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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON SCOTT ADAMS, SR.,

Defendant and Appellant.

E054571

(Super.Ct.No. SWF10001523)

OPINION

APPEAL from the Superior Court of Riverside County. Harry A. Staley, Judge.  
(Retired judge of the Kern Super. Ct. assigned by the Chief Justice pursuant to art. VI,  
§ 6 of the Cal. Const.) Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Steven T. Oetting and Tami  
Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jason Scott Adams, Sr., appeals after he was convicted of several vehicle code violations arising out of a hit-and-run accident. Defendant's theory of the case was that someone had taken his vehicle without permission, and that person was responsible for the crash. Defendant contends the trial court erred prejudicially in excluding evidence that defendant had a habit and practice of leaving his car keys with the bartender of a bar where he had been drinking; defendant intended to proffer this testimony as evidence of a character trait that defendant would leave his keys and order a taxicab, in lieu of drinking and driving. We conclude that the trial court properly excluded the evidence and, consequently, we affirm the judgment.

#### FACTS AND PROCEDURAL HISTORY

On March 23, 2010, at approximately 10:45 p.m., Donna Lancaster (the victim) was driving home from work. She was driving southbound when she reached an intersection with no traffic controls in her direction, and stop signs controlling the cross street. As the victim entered the intersection, she saw a flash from her left, and felt an impact. The impact activated the victim's air bag. Ultimately, the victim found herself lying across the seat, with the driver's side door and the steering wheel pushed up against her. The victim called her husband and waited for help to arrive.

Officer Eric Goodwyn of the Hemet Police Department responded to the scene of the accident. He found the victim wedged inside her vehicle, west of the intersection. A Ford sport utility vehicle (SUV) had come to rest in the front yard of a residence on the corner of the intersection. The SUV's driver side door was open, but nobody was inside. Officer Goodwyn looked inside the SUV and found a wallet with defendant's

identification. The SUV was registered to defendant and Rachel Adams. Two beer bottles, one of which was open, were inside the SUV. Officer Goodwyn also found a black leather jacket or vest, a fixed blade knife, and a metal flask. He requested assistance to search for the driver of the SUV.

Another officer, Ian Bailey, was supplied with defendant's description and picture. Officer Bailey drove around the area to look for defendant. Within less than 10 minutes, and approximately two or three blocks away from the accident scene, Officer Bailey spotted defendant walking along a street. Officer Bailey alighted from his patrol car and approached defendant, calling defendant by name.

Defendant stopped and turned to face the officer. Officer Bailey asked defendant what he was doing; defendant replied that he was "walking around." Officer Bailey noticed that defendant was sweating, which was unusual because the weather was cold, about 50 degrees. Defendant was agitated and he smelled of alcohol. Defendant demanded to know "why . . . did you stop me?" Officer Bailey handcuffed defendant and placed him in the back of the patrol car. Defendant wore an empty sheath on his belt.

Officer Goodwyn came to defendant's location. He noted defendant's belligerent behavior, and bloodshot eyes. Defendant refused to respond to Officer Goodwyn's investigative questions, and looked away. Defendant declined a breathalyzer screening test. Defendant was taken to the police station for booking. Defendant had a fresh laceration on his arm, and his shoulder was red, which could have been caused by a seat belt in an accident. Defendant's blood was drawn at booking. Defendant's blood sample was analyzed, and shown to have a blood-alcohol content of .15 percent. Defendant also

had another drug in his system, which would have increased the risk of impairment while driving.

The victim suffered a broken clavicle. She required surgery to place a plate and six screws into her shoulder.

Investigation of the accident scene showed that three vehicles were involved: defendant's SUV, the victim's vehicle, and a parked car. The victim had been driving on the street with the right-of-way. The damage to the victim's vehicle was on the driver's side, toward the front. Paint transfer indicated that the SUV had struck the victim's vehicle on the driver's side. The victim's vehicle had been propelled into a frontal collision with the parked car. The SUV had veered off the street, and struck a brick wall, scattering cinder blocks throughout the area. The SUV had come to rest in the front yard of a residence. The accident investigator opined that the SUV driver was at fault for the accident.

As a result of the accident, defendant was charged by information with four Vehicle Code violations. Count 1 alleged that defendant had driven a motor vehicle under the influence of alcohol, causing injury to another person. (Veh. Code, § 23153, subd. (a).) Count 2 alleged that defendant had driven a motor vehicle under the influence of alcohol, and caused bodily injury to another person. (Veh. Code, § 23153, subd. (b).) Count 3 alleged that defendant was involved in a motor vehicle accident, and left the scene. (Veh. Code, § 2001, subd. (a).) Count 4 alleged that defendant had been driving with a suspended license. (Veh. Code, § 14601.1, subd. (a).) The information included,

with respect to counts 1, 2 and 3, an enhancement allegation that defendant had caused great bodily injury (GBI) to the victim. (Pen. Code, § 12022.7, subd. (a).)

At the close of the evidence, the trial court dismissed the GBI enhancement allegation as to count 3 (leaving the scene of an accident). The jury returned verdicts finding defendant guilty on all four counts, and found true the GBI allegation as to counts 1 and 2 (DUI with injury, and DUI with bodily injury, respectively).

At sentencing, the trial court denied defendant's motion to reduce count 1 to a misdemeanor. The court sentenced defendant to the middle term of two years on count 1, plus a consecutive three years for the GBI enhancement. Sentence on count 2 was stayed under Penal Code section 654. Defendant was sentenced to two years in state prison on count 3, concurrent to the term in count 1. Defendant was given a misdemeanor sentence of 30 days, concurrent, on count 4.

Defendant now appeals.

## ANALYSIS

### I. The Trial Court Properly Excluded Defendant's Proffered Evidence

Defendant contends that the trial court violated his due process rights and his right to a jury trial determination of the facts, because the trial court excluded certain evidence that defendant wished to present to prove his defense. The defense theory of the case generally was that someone had taken or stolen defendant's SUV from the bar where he was drinking, and that the driver or thief caused the accident.

### A. Trial Court's Ruling on Defendant's Proffered Evidence

The evidence that defendant wanted to present was the testimony of a friend who was also an employee at Chappie's, the bar where defendant had been drinking on the night in question. Defendant's friend, Jennifer Behymer, worked as a bartender at Chappie's. The defense had discovered, after the case began, that Behymer could offer additional information: She would testify "to [defendant's] habit, that when he does go to Chappies [sic], his habit is to leave the keys at the bar, and if she is working, then he would have her call him a cab to go home. [¶] She does acknowledge she wasn't working this night, so she doesn't know if he did those things on this particular night, but nevertheless, she would be able to provide testimony of his typical habit of that conduct." At the court's request for a formal offer of proof, defense counsel restated the evidence in similar terms: "That [defendant] typically, when he comes into Chappies Bar [sic], he will leave his keys with the bartender and have the bartender call a cab for him. And she acknowledges she is the one who would call a cab for him when she was working. She wasn't working this night. She can't say it was done this night; however, she would say his typical habit is to do so."

The prosecutor objected that the evidence was not relevant, because Behymer was not working on the night in question, and had no knowledge of what defendant had done with respect to leaving his keys with a bartender.

The court mused that the testimony was in the nature of character evidence, "to show that he is not a person who drinks and drives." Defense counsel specifically disclaimed any intent to use the testimony as character evidence. The prosecutor argued

that it was inadmissible as character evidence. Defense counsel again specifically disclaimed any use of the testimony as character evidence: “[T]he way that I was offering to use it is typical habit. . . . So my intention was not to use it as character evidence.” Defense counsel explained the relevance: “The habit evidence says we’re allowed to argue he was more likely to have engaged in this conduct on the night in question given the habit of engaging in that conduct.”

The court responded that, “You’re already trying to prove that, A, he was going to drive, at least he was trying to find his vehicle, and, B, he wasn’t having a cab called, he started walking.” Defense counsel explained that he was not trying to prove that defendant was trying to drive his SUV, only that he was trying to find it after it was missing from the parking lot. The court objected that defendant “didn’t follow his custom and pattern and have a cab called. He did something different.” The court queried, “what would be the relevance of admitting a pattern and custom that you’re not even arguing he followed?” Defense counsel explained that a person might go outside a bar for a number of reasons, not only going to a car to drive. The court admitted it was “convinced from what you’re going to tell me from your evidence that it’s believed he left the bar on foot.” Defense counsel agreed: “To look for his car. . . . He walked out back to smoke a cigarette, sees the car is missing, walks down the street to find the car.”

The court ultimately ruled to “exclude the evidence on custom and habit. I don’t think it’s reasonable to think he was—at all reasonable to think he was going to walk the neighborhood looking for his car if it wasn’t in the parking lot.”<sup>1</sup>

B. Evidence of Habit and Custom

Evidence Code section 1105 provides: “Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.” Defendant now argues that the proffered evidence—that he had a habit and custom of leaving his car keys with the bartender—was admissible to prove that he had in fact done so on the night of the accident.

Determination of the admissibility of evidence of habit or custom rests in the sound discretion of the trial court. (*People v. Hughes* (2002) 27 Cal.4th 287, 337.) “Custom or habit involves a consistent, semiautomatic response to a repeated situation. [Citations.]” (*Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 926.)

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<sup>1</sup> Defendant points to the court’s remark that it was excluding the evidence because it did not think it reasonable that defendant would walk the neighborhood looking for his car if it was not in the bar parking lot. Defendant urges that this was an improper assessment of credibility by the court, which usurped the jury’s function. (Citing *People v. Melton* (1988) 44 Cal.3d 713, 735; *People v. Chandler* (1997) 56 Cal.App.4th 703, 711.) However, the issue that the trial court believed was unreasonable—that defendant would be walking around the neighborhood looking for his vehicle—was not removed from the jury’s consideration. Defendant fully testified to that version of events. The excluded testimony—that defendant would “typically” give his car keys to Behymer when she was bartending and have her call a cab for him—had no direct bearing on the question whether defendant was actually walking in the neighborhood looking for his missing SUV, rather than fleeing from the scene of the accident.

Defendant's proffered evidence was insufficient to prove that he had the habit or custom claimed, however. Behymer, the bartender-witness, knew defendant socially and was his friend. She was not working on the night of the accident, although she was present in the bar as a patron. She was socializing with defendant and others, but she did not see very much of what defendant did during the time they were both present at Chappie's. There was certainly no testimony offered that she saw or knew that defendant had complied with his supposed habit and custom of giving his car keys to the bartender on the night of the accident. Behymer could have testified, at most, that she was aware of times that defendant had left his car keys with her personally, when she was working as a bartender, and those occasions when he had asked her to call a cab for him. The offer of proof did not indicate how many times this may have happened, or whether defendant's conduct varied; for example, defendant may only have given his keys to Behymer on occasions when he judged that he had a significant amount to drink, but not on other occasions. The offer of proof was insufficient to show that defendant habitually left his car keys with whatever bartender was on duty, that he did so consistently as a response to repeated situations, e.g., whenever he visited Chappie's, or even that he did so routinely when Behymer was bartending.

Moreover, the evidence was irrelevant for its proffered purpose, i.e., to show that defendant had acted consistently with the supposed habit and custom on a particular occasion. Defense counsel's offer of proof itself included the admission that the witness had no idea whether defendant had acted consistently with any habit or custom on the night of the accident. Behymer was in no position to know what defendant did when she

was not bartending. Moreover, defendant did not act in conformance with the other portion of his habit and custom: it was undisputed that on this occasion defendant did not have the bartender call a cab for him.

Defendant's own evidence was inconsistent with a claim that he had acted in conformance with the claimed habit and custom. It is true that defendant did testify, at one point, that he was "sure" that he had left his keys with the bartender on the night of the accident. However, he also testified that he might have left his keys in the SUV under the front seat. Especially telling was defendant's response to the claimed discovery that the SUV was missing: defendant never attempted to retrieve his keys from the bartender, or even ask the bartender about the keys. In addition, even though he had used the telephone in the bar earlier that evening, to ask some friends to bring him money, he did not use the telephone to find out from his wife whether she or someone else had taken the SUV (defendant had testified that his wife had a second set of keys to the SUV). A set of keys was found inside the abandoned SUV at the accident site; defendant offered no explanation for their presence in the wrecked SUV.

According to defendant, he did not return to the bar at all, but simply set off on foot to look for the SUV. Defendant said he did not believe the SUV had been stolen, but then he also testified that when he retrieved the SUV from the impound yard, the ignition had been tampered with and CD's were missing from a nine-disc CD changer. Defendant said that he thought his wife or a friend must have taken the SUV, and decided to walk to another bar nearby where some of his friends often drank. After walking part of the way to the second bar, however, defendant suddenly changed his mind. He testified that he

realized he was not thinking clearly, and decided to return to Chappie's. It was then that he was accosted, walking in the neighborhood, by the police.

Defendant's story had nothing to do with any supposed habit and custom of giving his car keys to the bartender at Chappie's and calling for a cab. Any such habit and custom had no relevance to defendant's self-contradictory or nonsensical explanations for his presence as a pedestrian in the vicinity of both Chappie's and the accident.

Defendant's proffered "habit and custom" evidence was properly excluded as irrelevant. (Evid. Code, § 350.) The trial court therefore did not abuse its discretion in excluding that evidence.

Even assuming, for the sake of argument, that the trial court erred in excluding the evidence, defendant must show that the error was prejudicial. Defendant contends that the trial court's ruling unconstitutionally deprived him of his right to present a defense (deprived him of due process), and that the proper standard of prejudice requires reversal unless it can be shown that the error was harmless beyond a reasonable doubt, under the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705].) Defendant was not prevented from presenting his desired defense, however.<sup>2</sup> He was fully able to testify to his theory that some unknown person had taken

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<sup>2</sup> Defendant's reliance on *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297] is misplaced. There, the United States Supreme Court held that it was a violation of due process of law to exclude evidence that a third party had confessed to the murder of which the defendant stood accused. The evidence was trustworthy and critical to the defense. The court concluded "that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied

[footnote continued on next page]

the SUV, and he even stated that he had given his car keys to the bartender on duty at Chappie's that night, for whatever relevance that may have had. The theory presented to the jury for its evaluation was the one defendant desired to present. The exclusion of evidence that he "typically" gave his car keys to the bartender at Chappie's, and then took a cab home, did not impinge on defendant's ability to explain why, without even attempting to retrieve his keys from the bartender, or to call a cab, he decided to walk away from the bar and, thus, was found on foot in the neighborhood of both the accident and Chappie's Bar. Because defendant was not deprived of the right to present his chosen defense, the *Chapman* standard is inapplicable. Rather, when reviewing a claim of state law error (erroneous exclusion of evidence), the normal standard of prejudice for state law error applies: reversal is required only if there is a reasonable probability that

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*[footnote continued from previous page]*

him a trial in accord with traditional and fundamental standards of due process." (*Id.* at p. 302.)

For all that defendant contends that his "jury could not have reliably determined whether [he] drove his vehicle the night of the accident without knowing that he regularly took steps to avoid such conduct [i.e., driving while intoxicated]," the excluded evidence was not critical in the same fundamental way as a third-party confession. The proffered evidence only showed that defendant may have "regularly t[aken] steps" to call for a cab on some nights when he had drunk too much. It may have shown that defendant "typically" left his keys with the bartender when he called for a cab. It was not evidence to show that defendant actually gave his keys to a different bartender (not his friend) on a night when he did not call for a cab. Defendant was not, as in *Chambers*, precluded from presenting his theory of the case. He directly testified that he had given his car keys to the bartender, although (1) he never called the percipient witnesses who could have verified this point, (2) he testified inconsistently (e.g., he may have left the car keys under the seat of the SUV), and (3) he behaved inconsistently with having done so (i.e., never inquired of the bartender about his keys).

The court's ruling here did not violate defendant's due process right to present his defense.

the error affected the verdict adversely to the defendant. (See *People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089.)

Under the *Watson* standard, defendant has failed to demonstrate prejudice from the exclusion of his so-called “habit and custom” evidence. Even if Behymer had testified that, when she was bartending and defendant was drinking at Chappie’s Bar, defendant “typically” gave his keys to her and asked her to call a cab for him, that evidence would not show that defendant had done so on the night in question. The offer of proof itself acknowledged that the witness had no knowledge whether defendant had done so that night. Defendant never called the bartender on duty at Chappie’s to corroborate the claim that he had given his keys to the bartender.

Defendant, by his own testimony, did not act in accordance with his supposed habit and custom of giving his keys to the bartender. First, he never went to the bartender to retrieve them (or to find out what had happened to them), once defendant discovered that the SUV was missing. Second, he failed to have the bartender call a cab for him. Instead, he claimed he left on foot.

Other evidence contradicted defendant’s claim. A set of keys was found in the abandoned SUV at the crash site. Defendant presented no evidence to explain how a set of keys came to be in the SUV, even though such evidence was readily available to him. He called no one from Chappie’s to explain what had happened to the set of keys defendant had purportedly left with the bartender. He did not call his wife as a witness to account for the set of keys in her possession on the night of the accident. Defendant claimed both that he believed the SUV had not been stolen but that the ignition appeared

to be damaged and items taken when he recovered the SUV from the impound yard. The investigating officer testified in rebuttal that he observed no such damage.

When defendant was stopped by police, he never told the officers that his SUV had been taken or stolen, and never said that he was looking for it. When defendant's blood was drawn at the police station, defendant told the phlebotomist that he had ridden his motorcycle to the bar. On investigation, defendant's motorcycle was not found at the bar. Defendant did not tell the phlebotomist that his SUV had been stolen. Defendant had no explanation for the laceration on his arm or the redness on his shoulder (consistent with the pressure of a seat belt shoulder strap in a collision).

In short, the evidence of defendant's guilt was overwhelming, and there is no reasonable probability that the verdicts were affected by the exclusion of the proffered "habit and custom" evidence.

### C. Character Evidence

Defendant also contends that the proffered testimony was relevant to prove that defendant had a character trait of not driving under the influence of alcohol. Evidence Code section 1100 provides: "Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character."

Evidence Code section 1101, subdivision (a), provides, however, that "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion,

evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.”

Evidence Code section 1102 provides: “In a criminal action, evidence of the defendant’s character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:

“(a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.

“(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).”

Defendant now urges that Behymer’s testimony was relevant and should have been admitted as character evidence. We reject this contention.

First, we note that trial defense counsel specifically and repeatedly disclaimed any intention to use the proffered testimony as character evidence. Thus, defendant is in no position to claim that the trial court erred in excluding it as character evidence. “A party who requests the court to act as it did has invited error. [Citation.]” (*People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1408.)

Second, defendant’s reliance on *People v. Callahan* (1999) 74 Cal.App.4th 356, is misplaced. There, in a prosecution for child molestation, the prosecution had introduced evidence under Evidence Code section 1108 to show the defendant’s character or propensity to molest young girls. Defendant attempted to introduce rebuttal character testimony to demonstrate that he did not have the character of someone who would molest young girls. The trial court had sustained objections to certain questions posed to

two witnesses, about defendant's " 'character for child molestation,' " or whether the defendant was " 'the type of person who would molest a child.' " (*Id.* at p. 379.) The appellate court held that the defendant was entitled to respond to the prosecutor's evidence of propensity or character (based on instances of prior uncharged bad conduct) with evidence of his character for the opposite character trait (based on instances when the defendant did not commit bad acts, even though under similar circumstances). However, reversal was not required because the witnesses had testified to the same effect in answer to other questions. One witness had stated that the defendant had never touched her in a way that made her uncomfortable, and said that the defendant had treated her " 'nice,' " and " 'gentle.' " The other witness had testified that the defendant had " 'take[n] very good care of us.' " (*Id.* at p. 380.) Both statements carried the same import as the excluded questions, i.e., that the defendant had cared for these witnesses when they were youngsters, and had not touched them inappropriately.

The circumstances here are different. The prosecution had introduced no character or propensity evidence. There was no character evidence for defendant to rebut. In addition, the character trait evidence that defendant wished to present was inconsistent with the defense theory of the case. Defendant now claims that, "[e]vidence that [he], on prior occasions, took steps to avoid driving intoxicated by leaving his car keys with the bartender had probative value to show he did not drive intoxicated the evening of the accident," and that "evidence that [he] had taken measures in the past to avoid driving under the influence of alcohol was relevant to prove he did not do so the night of the accident." However, defendant mistakes the purport of his offer of proof.

At most, Behymer would be able to testify that defendant had given his car keys to her, on some occasions when she was working as a bartender, and that she then called a cab for him to drive him home. She had no knowledge of what defendant had done on the night of the accident. Defendant's purported character trait for "avoiding drunk driving" did not consist solely of giving his car keys to the bartender on duty. To the extent he had a character trait of avoiding driving while intoxicated, that trait was manifested by two actions: leaving his keys with the bartender and having a cab take him home. Defendant did not act in conformity with either prong of his supposed character trait. He did not behave as if he had left his car keys with the bartender; he never asked the bartender for his keys and never inquired what had happened to them. He simply left. Defendant also did not fulfill the other portion of his protocol for avoiding drunk driving. He never requested a cab and never called anyone for a ride. He simply left on foot. When the police found him, he never claimed to be looking for his "missing" SUV.

In any case, as with the "habit and custom" contention, any error in excluding defendant's character evidence was harmless. Although defendant now argues that his proffered evidence was "crucial" to show that someone else may have had access to the keys, the testimony he proffered did not actually establish that claim. Defendant sought to introduce the testimony of a tangential witness—a friend who had a personal bias in the matter—who had no real knowledge of what defendant had done on the night of the accident. On the other hand, he did not produce evidence, which should have been readily available to him, to show that he had in fact given his car keys to the bartender on duty. He did not explain how the car keys were found in the SUV. He had no

explanation for the injuries or marks on his body.<sup>3</sup> Defendant never mentioned, once he had been contacted by the police, that he was looking for his missing SUV. Instead, he was found about two or three blocks away from the accident, highly intoxicated, with marks and cuts on his body consistent with having been involved in a recent accident. It is not reasonably probable that the result would have been any different in the absence of the alleged error.

DISPOSITION

The trial court did not abuse its discretion in ruling on defendant’s proffer of “habit and custom” or “character” evidence. Even if the court erred in its ruling, any error was harmless. Defendant was properly convicted of the driving-under-the-influence and leaving-the-scene counts. The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER  
J.

We concur:

HOLLENHORST  
Acting P. J.

RICHLI  
J.

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<sup>3</sup> Although appellate defense counsel suggests that such marks or cuts could be explained by defendant falling as he walked around the neighborhood, there was no evidence in the record to suggest that defendant had fallen.