Drive, he saw a group of eight African-American youths standing around a white Acura parked near a greenbelt, a walking path for local residents. When he returned on the same street about 10 minutes later after picking up his sister, the youths and the car were gone. However, a black Infiniti in front

² Fuchs had an 8:00 p.m. curfew. Fuchs's mother knew her son used marijuana but not that he sold it. After Fuchs arrived home, the front door was locked. Fuchs's mother surmised her son had left the house through his bedroom window because the screen had been removed.

of him was driving substantially slower than the speed limit. He flashed his bright lights at the car, which eventually pulled over to let him pass. The driver appeared to be an Asian male wearing a khaki cap pulled low over his face.

As Koepp turned onto El Capitan toward home, he saw several African-American youths wearing hoods and gloves hiding themselves. One was crouched behind a car; another was behind a lamppost. Both were looking towards Fuchs's home. He thought the person behind the lamppost was wearing the same jacket as one of the people he had seen earlier on the greenbelt. As Koepp continued toward home, he saw three or four people crouching behind bushes, facing Fuchs's house.

Koepp passed Fuchs's house just before arriving home at 9:12 p.m. He saw Fuchs in his driveway talking with an African-American male who could have been Marks, whom he knew by sight because they both attended San Ramon High School. Koepp drove home and went to his room. He did not hear any gunshots but, about a minute later, he heard sirens and saw lights when he looked outside his bedroom window. He also saw several African-American males scatter in different directions.³

B. Events After the Shooting

In late January 2009, Emily Amkhamavong was living in Richmond, California with her parents, her brother Tony, and defendant. She and defendant had a serious boyfriend-girlfriend relationship at the time. They broke up in June or July 2010.

In January 2009, defendant "wanted to get more money." Emily knew he robbed marijuana dealers for money. She had seen him with a gun a couple of times. He sometimes brought money home after the robberies, and he sometimes texted her while

³ Knowing that Fuchs sold marijuana, when he saw the African-American youths hiding near Fuchs's house, it occurred to Koepp that Fuchs might "get jumped or something," but he "wasn't going to get involved." He also did not call the police because he thought the youths were just playing around.

committing robberies. He used the terms “lick” or “wipe” for robbery and “grapes” for marijuana. “Jock” was a nickname for Aaron Marks; “Tay” was a nickname for Tamon Lewis. Defendant used the terms “thang,” “pistol,” and “cannon” for gun. He sometimes talked about getting a gun when he was planning a robbery.

At some point on January 19, 2009, defendant went out to get marijuana and came home about 5:00 a.m. or 6:00 a.m. on January 20. He acted “weird” and “seemed scared and concerned.” Defendant and Emily watched the television news together at 7:00 a.m. or 8:00 a.m. During a broadcast about a shooting in Danville involving marijuana, defendant acted “weirder.” Emily asked defendant if he had done anything wrong. “He was hesitant to tell me, and he was scared and told me that things didn’t go right. [¶] . . . [¶] He said someone had—had got shot. [¶] . . . [¶] He said it was an accident and he felt really bad.” Later that morning, he changed both of their cell phone numbers. He said, “[h]e didn’t want the police to come.”

Acting on leads provided by Gene Souza and others, homicide detective Fawell identified the cell phone number ending in 1818 as belonging to Emily Amkhamavong. On January 22, Fawell authored warrants for records for various cell phones, including Emily’s, and for Marks’s arrest.

On January 23, the Sheriff’s Office received an anonymous tip about Marks’s location. He was arrested the same day in Oakland and his cell phone was seized. His appearance was similar to the description Koepp gave of the person he saw talking to Fuchs in the driveway.

Also on January 23, police went to the Amkhamavong home in Richmond. Tony Amkhamavong was a person of interest because of Koepp’s information about the Asian driver. He was not at home, but Emily and defendant were. Although they were not suspects, Emily and defendant were interviewed separately about their cell phones. Defendant said he left his phone at his friend Devin’s house. Emily said hers had fallen out of her pocket while she was running to BART, which she and defendant had agreed

beforehand she would say. When the officers asked Emily where defendant was the night of January 20, she said he was out until 5:00 a.m. or 6:00 a.m.; she did not know defendant had told police he was with her all night. When defendant was confronted by police about the discrepancies between his and Emily's statements, he ran away. Two officers chased him but were unable to catch him. After defendant ran away, police re-interviewed Emily. She told them Aaron Marks was the shooter to protect defendant, because she thought defendant was the shooter.

In January 2009, Devin McCalope and defendant were close friends who saw each other daily. McCalope was staying at his grandmother's house in Berkeley, but his "play auntie" lived next door to defendant's family home on Martin Luther King Boulevard in Berkeley, and he saw members of defendant's family all the time. On the day of the shooting, McCalope saw defendant use Kevin Dixon's phone and heard him say something about getting a "thang," meaning a gun. Defendant invited McCalope to go with him to Danville to get some marijuana. When McCalope asked defendant if he was going to buy it, defendant did not answer. McCalope got a bad feeling and decided not to go.

On January 21, 2009, defendant and McCalope watched a newscast about the shooting in Danville. Defendant said he did the shooting and it was "an accident." He said the person was running away, and defendant meant to shoot in the air to scare him, but instead he shot the person in the neck. He said the person was still alive when he left. A few days later, McCalope reported what defendant told him to the Berkeley Police Department. At that point, no one had threatened him.⁴

⁴ At trial, McCalope acknowledged he told the prosecutor's investigator he was afraid about testifying. He said he did not want to testify, but he was ready to do so. Defendant had accused him of talking to the police, which McCalope denied. Defendant said if he was convicted, he would know McCalope had been talking to the police. Also, about a year earlier, after McCalope had testified at another hearing, defendant's sister Danika punched him. She was angry that defendant was in custody, and she blamed McCalope. Finally, the night before his testimony, Danika had called him and said she needed to talk

On January 27, 2009, Berkeley police contacted police in Danville about McCalope's statement. Detective Fawell interviewed McCalope the next day. Defendant was upset that McCalope had talked to the police and asked him to lie when he talked to the Danville investigators. Defendant told him to say he was playing basketball and ran when he heard the shots. McCalope told the investigators the basketball story, but later told them the truth.⁵

On May 18, 2009, Detective Fawell interviewed Kevin Dixon, whose cell phone had significant contacts with people important to the investigation. Dixon had heard about what had happened. He told the police, "That they didn't buy it. That they didn't get it. They didn't get the weed. It went bad. Dude was leaving and I guess he died." McCalope told Dixon defendant got the gun from Tamon, and that he fired a warning shot that hit the victim in the neck. After the shooting, defendant and McCalope were not getting along.

At trial, Dixon reluctantly admitted he let defendant use his cell phone on January 20, 2009. Later that day, Dixon received an incoming call from someone he did not know, asking for defendant. He denied he heard about a murder after letting defendant use his phone, denied McCalope told him defendant shot someone, and denied defendant and McCalope were having problems.

In late May 2009, defendant was taken into custody in Alameda County. He called Emily from jail and asked her to make three-way calls. She made one three-way call to "Tay", and defendant told her to delete that telephone number. Between January

to him. She came by his house and drove him to meet with the defense investigator. She stayed in her car or nearby while he talked with the investigator on the street, and she eventually left. The investigator told him defendant might go free if McCalope did not testify, and suggested McCalope could refuse to testify by invoking the Fifth Amendment.

⁵ At trial, McCalope admitted convictions for petty theft in 2003; attempted robbery in 2004; and petty thefts in 2007 and 2012.

2009 and June or July 2010, when they broke up, defendant never once told her Aaron Marks or someone other than himself shot Fuchs.

In June 2009, detectives re-contacted Emily in an attempt to find defendant. Although Emily knew defendant was in jail, she did not tell the police. They also re-interviewed her about the shooting. At first, she again said Marks was the shooter. However, later in the interview, Emily said it was defendant who shot Fuchs. She also said defendant had not given her any specifics about the shooting except that he went to Danville to do a marijuana robbery and “it was just supposed to be a regular lick,” but the gun went off once by accident; he only meant to scare the victim. He went to Danville in Tay’s black car, and he committed the robbery with four or five people, including Tay, Marks, and others. Emily told the police she would be honest. In a jail phone call, defendant told her to stop talking to the police.

Defendant was scheduled to be released from Alameda County jail on November 18, 2009. He was taken into custody on the Fuchs murder upon his release. Detective Meth *Mirandized* and interviewed defendant at the Martinez Detention Facility. Detective Meth played for defendant part of his interview the previous day with Emily, in which she repeatedly said defendant reported to her that he accidentally shot the gun and only meant to scare Fuchs.

C. Expert Testimony About Drug Robberies

Sergeant Brian Gardner of the Contra Costa County Sheriff’s Office testified as an expert in marijuana sales. The terms “lick” and “wipe” are street terms for a drug robbery. In his experience, it was not common for people from Alameda County to go to Danville to buy marijuana; nor was it common for eight people to travel together to buy four ounces of marijuana; nor would it be normal to bring a gun to buy four ounces of marijuana.

II. The Defense Case

Approximately two weeks before his testimony, defense investigator Edward Stein spoke with Devin McCalope in a parking lot in Berkeley at defense counsel's request. He arranged the interview through defendant's sister, because she knew him and he did not. McCalope said he wanted to help, and Stein said: "if you want to help Walter, you need to tell the truth." Stein did not say anything about defendant going free if McCalope refused to testify. In the conversation, McCalope asked what would happen if he did not testify, and Stein explained he could be held in contempt and go to jail. McCalope said he guessed he was going to jail. Stein told him he would not do defendant any good in jail.

Defendant testified on his own behalf.⁶ In January 2009, he was going to school at Berkeley City College and living in Berkeley with his mother. He was getting financial aid, and his parents were giving him money, but he was also selling marijuana to support himself. He had started selling marijuana in October 2008. Defendant denied committing any robberies for marijuana. He said Emily's testimony to the contrary was a lie.

Defendant met Aaron Marks in 2007. They were friends who would smoke and buy marijuana and "hang out" in North Oakland together. In 2009, Marks, lived in Oakland and San Ramon, and went to school in San Ramon. On January 20, 2009, Marks said he was planning to buy some weed and invited defendant to go along; defendant agreed.

In January 2009, defendant was close with Devin McCalope, although they occasionally had misunderstandings. Around 12:00 noon on January 20, defendant, McCalope, and Kevin Dixon met near defendant's house on Martin Luther King and

⁶ Defendant acknowledged juvenile adjudications for robbery in 2004, misdemeanor grand theft in 2007, and felony residential burglary in 2009.

smoked marijuana together. Defendant denied telling McCalope he was going to buy marijuana with Marks or inviting him to come along. Defendant admitted using Dixon's cell phone, but denied using it to locate a handgun. Defendant used McCalope's house phone, because he left his phone charging at his house. He denied Tamon Lewis gave him a gun, or that he told McCalope Tamon did so.

Later, he met Marks in North Oakland and went with him to buy marijuana. A Caucasian he did not know was driving. Marks said nothing about a robbery. When they took a different route than usual, defendant asked where they were going. Marks said they were going to Danville to get four "zips," or ounces, of marijuana. He did not think it was going to be a robbery because Marks said "the person he was getting [the marijuana] from was the one he went to school with. So I didn't think he was going to rob someone he went to school with." They parked in Danville at approximately 8:45 p.m. or 9:00 p.m., and defendant got out of the car to smoke a marijuana "blunt" while Marks, who was wearing a backpack, walked away and out of sight to buy the marijuana. Defendant did not see any occupants of the car with a gun and did not have one himself. After he lost sight of Marks, he heard a shot, and turned his head to look in the direction of the shot. At that point, the driver of the car told him to get in, which he did. As they drove off, he saw Marks running down the street toward them with something in his hand that looked like a gun. The driver drove away without picking him up. They drove to a friend's house in Berkeley, where defendant spent the night.

He went to Emily's house about 7:30 a.m. or 8:00 a.m. the next morning. They watched a news program about a shooting in Danville. He denied saying anything to Emily about the incident. Defendant denied ever telling Emily he shot Fuchs, or planned to rob him, or planned to commit a robbery in Danville on January 20, or about trying to scare the person in Danville.

On January 23, detectives came to Emily's house at 6:30 a.m. or 7:00 a.m. and asked him where he was on January 20. He denied discussing with Emily what to say

about their cell phones or his alibi. Defendant told the officers he had been in Berkeley on January 20 because he did not want to put himself in Danville. He did not think the police “was gonna believe that I just went there to get marijuana” because “I’m young, and I’m black, African American so I didn’t think they was gonna believe that I was there when the shooting occurred and I didn’t have anything to do with it.” He ran from police because they caught him in a number of lies, and he “just panicked.”

He could not remember which lie caused him to run, but it could have been the lie about his losing his phone because he knew it connected him to Marks. There were text messages between him and Marks about “doing a lick,” and getting a gun to rob someone in San Ramon on January 16. Defendant and a friend had driven to San Ramon to meet Marks, but they made sure they were “late on purpose because we didn’t want to participate in the robbery” He did not participate in the robbery that night. Marks was mad at him for not joining in, but he “got over it.” No text messages were exchanged between him and Marks on January 20 about a robbery.⁷

Around 12:00 noon on January 23, defendant spoke to McCalope. He told McCalope that homicide detectives came to Emily’s house and questioned him about his whereabouts on January 20. He denied discussing with McCalope anything about going to Danville. He never told McCalope to tell the police he was playing basketball and heard shots fired.

On January 23, he also went back to Emily’s house. She gave him a card with a detective’s number on it. He later called the detective from his mother’s house because he felt he “needed to clear up [his] story.” He told the detective the truth at some point during the conversation.

⁷ Defendant acknowledged he texted Tamon Lewis on January 17 about another robbery with Marks. Before the shooting, Marks told him about another armed robbery he committed in addition to the one in San Ramon on January 16, but defendant denied supplying Marks with a gun, seeing Marks commit a robbery, or participating with Marks in any robbery.

Defendant was cross-examined about his cell phone usage. Cell phone records for defendant's phone showed calls to Fuchs at 5:00 p.m. on January 18; at 1:05 p.m., 1:07 p.m., and 3:02 p.m. on January 19; and at 11:37 a.m. and 1:38 p.m. on January 20. Emily's phone was also used on January 19 to call Fuchs.

While he was in jail, defendant spoke to Tamon Lewis and others on the phone about them talking to the police. It upset him at the time "because the detectives was saying that my friends was talking about me." He told his friends, "How these people gonna say something about me when they wasn't even there [?]" Defendant also spoke with Emily many times and knew she told the detectives that he told her he shot Fuchs. He worried "the detectives was gonna try to use her against me." He urged her to tell the truth in court, because he knew that what Emily told the officers was a lie.

III. Prosecution Rebuttal

Captain Chris Simmons of the Contra Costa County Sheriff's Office interviewed defendant on the porch outside Emily's house on January 23. Initially, defendant said he was at Emily's house all night on January 20. Confronted with Emily's statement contradicting him, defendant said he was somewhere else that night. Defendant and Emily also contradicted each other about what happened to defendant's cell phone. Defendant ran off after officers asked him about his ties to North Oakland.

Later that day, defendant called Simmons to apologize for running away. The call was recorded. He said Marks told him he needed a ride to Danville for a marijuana deal and wanted defendant to go with him, but he did not want to go, even though Marks said there was a lot of marijuana and it would be worth it. Eventually, defendant admitted he went to Danville and waited with the driver, who was African-American, outside the car. Defendant said he did not see a second car, but he did not deny there was a second car of perpetrators. He heard a gunshot and left with the driver of the car while Marks ran after them. He said Marks had the gun in his hand; he also said Marks had the gun in his

pocket. The next morning, he watched the news of the shooting with Emily. He told her he was there, and that Marks was the shooter.

Simmons also testified he was aware of the media coverage of the homicide. Among other things, the media had not published that the victim was still alive when the shooter left, that the victim ran before being shot, that the shooter had tried to fire a warning shot, or that it was an accidental discharge.

DISCUSSION

I. Exclusion of Defendant's Exculpatory Statements to Emily

Defendant argues the court deprived him of his constitutional rights to due process, a fair trial, and the right to present a full defense⁸ when it refused to allow him to corroborate his own testimony that Aaron Marks shot the victim and impeach Emily Amkhamavong's testimony "that from 2009 through 2010, Walter Bell never claimed that someone else had shot Aaron [*sic*] Fuchs."⁹ Specifically, defense counsel sought to impeach her testimony with the November 17, 2009 recorded telephone call from the jail in which defendant "repeatedly tells her that, you know, he never did anything, he never did anything, he's not going to confess to something he didn't do." The prosecutor

⁸ Defendant did not constitutionalize his objection below. "We entertain such claims only to the extent 'the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the Constitution. . . . [¶] In [this] instance, of course, rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional "gloss" as well. No separate constitutional discussion is required in such cases, and we therefore provide none.' [Citation.]" (*People v. Homick* (2012) 55 Cal.4th 816, 856, fn. 25.)

⁹ The prosecutor asked: "From January of 2009 until the time you broke up in 2010, did the defendant, Walter Bell, ever once tell you that Aaron Marks shot the victim?" She answered, "No." Variations on the question were also asked and answered the same way by Emily: Q: "Did the defendant ever claim that someone, other than himself, shot the victim?" A: "No"; and Q: "Is there anything that the defendant told you that would make you think anybody else shot the gun? A: "No."

objected on hearsay grounds to defense counsel's proposal to play the November 17, 2009 jail call. The court indicated it was disinclined to allow the evidence but would reconsider after it read the transcript of the November 17 call.

When the court re-addressed the matter, it clarified: "The question was, something to the effect, did the defendant ever claim anyone other than himself shot the victim; and that's the testimony you were seeking to impeach, right?" Defense counsel *agreed* with this statement of the issue. The court ruled: "She indicated, No. [¶] And having reviewed the transcript of the telephone conversation, the Court's ruling is that it would not be allowed because it does not impeach Emily's testimony. During the course of it, the telephone conversation, the defendant's essentially repeating to her that he's not going to confess, he didn't do it, he didn't do it. But he never implicates anyone else during the course of that conversation. [¶] Also, the Court believes it is not an impeachment of her; but it is clearly the defendant's own self-serving statements. [¶] So the Court would not allow it for those reasons and, also, under 352."

On appeal, defendant argues the trial court erred because the "unqualified and unequivocal testimony elicited from Emily by the prosecutor that [he] never said anything that would make her believe he did not shoot Rylan Fuchs" was contradicted by his own "unequivocal and unqualified denials of culpability seven times during the course of the November 17 conversation." He also argues the court's ruling was incorrect because Emily's testimony was not limited to the assertion defendant never named someone else as the actual killer. He asserts the prosecutor's questions were "more broad than that." In addition, the ruling is "untenable" because defendant *did* point to somebody else, albeit not by name, when he queried Emily: "Tell whoever did it? [inaudible] So they – you think I'm going down for some whoos [*sic*] person on what somebody else did?" In our view, the court's exclusion of defendant's out-of-court statements was proper.

A trial court's evidentiary rulings admitting or excluding evidence are reviewed for abuse of discretion, " "and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' ' (*People v. Geier* (2007) 41 Cal.4th 555, 585.) The twin bases for the trial court's ruling here were hearsay and relevance. Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing [i.e., by the declarant] and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).)¹⁰ " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

Here, defendant's out-of-court protestations of innocence were offered to corroborate his trial testimony that he did not shoot Fuchs and never admitted to Emily that he did. They were also offered to prove Emily lied when she testified he did make such admissions and never said anything that made her think somebody else shot Fuchs. " " "If a fact in controversy is whether certain words were spoken or written and not whether the words were true, evidence that these words were spoken or written is admissible as nonhearsay evidence." ' [Citations.]" (*People v. Smith* (2009) 179 Cal.App.4th 986, 1003.) In this case, whether certain words were spoken was superficially at issue, but if the words were not true, they failed to corroborate defendant's testimony or prove Emily's was false. Put differently, if defendant's protestations of innocence were not offered "for their truth," they were either not relevant at all, or were at best only marginally relevant to defendant's, or Emily's, credibility.

¹⁰ For purposes of the hearsay rule, a "statement" is defined as an "oral or written verbal expression" or "nonverbal conduct of a person intended . . . as a substitute for oral or written verbal expression." (Evid. Code, § 225; see *People v. Lewis* (2008) 43 Cal.4th 415, 497–498). Hearsay is not admissible unless it qualifies under an exception to the hearsay rule. (Evid. Code, § 1200, subd. (b).)

Defendant did not proffer any exception to the hearsay rule below, and does not proffer one on appeal. Furthermore, Emily's testimony, that defendant "never said anything that would make her *believe* he did not shoot Rylan Fuchs" was not contradicted by defendant's statements that he did not do it and was not "going down for some whoos [*sic*] person on what somebody else did." She evidently did not believe what defendant said on November 17, 2009, because she testified at trial to all the things he told her the morning of January 21, 2009 that made her believe he shot Fuchs, even though "he did not say the words, 'I shot the gun.' "

Furthermore, if the statement was not excludable as hearsay, the trial court did not abuse its discretion in excluding it, because defendant failed to make an offer of proof that was adequate under *People v. Hall* (1986) 41 Cal.3d 826 (*Hall*) in support of his theory that someone other than himself shot Fuchs. (*People v. Prince* (2007) 40 Cal.4th 1179, 1242 (*Prince*)). " '[T]hird party culpability evidence is admissible if it is "capable of raising a reasonable doubt of [the] defendant's guilt," but . . . "[w]e do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: *there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.*' " [Citation.] '[I]n making these assessments, "courts should simply treat third-party culpability evidence *like any other evidence*: if relevant it is admissible ([Evid.Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion [citation]." ' " (*Prince, supra*, 40 Cal.4th at p. 1242, quoting from *People v. Robinson* (2005) 37 Cal.4th 592, 625, fn. omitted, italics added.)

Here, as in *Prince, supra*, the out-of-court statements at issue did not point to any particular perpetrator. Consequently, "the probative value of the evidence was slight, whereas its potential for delay and confusion of issues was great. Under the

circumstances, the court did not err in excluding this evidence.” (*Prince, supra*, 40 Cal.4th at p. 1243.)

People v. Filson (1994) 22 Cal.App.4th 1841 (*Filson*), disapproved on another ground in *People v. Martinez* (1995) 11 Cal.4th 434, 452, does not compel a different result. In *Filson, supra*, the court of appeal reversed the defendant’s conviction for child molestation because the prosecution did not disclose to the defense a tape-recorded statement made by defendant to the police shortly after his arrest, and because the trial court excluded the tape for impeachment purposes (per Evidence Code section 352) without knowing what was on it. (*Filson, supra*, 22 Cal.App.4th at pp. 1847, 1849-1850.) Defendant’s sole defense was intoxication, and two witnesses testified he did not seem very inebriated. (*Id.* at p. 1848.) “[A] tape preserving the sounds of a grossly intoxicated defendant talking would constitute persuasive *circumstantial evidence* supporting the defense theory that defendant was too drunk to form the specific intent needed for conviction.” (*Ibid.*, italics added.) The errors were deemed prejudicial because they “prevented the defense from obtaining and using the tape, and also foreclosed all inquiry into the legitimate field of favorable inferences deducible from defendant’s statements.” (*Id.* at p. 1852.)

The situation here is very different. The court reviewed the transcript of the phone call before ruling on defendant’s motion to admit it for impeachment purposes. Defendant did not identify any basis for admitting his claims of innocence as circumstantial evidence relevant to some disputed fact, regardless of their truth. As matters stood, the trial court correctly concluded defendant’s statements were hearsay, not admissible for any legitimate evidentiary purpose. Absent such a purpose, the court evidently perceived their admission as potentially confusing within the meaning of Evidence Code section 352.

Likewise, *Ortiz v. Yates* (9th Cir. 2012) 704 F.3d 1026 (*Ortiz*), does not advance defendant’s cause. In a domestic violence case, the California Court of Appeal found

“ ‘the trial court erred by refusing to allow defense counsel to cross-examine [the defendant’s wife] as to whether her testimony was influenced by any threat or implied threats of prosecution.’ ” (*Id.* at p. 1033.) However, the state court concluded the error was harmless under the state law standard of *People v. Watson* (1956) 46 Cal.2d 818. (*Ortiz* at p. 1033.) A majority of the Ninth Circuit panel found the state court’s conclusion unreasonable in light of its view the error violated defendant’s confrontation rights under the federal constitution and should have been evaluated under the harmless-beyond-a-reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18. (*Ortiz* at p. 1033, fn. 4.) Accordingly, the federal Court of Appeals granted defendant’s habeas corpus petition. (*Id.* at p. 1040.)

Using cross-examination to show that a witness has been threatened or intimidated is a time-honored way of testing the credibility of a crucial witness. (See *Ortiz, supra*, 704 F.3d at p. 1036, citing *United States v. Vavages* (9th Cir.1998) 151 F.3d 1185, *Webb v. Texas* (1972) 409 U.S. 95, 97–98.) That type of impeachment is not implicated here. Defendant has not demonstrated the court erred in excluding hearsay evidence of exculpatory statements defendant made to Emily in a telephone call to impeach her testimony that defendant never said anything to her that made her believe someone else shot the victim, and corroborate his testimony that he did not shoot Fuchs or admit to her that he did. No error appears.

II. Exclusion of Aaron Marks’s Out-of-Court Statements

Defendant contends the trial court erred in “excluding significant portions of the third party culpability defense ” under *Hall, supra*, and that the error violated his federal Constitutional rights to due process, a fair trial, and presentation of a defense.¹¹ He argues he should have been permitted to introduce evidence of partially inculpatory

¹¹ See footnote 8 of this opinion.

statements Aaron Marks made shortly after the shooting as statements against his penal interest. As explained below, we disagree.

A. Background

Defense counsel made an in limine motion to introduce statements Marks made to his former group home counselor, James Mitchell, and to police after his arrest.¹² Marks made two phone calls to Mitchell after Fuchs's murder, one on January 21, 2009 at 11:15 p.m., and one on January 22, 2009 at 12:15 a.m. At first, Marks said he was in Hawaii but, faced with Mitchell's skepticism, admitted he was lying, although he refused to disclose his location. Mitchell advised Marks the police were looking for him and urged him to turn himself in. Marks acknowledged he had watched the news and knew the homicide victim. He admitted he had done drug deals with the victim in the past and had planned to buy drugs from him the night he was killed. Marks said he did not kill the victim and was not at the scene, but the police would never believe he was not involved because of the text messages on his cell phone. Mitchell opined Marks was intoxicated; Marks said he was drinking cough syrup and wanted to die. He agreed to turn himself in the next day.

While Marks was sitting in the back of a patrol car after his arrest, Marks asked Detective Meth, "Do you think I'm a bad person for what I've done?" However, when interviewed at 2:30 a.m., Marks denied knowing Fuchs. He then admitted he had heard something about Fuchs being killed. Finally, he admitted meeting Fuchs while living at a group home in Danville and talking with him about drugs. Marks claimed he was at his aunt's apartment the entire night of January 20, 2009, into the next day. He admitted texting Fuchs about drugs that day. He said he and Fuchs were friends who enjoyed a good relationship. He stood Fuchs up at the time of the purchase because he did not have

¹² Marks was shot to death in Oakland on November 24, 2012, according to a death certificated submitted to the court in connection with the motion.

any money and he does not rob people. He would not say how much marijuana he was supposed to buy because he did not want to be a snitch. He claimed other people used his cell phone. Asked about his statement to Mitchell that he wanted to die, Marks stated he had been misunderstood and was talking about life in general.

Marks was interviewed again the next day. He asked: What if he was at the scene to get weed, left, and did not know what happened after that? Eventually, he admitted he met Fuchs the night of the shooting and purchased marijuana from him. However, he adamantly denied being the shooter or going to Danville to rob him. He felt accused because he was “young and black.”

The court ruled Marks’s statements did not qualify for admission under Evidence Code section 1230, stating: “[T]he issues really fall on whether or not the statements are clearly statements that show that they are against his penal interest when made. And the Court has had an opportunity to look at the statements that he made, the entire context in which they were made, and although they indisputably contain some admission that appear on their face to be contrary to Mr. Marks’ interest, in avoiding criminal liability and punishment [¶] However, the statements [are] viewed in the context to determine whether they are self inculpatory [¶] . . . He also tried to paint himself in a different light, his relationship with the victim, saying they were friends, that they had a good relationship. With the cell phone messages, that someone else was using his phone. He says that he did not shoot him, he denied being the shooter and denied being there for the robbery, and said he was being accused because he was young and black. [¶] So I think that the statements, when taken as a whole, show that Mr. Marks is trying to put himself in a positive light. They were friends, to show they had a good relationship. And although there are some that are disserving, that when you take it all in whole, it should not be admitted because it lacks the trustworthiness. [¶] The Court considered the possibility of the redaction. However, in light of the circumstances, the Court finds that the statement lacks sufficient indicia of trustworthiness to qualify for admission.”

B. Legal Principles and Analysis

“To be admissible, the third-party evidence need not show ‘substantial proof of a probability’ that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant’s guilt.” (*Hall, supra*, 41 Cal.3d at p. 833.) It is true *Hall* loosened overly restrictive judicial interpretations of relevance that tended to exclude such evidence. However, *Hall* also stressed that “ ‘the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.’ ” (*Id.* at p. 834.)

“Evidence Code section 1230 permits a hearsay statement to be admitted if it ‘so far subjected [the declarant] to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.’ ” (*People v. Gonzales* (2011) 51 Cal.4th 894, 933.)

A statement “which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others)” is inadmissible. (*In re Larry C.* (1982) 134 Cal.App.3d 62, 69 (*Larry C.*); see also *People v. Duarte* (2000) 24 Cal.4th 603, 611-612 (*Duarte*) [quoting *Larry C.* with approval].) Such an inadmissible statement “does not meet the test of trustworthiness” because it is, at least in part, self-serving. (*Larry C., supra*, at p. 69; see *Duarte, supra*, at pp. 611-612.) To be admissible as a statement against penal interest, the declarant’s statement must be “truly self-inculpatory, rather than merely [an] attempt[] to shift blame or curry favor.” (*Williamson v. United States* (1994) 512 U.S. 594, 603 (*Williamson*); see *Duarte, supra*, at pp. 611-612.) Whether or not a statement is truly self-inculpatory “can only be determined by viewing it in context.” (*Williamson, supra*, 512 U.S. at p. 603; *Duarte, supra*, 24 Cal.4th at p. 612.) “ ‘The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining

whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the *possible motivation* of the declarant, and the *declarant's relationship to the defendant.*' [Citation.]" (*People v. Geier, supra*, 41 Cal.4th at p. 584, italics added.) "[B]asic trustworthiness and factual truthfulness are required for a statement to qualify for admission under Evidence Code section 1230." (*Gonzales, supra*, 51 Cal.4th at p. 933.)

We review a trial court's ruling under Evidence Code section 1230 for abuse of discretion. (*People v. Geier, supra*, 41 Cal.4th at p. 585.) Defendant's argument focuses on Marks's seeming expressions of remorse ("wanted to die") or shame ("Do you think I'm a bad person for what I've done?") as evidence of Marks's consciousness of guilt. However, the trial court correctly reviewed Marks's inculpatory statements in their entire context as directed by case law, and concluded they were not trustworthy. In his statements, Marks incriminated himself about relatively minor matters (buying marijuana from Fuchs the night he was shot), exculpated himself from major ones (shooting Fuchs, or even being on the scene when Fuchs was shot), prevaricated, changed narratives, minimized his involvement, and even tried to engender sympathy for himself. As a whole, Marks's statements to Mitchell and the police were profoundly lacking in basic trustworthiness and factual truthfulness, and the trial court did not abuse its discretion in excluding them.

Defendant also argues he should have been permitted to cross-examine Jeff Koepp about Marks's "reputation for violence." On cross-examination, defense counsel asked, "And you had prior encounters with Mr. Marks?" Koepp responded, "I've never spoken any words to him. I've never spent any time with him. I just knew who he was based on reputation and people saying, 'That's Aaron Marks.'" Counsel started to ask, "And is it fair to say that his reputation—" The prosecutor objected on foundation grounds. After a sidebar discussion, the court sustained the prosecutor's objection. As defendant

acknowledges, the sidebar was not reported. Thus, the record does not reflect what counsel intended to say, what offer of proof defense counsel made, whether it involved a reputation for violence or something else, such as drug dealing, nor the basis of the court's ruling. Certainly, the record of Koepf's testimony shows no foundation for anything he may have known about Marks, other than his name and appearance.

It is up to defendant to demonstrate error. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) Defendant also "bears the burden to provide a record on appeal which affirmatively shows that there was an error below, and any uncertainty in the record must be resolved against the defendant." (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) On this record, no error has been demonstrated. Accordingly, we find no error in either of the court's rulings challenged here.

III. Exclusion of Defendant's Family Members During Devin McCalope's Testimony

Defendant argues he was deprived of due process, a fair trial, and his right to a public trial by the trial court's exclusion of defendant's mother and sister from the courtroom during part of Devin McCalope's testimony.

A. Background

Before Devin McCalope testified, the prosecutor made a request in chambers to exclude defendant's sister, Danika, from the courtroom during his testimony.¹³ The prosecutor represented to the court that, just before he testified, McCalope told the prosecutor that he would feel safer if Danika was not present while he testified. McCalope reported that after he testified at the preliminary hearing, Danika approached him and physically hit him. Then, the day before his trial testimony, Danika was present at McCalope's meeting with the defense investigator, which made him feel

¹³ The prosecutor also requested leeway "to treat [McCalope] as a hostile witness, to ask leading questions of him." The request was granted because it was apparent to the court that McCalope was mentally slow and had "some sort of a disability."

uncomfortable, intimidated, and scared. Based on the prosecutor's representations, the court asked Danika to "step outside of the courtroom during his testimony" over a defense objection.

On direct examination, McCalope testified he had not wanted to testify a year earlier in this matter, and preferred not to testify at trial. Asked whether anything bad had happened after his preliminary hearing testimony, McCalope testified that defendant's sister, Danika, was angry because defendant was in custody, and she blamed McCalope for talking to the police. She had come up to him in a store and punched him. He acknowledged telling the district attorney's investigator Dominic Medina that he was afraid to testify. The prosecutor had to repeatedly ask him to remove his hands from his face.

The next morning, before McCalope resumed his testimony, the court cleared the courtroom of jurors and audience for an in-camera hearing at the prosecution's request. The prosecutor made the following offer of proof: "This morning Inspector Medina brought Devin McCalope back to court to finish his testimony; and at some point this morning, Mr. McCalope saw the defendant's mother and the defendant's other sister, a sister other than Danika, whom we discussed yesterday. And Mr. McCalope reported to the inspector that he would not be comfortable testifying in front of the defendant's family. He alleges that the mother has called him a snitch before or told him not to snitch, something along those lines; and that this sister, the sister of the subject today, has not physically assaulted him but has, I think, the word used was haggled [*sic*]. I don't know if that's Inspector Medina's word or Mr. McCalope's word, him over snitching. [¶] And I'm not sure how well the testimony came out yesterday, but I know from my review of the police reports that Mr. McCalope spends a large portion of his time at his play auntie's house. Her name is Star Mills, and she lives right next door to the defendant's family's house. Now, I recall that did come in. They see each other all the time. The families are intertwined. They've known each other for at least a decade. And he is not

comfortable at all, as demonstrated yesterday, in testifying against this defendant publicly. He has serious concerns. So he has asked that he not have to testify in front of the mom or any family members.”

McCalope testified at the ensuing hearing he had seen defendant’s mother and his sister Luanda in court earlier. It made him feel “[n]ot good” to see them because “she out there crying.” Asked how he would “feel about testifying with them in the courtroom,” McCalope moved his head from side to side and then said, “No.” He explained defendant’s mother told him that she was not happy about him telling on her son, and Luanda had said the same thing to him. He acknowledged defendant’s mother and sister Luanda had confronted him about “telling on” defendant in 2009 or 2010 when he first got out of jail, and not since. Luanda was with Danika when Danika hit him; “Like, they came outside. They seen me. They was, like, Tell on my brother. That’s all Luanda had said. And then that’s when his other sister came, and she was like . . . Why you tellin’ on my brother, your partner, whoop, whoop, whoop, and that’s when she had hit me.” Luanda had not said anything to him since. However, McCalope saw defendant’s mother and sister every day. He knew they did not want him to testify. He feared for his grandmother’s safety. McCalope acknowledged telling Inspector Medina he would be too afraid to testify with them listening. He wanted them outside the courtroom and thought he could testify more freely with them outside.

Asked by the court whether it would interfere with his “ability to freely testify in this courtroom” if defendant’s family was present, McCalope answered, “Yes.” The court excluded appellant’s mother and both sisters from the courtroom for the remainder of McCalope’s testimony.

After the hearing, on redirect examination, McCalope testified defendant’s family “was making threats,” and because of that he wanted them removed from the courtroom.

B. Applicable Legal Principles

A criminal defendant has a right to a public trial that is guaranteed by the Sixth

and Fourteenth Amendments to the United States Constitution and by article 1, section 15 of the California Constitution. (*Waller v. Georgia* (1984) 467 U.S. 39, 46; *People v. Woodward* (1992) 4 Cal.4th 376, 382.) “[A]n accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.” (*In re Oliver* (1948) 333 U.S. 257, 272.) “Violation of this right requires reversal of the judgment without examination of possible prejudice. [Citation.]” (*Prince, supra*, 40 Cal.4th at p. 1276.) However, the right to a public trial is not absolute.

“[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information. . . . [¶] ‘The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’ ” (*Waller v. Georgia, supra*, 467 U.S. at p. 45; *Presley v. Georgia* (2010) 558 U.S. 209, 213; accord, *People v. Woodward, supra*, 4 Cal.4th at p. 383; *People v. Virgil* (2011) 51 Cal.4th 1210, 1237.)

“[T]he temporary exclusion of select supporters of the accused does not create an automatic violation of the constitutional right to a public trial.” (*People v. Esquibel* (2008) 166 Cal.App.4th 539, 554 (*Esquibel*)). “Trial courts retain broad power to control their courtrooms to maintain security, protect the defendant’s interest in a fair trial, protect the privacy concerns of prospective jurors, and efficiently dispose of matters outside the hearing of jurors or testifying witnesses. [Citations.] We have also held that even a partial or temporary exclusion of the public from certain proceedings, if justified, imposes no more than a de minimis restriction on the constitutional right to a public trial.” (*People v. Virgil, supra*, 51 Cal.4th at p. 1237.) Nevertheless, “[t]he exclusion of any nondisruptive spectator from a criminal trial should never be undertaken without a full evaluation of the necessity for the exclusion and the alternatives that might be taken.

This evaluation should be reflected in the record of the proceedings. The evaluation would fulfill the statutory requirements, if any, for exclusion of persons from a trial and assist in the evaluation of any alleged constitutional violation.” (*Esquibel, supra*, 166 Cal.App.4th at p. 556.)

C. Analysis

The trial court undertook such an evaluation here and, in light of the prosecution’s offers of proof and McCalope’s testimony in open court and at the in-camera hearing, correctly concluded that a temporary exclusion of defendant’s mother and sisters from the courtroom during McCalope’s testimony only, was essential to ensuring a fair trial free from witness intimidation. (See *NBC Subsidiary (KNBC–TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1223, fn. 48 [the protection of witnesses from intimidation is one of the “overriding interests” that may justify closure of a courtroom].)

The record supports the court’s implied findings that McCalope was a vulnerable witness due to his mental disability, and that the presence of defendant’s mother and sisters in the courtroom during his testimony genuinely made him feel too fearful and intimidated to testify freely. His apprehension was based on concrete examples of their prior intimidating behavior towards him after he testified at a prior hearing. At its core, the trial court’s decision in this case was grounded in a credibility determination about the genuineness of McCalope’s feelings of fear and intimidation, which an appellate court may not ignore. Furthermore, a trial is a search for truth which witness intimidation impedes. In our view, the trial court did not abuse its discretion in finding that temporary closure of the courtroom to defendant’s family members was a narrowly tailored, de minimis intrusion on defendant’s constitutional right to a public trial.

Our conclusion is reinforced by several recent appellate opinions which have reviewed similar temporary courtroom closures and found no constitutional violation. In *Esquibel, supra*, 166 Cal.App.4th 539, the trial court excluded two of the defendant’s friends during the testimony of a child witness in a gang-related shooting case. (*Id.* at p.

546.) The child lived in the same neighborhood as the defendant's friends, and the record reflected the court's concerns about retaliation against the child by gang members. (*Ibid.*) In *People v. Bui* (2010) 183 Cal.App.4th 675, the trial court excluded three individuals, including members of the defendant's family, from part of voir dire. (*Id.* at p. 679.) The appellate record reflected the court's concern "that the spectators, who would be in immediate proximity with the prospective jurors in the body of the courtroom, had not yet been admonished by defendant's counsel to refrain from comments that might prejudice the panel." (*Id.* at pp. 687-688.) They were permitted to return after they were admonished. (*Ibid.*) In *People v. Pena* (2012) 207 Cal.App.4th 944, the trial court excluded 10 to 12 members of defendant's family from the courtroom during the last 30 minutes of testimony, closing argument, and jury instruction in response to juror complaints by two jurors that defendant's family members were following them and making them feel uncomfortable. (*Id.* at p. 950.) The appellate court concluded the trial court acted reasonably in concluding that the complaining jurors were credible, and promptly removing anyone who might have participated in the intimidation without first holding a hearing to examine the jurors and family members. (*Id.* at p. 951.)

In the present case, the trial court did hold a hearing and, in our view, reasonably concluded that the public interest in maintaining an atmosphere free of witness intimidation justified the exclusion of family members during a limited portion of the examination of a single witness. In our view, this was a de minimis infringement upon defendant's right to a public trial that does not require reversal. (See *Prince, supra*, 40 Cal.4th at pp. 1279-1280.)

Defendant also argues the trial court's order excluding spectators violated section 686.2. That statute provides: "(a) The court may, after holding a hearing and making the findings set forth in subdivision (b), order the removal of any spectator who is intimidating a witness. [¶] (b) The court may order the removal of a spectator only if it finds all of the following by clear and convincing evidence: [¶] (1) The spectator to be

removed is actually engaging in intimidation of the witness. [¶] (2) The witness will not be able to give full, free, and complete testimony unless the spectator is removed. [¶] (3) Removal of the spectator is the only reasonable means of ensuring that the witness may give full, free, and complete testimony. [¶] (c) Subdivision (a) shall not be used as a means of excluding the press or a defendant from attendance at any portion of a criminal proceeding.” (§ 686.2.) In *Esquibel, supra*, 166 Cal.App.4th 539, the court of appeal held: “By its own terms, [section 686.2] only applies when there is a proposed exclusion of a spectator who is engaged *in the active intimidation of a witness*. When the predicate facts are present, the statute directs the court how to handle the exclusion of the offending spectator. Here, there is no evidence of any intimidation by the spectators in this case. They were excluded based solely on the concerns of the witness’s mother for the safety of her child. There is no evidence of any conduct, act or attitude by the spectators which would call for the application of section 686.2.” (*Id.* at pp. 555-556, italics added.) This case is similar. The court’s decision to exclude defendant’s mother and sisters from the courtroom was not based on their current engagement in active intimidation of the witness, but rather on the fear-inducing effect of their prior intimidating behavior on the witness at the time of trial. Section 686.2 does not apply. In any event, even if section 686.2 did apply, we find the hearing conducted by the trial court satisfied the requirements of the statute. No error appears.

DISPOSITION

The judgment is affirmed.

Dondero, J.

We concur:

Margulies, Acting P.J.

Banke, J.