

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 18, 2026 Session

FILED

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. BRIAN KRAG MCALLISTER

Appeal from the Criminal Court for Campbell County
No. 19472 Zachary R. Walden, Judge

No. E2025-01648-CCA-R3-CD

The Defendant, Brian Krag McAllister, was convicted in the Campbell County Criminal Court for vandalism with damages over \$1,000, a Class E Felony. He received a sentence of two years, to be served on supervised probation. At trial, the State argued, and the trial court agreed, that an alleged act of vandalism committed by the Defendant two days before the date in the indictment was captured by the “on or about” language in the indictment, part of its case in chief, and admissible under a continuing offense theory. In this appeal, the Defendant contends that the trial court erred by allowing the State to enter evidence of an event that was outside the scope of the indictment and that it was used solely as a prior bad act for propensity purposes. Specifically, the Defendant argues that vandalism is not a continuing offense and that no applicable exception to Rule 404(b) of the Tennessee Rules of Evidence allowed for the admission of evidence related to the prior act of vandalism. The Defendant also argues that the evidence was insufficient to prove the value of the damage to the victim’s property. Upon review, we hold that the evidence was sufficient to sustain the Defendant’s conviction. We also conclude that the trial court improperly admitted evidence of the prior act of vandalism, and this error was unfairly prejudicial. Based on the evidentiary error, we vacate the Defendant’s conviction, reverse the judgment of the criminal court, and remand for a new trial.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed
and Vacated, Case Remanded**

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TOM GREENHOLTZ, JJ., joined.

Jessica F. Butler, Franklin, Tennessee (on appeal); William Evans, Assistant Public Defender (at trial), for the appellant, Brian Krag McAllister.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Jared R. Effler, District Attorney General; and Lindsey Cadle and Blake Mullins, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The Defendant, Brian McAllister, resided in a rural area in Campbell County, Tennessee. He lived across the road from the victim and his family, his only nearby neighbors. This case involves two separate incidents that occurred at the victim's home.

On October 14, 2022, while sitting outside, the victim's minor daughter noticed something pass by her, heard a noise, and found a small hole in the vinyl siding on the side of the house. After she ran inside to tell her parents, the victim came outside and saw a hole in the side of his house. He observed the Defendant standing on his porch but did not contact the police. Two days later, on October 16, 2022, the victim's wife saw the Defendant shoot her car with a BB gun, damaging it. After she confronted him and threatened to call 911, the Defendant fired several more shots at the victim's house. The victim and his wife heard the shots and saw new damage, this time on the front side of the house, near the door. The police officer arrived that day, spoke with the Defendant and advised him that it is dangerous to shoot his BB gun, to which he responded, "it's just a BB gun."

Based on the above facts, on May 17, 2023, a grand jury indicted the Defendant for vandalism, alleging that on or about October 16, 2022, he knowingly and without the owner's consent damaged the victim's real and personal property in an amount exceeding \$10,000, in violation of Tennessee Code Annotated section 39-14-408.

Prior to trial, the Defendant filed a motion in limine to exclude evidence under Rule 404(b) and Rule 608(b) of the Tennessee Rules of Evidence. Specifically, the Defendant moved to exclude "any testimony of past criminal convictions, time spent in jail, past arrests, prior incidents involving the [D]efendant allegedly shooting his BB gun, or allegations of threats or inappropriate comments made by the defendant to the victim or any other persons." For any prior bad acts the State wished to introduce, the Defendant asked the trial court to hold a hearing in the absence of a jury, as required under Rule 404(b).

The trial court held hearing on the pre-trial motion on January 27, 2025. The Defendant argued that introducing evidence of the October 14 incident would be prejudicial because it was so similar to the October 16 incident for which the Defendant was on trial. The Defendant also argued that introducing this evidence so close to trial did

not give him the chance to interview other potential witnesses or review the evidence. The State argued that it was not required to put a date in the indictment which was why it was listed as “on or about October 16.” The State argued that this language captured the October 14 incident. The following exchange then occurred:

[STATE]: So the State’s not using it for 404(b), we’re using it in our case in chief as part of the underlying vandalism charge. That being said, in the alternative, should the Court disagree with me, it’s not 404(b). And I would plan on introducing it to show that absence of an accident which –

THE COURT: Well, it is 404(b) because it’s a prior bad act.

[STATE]: It is, but for – it would be an exception to that based on it being – I mis said that – being – to demonstrate there is an – it’s not an accident. We anticipate that’s what the testimony will be in our case in chief based on what [the Defendant] said to the officer when she was dispatched to the house. So in the first instance, it’s not 404(b), it’s a part of the case in chief in evidence. Of the vandalism, if the Court disagrees with me on that, there’s an exception to it being 404(b).

After the trial court inquired about the damage to the house which had occurred on both days, the court and the State had the following exchange:

THE COURT: All right. I’m gonna let the jury consider that as one continuing course of vandalism. I don’t know whether they’ll be persuaded by that.

[STATE]: I’m not –

THE COURT: But I’ll let you argue it that way.

[STATE]: But I don’t plan on anything with the Burgins. I advised –

THE COURT: So I’m not ruling pursuant to Rule 404(b) because the State’s representing that this is the offense charged, not a prior bad act?

[STATE]: Correct.

[DEFENSE COUNSEL]: I –

THE COURT: And I suspect that if we had a jury out hearing if I did find by clear and convincing evidence that the event on October 14th occurred, it would go to intent, but I'm not gonna try a limiting instruction because I –

[DEFENSE COUNSEL]: So, that prior act that we were just talking about, it's coming in whether he opens the door or not?

THE COURT: October 14th.

The Defendant later filed a motion to reconsider, arguing that admitting testimony from October 14 “would result in a constructive amendment and fatal or material variance between the indictment and the subsequent proof presented at trial.” Further, the Defendant argued that this evidence would confuse the jury “in determining the amount of damages in this case as at least one BB gun shot occurred on October 14.”

Prior to trial on January 29, 2025, the trial court addressed the Defendant's motion to reconsider. The court reaffirmed its earlier evidentiary ruling, denying the Defendant's motion to reconsider. The trial court then asked the Defendant if he still wished to proceed or to continue the trial, and the Defendant stated that he wished to proceed. In its opening statement, the State asserted:

On October 16th, 2022, and a couple of days before, the [victim's] family had a stroke of luck. They got lucky that day and the two days prior. They're lucky that the only damage done was to their house and to their car at the hands of their neighbor, [the Defendant], who decided on those two days to rain BBs across the road, striking their home and car.

The State continued and described the events of October 16 and argued that this “act of aggression” was not an accident, “[b]ecause you see, this similar incident happened two days before. That's how [the victim] knew it wasn't an accident on October 14th, 2022” In conclusion, the State described the events of October 14 in detail and stated, “the second time when the [victim] knew it wasn't an accident, they called the police.”

As relevant to the issues raised in this appeal, the proof at trial consisted of the following testimony. The victim's minor daughter testified about the incident on October 14. She stated that while she was sitting outside with her grandmother, she felt something pass by her, looked up, and saw the Defendant on his porch. She then heard a noise and noticed a small hole in the vinyl siding of their house. She ran inside and told her parents. At trial, she identified their house and the Defendant in a photograph, and she pointed to the location of the hole on the left side the house and her position in the garden.

The victim's wife testified about the events of October 16. She stated that while walking her dog, she saw the Defendant on his porch and watched him shoot his BB gun, striking her car and leaving a dent in the back passenger door and chipping the paint. When she confronted the Defendant, he yelled profanities, and she told him she would call 911. As she went inside, the Defendant fired three or four shots in rapid succession at the house. She identified photographs of the new damage to the vinyl siding on the front of the house and confirmed that the house had no such damage prior to October 16. She marked the damage on the photograph provided by the State. She also confirmed that the damage to the car had been repaired.

The victim testified about both incidents. He stated that on October 14, after his daughter notified him of the damage, he went outside, saw the hole in the vinyl siding on the side of the house, and yelled at the Defendant not to shoot his BB gun toward their house. The Defendant did not respond, and the victim did not call the police, hoping the incident had been accidental. The victim noted that when the Defendant stood up, he appeared to have a "rifle-style" BB gun.

Regarding October 16, the victim testified that he heard his wife yelling at the Defendant and went outside. He saw the Defendant on his porch, heard additional shots, and later observed damage to the front siding of the house. He testified that his daughter dug a "BB" out of one of the holes. He stated that the back passenger door of the car had a small dent and that he paid a \$500 deductible to have it repaired. He also testified that the deductible for repairs to the house was \$1,000. He believed that the damage exceeded \$1,000, but, at the time of trial, he had not yet repaired the house or paid the deductible. On cross-examination, he clarified that he did not see the Defendant shoot on October 14 but he did hear the shots striking the house on October 16 and observed the damage to the front of the house.

Lastly, Sergeant Tosha Tackett Owens testified that when she arrived on October 16, she observed damage to the victim's car and several holes in the siding of the home. She spoke with the Defendant, who said he had been shooting into the field next to the victim's house. When told he could injure someone, the Defendant responded, "[i]t's just a BB gun." She did not seize the BB gun or photograph it.

In its closing argument, the State asserted that, on October 16, the Defendant "riddled the [victim's] house and vehicle with BBs, but that wasn't the first time. On October the 14th of 2022, [the Defendant] also fired his BB gun at [the victim's daughter] as she was outside cracking walnuts with her grandmother." The State asserted that the Defendant knowingly caused damage to the victim's house and vehicle "and he did it on two separate instances, on the 14th and 16th" The State reminded the jury that it presented photographic evidence of holes in the house. As for the value of the damages,

the State argued that “[the victim] talked about the deductibles for a total of around [\$1,500].”

In his closing argument, the Defendant reiterated that the vandalism statute requires not only the finding of damage caused to a person’s property but also the valuation of damage, in this case over \$1,000, which the jury must find that the State proved both prongs beyond a reasonable doubt. The Defendant pointed out that the victim offered insurance deductible quotes as evidence of the value of the damage, but nothing beyond that. The Defendant questioned this evidence: “Did he meet his deductible? We don’t know. There’s no estimates in evidence. This case has been pending for two years, not one estimate into evidence to just how much it is.”

The Defendant moved for a judgment of acquittal, arguing that the State did not present adequate proof of valuation of the damage to the property. The trial court denied the motion. The jury returned a guilty verdict of vandalism causing damage over \$1,000. On March 10, 2025, the trial court selected the offense level of vandalism with damages over \$1,000 but below \$2,500, a Class E Felony, and sentenced the Defendant to two years, suspended to probation. The trial court also ordered the Defendant to pay the victim \$1,500 in restitution and court costs as required under the vandalism statute.

On April 7, 2025, the Defendant filed a motion for a new trial asking the trial court to set aside the guilty verdict and judgment and to grant the Defendant either a judgment of acquittal or a new trial. He argued that the trial court (1) erroneously denied his motion to exclude propensity evidence; (2) erroneously denied his motion to reconsider; and (3) erred in denying the defense’s request on lost evidence. The Defendant also argued that the evidence was insufficient to sustain a verdict of guilty of vandalism with damages over \$1,000 and that the cumulative effect of the errors warranted a judgment of acquittal or a new trial. The State filed a response denying all allegations of the Defendant.

On August 25, 2025, the trial court held a hearing on the Defendant’s motion for a new trial. As relevant to this appeal, the Defendant again argued that his motion in limine to exclude evidence about the October 14 incident should have been granted because it was “irrelevant and prejudicial under [Rule] 403 and was a prior bad act under [Rule] 404,” and allowing that evidence “prejudiced the case[.]” The Defendant also argued that the evidence was insufficient to support the conviction of vandalism with damages over \$1,000, because the only information on the valuation of the damage were insurance deductible quotes of \$500 and \$1,000, for the vehicle and house respectively, and the victim confirmed that he had not yet repaired his home. The Defendant asserted that, because the State did not present any estimates, did not have any experts such as insurance adjusters testify, and did not prove that the victim even met his insurance deductible, the

evidence “was insufficient to prove, at least beyond a reasonable doubt, that damages in this case were over one thousand dollars.”

In response, the State argued that, because the vandalism statute requires the offense to be committed “knowingly,” it utilized the evidence of the October 14 incident to “prove that type of motive, that type of intent,” and “not necessarily a prior bad act[.]” The State asserted that it was “obligated to prove the [D]efendant’s motive in the October instance when he fired the BB gun that it was not an accidental occurrence[.]” The State further argued that the property owner is allowed to give his opinion on the value of the damage done to his property. The insurance deductible quote, the State argued, “was enough proof beyond a reasonable doubt to sustain the conviction as rendered by the jury.” The trial court denied the motion for a new trial without elaboration. On September 30, 2025, the court issued an order stating only that, after reviewing the motion for a new trial, the argument of the parties, and the entire record, the Defendant is not entitled to a new trial. It is from this order that the Defendant now timely appeals.

ANALYSIS

I. Admissibility of Evidence. In this appeal, the Defendant argues the trial court erred by allowing the State to enter evidence of an event that was outside the scope of the indictment and that it was used solely as a prior bad act for propensity purposes. Specifically, the Defendant argues that vandalism is not a continuing offense and that no applicable exception to Rule 404(b) allowed for the admission of evidence related to the prior act of vandalism. In response, the State asserts that the October 14 evidence was properly admitted based on three different theories: that vandalism is a continuing offense; the theft statute allows the prosecution to aggregate several acts under the same offense; and that the evidence was admissible under a permissible exception under Rule 404(b).

Standard of Review. The admissibility of evidence rests within the trial court’s discretion, and this court will not overturn a trial court’s decision regarding the admissibility of the evidence absent an abuse of that discretion. State v. Clayton, 535 S.W.3d 829, 859 (Tenn. 2017). A trial court is found to have abused its discretion when it “applies an incorrect legal standard or reaches a conclusion that is ‘illogical or unreasonable and causes an injustice to the party complaining.’” State v. Lewis, 235 S.W.3d 136, 141 (Tenn. 2007) (quoting State v. Ruiz, 204 S.W.3d 772, 778 (Tenn. 2006)).

A. Continuing Offense Theory. First, the Defendant argues that vandalism under the Tennessee Code is not a continuing offense, and therefore the trial court erred in admitting evidence of October 14 incident under this theory. The State acknowledges that only a few crimes in Tennessee are considered continuing offenses, without genuinely advancing on appeal or at oral argument that vandalism is a continuing offense. During the pretrial

hearing on the Defendant's motion in limine to exclude evidence of a prior bad act, the Defendant argued that the October 14 evidence would be highly prejudicial and should be excluded. The State argued that the October 14 incident was "part of the case in chief" based on the "on or about" language in the indictment. Remarkably, the trial court stated that the October 14 evidence was, in fact, a prior bad act and hypothesized whether it would be admissible under any exception. Nevertheless, after hearing the arguments, the trial court stated, "I'm gonna let the jury consider that as one continuing course of vandalism. I don't know whether they'll be persuaded by that." The trial court did not analyze or explain why it considered vandalism to be a continuing offense, and it did not provide reasoning for relying on this theory in admitting the October 14 evidence. In short, the court admitted evidence of an incident that occurred two days before the charged offense, invoking a continuing-offense theory that such evidence was captured by the "on or about" language in the indictment.

We conclude that the trial court abused its discretion in admitting the October 14 evidence based on the "on or about" language in the indictment. Under Tennessee law, the use of "on or about" in an indictment does not permit the State to introduce evidence of a separate, uncharged offense as substantive proof of guilt—particularly where the indictment is date-specific and the separate conduct would otherwise qualify as a prior bad act subject to the restrictions of Tennessee Rule of Evidence 404(b). See e.g. State v. Rickman, 876 S.W.2d 824, 830 (Tenn. 1994) (in date specific indictment victim's testimony about other uncharged sex crimes was not admissible in defendant's prosecution for statutory rape and incest despite being close in time to indictment date); State v. Jones, No. W2016-00491-CCA-R3-CD, 2017 WL 2493686, at *9 (Tenn. Crim. App. June 9, 2017) (even where "on or about" language or an amended date might technically encompass an earlier event, Tennessee courts treat the admissibility of that conduct as a separate evidentiary question governed by Rule 404(b)), perm. app. denied (Tenn. Oct. 6, 2017). The "on or about" language governs the flexibility of proof as to the timing of the charged offense, not as a vehicle to capture entirely different criminal acts. We therefore need not decide whether vandalism is a continuing offense and conclude that the October 14 evidence was improperly admitted on this ground.

B. Aggregated Under Section 39-14-105(b) Theory. On appeal, the State contends that, "even if the court erred [in finding that vandalism is a continuing offense], our legislature has made clear that the State may charge multiple acts of vandalism in a single count." Tenn. Code Ann. § 39-14-105(b)(1) (stating that the State may charge multiple criminal acts committed against one or more victims "if the criminal acts arise from a common scheme, purpose, intent, or enterprise."). The State asserts that, while it could have indicted the Defendant separately for other instances of vandalism, "it chose to indict him under one count of vandalism that occurred 'on or about October 16, 2022.'" The

Defendant responds that this issue is waived because the State did not make this argument at the pretrial hearing or during trial.

Although aggregation is permitted in theft cases when the State charges multiple acts in a single count and proves a common scheme, see Tenn. Code Ann. § 39-14-105(b)(1), the record shows that the State never made this argument at trial, never sought to aggregate the offenses, and did not present the required factual basis. Because of the State's failure to advance this ground before the trial court, there was also no ruling on this issue. The argument is waived. See Tenn. R. App. P. 36(a) (Relief on appeal is typically not available when a party is "responsible for an error" or has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); State v. Minor, 546 S.W.3d 59, 65 (Tenn. 2018) ("Appellate review generally is limited to issues that a party properly preserves for review by raising the issues in the trial court and on appeal."). Waiver notwithstanding, based on State v. Jones, an offense may be aggregated by the State if and only if (1) multiple theft or vandalism events are included within one count; (2) the charging instrument relies on Tenn. Code Ann. § 39-14-105(b)(1); (3) the State alleges (and seeks to prove) that all thefts or vandalism arose from a common scheme, purpose, intent, or enterprise; (4) the State seeks a single aggregate value for grading the offense; and (5) the jury is instructed that aggregation depends on its finding of the common-scheme element. 589 S.W.3d 747, 760 (2019). None of the above occurred in this case. Accordingly, the State's aggregation theory fails, and the October 14 evidence is not admissible on this ground.

C. Exceptions to Rule (404)(b). As its third and fourth theories of admissibility, the State contends that the October 14 evidence meets certain exceptions under Rule 404(b). The State asserts that "proof of the October 14, 2022[] shooting was necessary to show that [the Defendant] meant to damage the [victim's] property two days later." According to the State, the October 14 evidence was therefore admissible to show the Defendant's intent to damage the victim's property. Embedded within the argument section of its brief, the State also asserts that because the Defendant "told Sergeant Owens that he meant to fire into the field beside the [victim's] house, (IV, 142), the State needed to disprove the possibility that he had simply missed[.]" From this assertion, the State suggests the October 14 evidence was also admissible to rebut absence of mistake or accident. The Defendant contends that the October 14 incident constituted inadmissible prior bad act evidence introduced solely for propensity purposes.

Generally, "[e]vidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Tenn. R. Evid. 404(a)(1). Tennessee Rule of Evidence 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b). However, the rule

permits admitting “[e]vidence of other crimes, wrongs, or acts” for a limited number of “other purposes” including: (1) to prove identity (including motive and common scheme or plan); (2) to prove the defendant’s intent to commit the offense; or (3) to rebut a claim of accident or mistake if asserted as a defense. Tenn. R. Evid. 404(b) (advisory commission comments); State v. Thacker, 164 S.W.3d 208, 239-40 (Tenn. 2005) (quoting State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996)).

The rationale supporting the Rule is that the admission of such evidence “carries with it the inherent risk of the jury convicting a defendant of a crime based on his or her bad character or propensity to commit a crime, rather than the strength of the proof of guilt on the specific charge.” State v. Gardner, 716 S.W.3d 388, 435 (Tenn. Crim. App. Oct. 30, 2024) (quoting State v. Eady, 685 S.W.3d 689, 712 (Tenn. 2024) (citation and internal quotation marks omitted)). Consequently, to minimize the risk of unfair prejudice accompanying the introduction of other-acts evidence, Rule of Evidence 404(b) establishes several protective procedures that must be followed before other-acts evidence is admissible. State v. James, 81 S.W.3d 751, 758 (Tenn. 2002) (internal citations omitted). The trial court must follow these strict procedural requirements as a condition precedent to the admissibility of evidence under Rule 404:

- (1) The court upon request must hold a hearing outside the jury’s presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
- (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
- (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). In those instances where the prior conduct or acts are similar to the crimes on trial, the danger of unfair prejudice increases. James, 81 S.W.3d at 762.

When the trial court substantially complies with the above requirements, we review that court’s ruling for an abuse of discretion. Thacker, 164 S.W.3d at 240. We conduct a de novo review, however, if the trial court did not substantially comply with the procedural requirements of Rule 404(b). State v. Mallard, 40 S.W.3d 473, 486 n.13 (Tenn. 2001) (citing State v. DuBose, 953 S.W.2d 649, 652-53 (Tenn. 1997)). The parties agree and the record shows that prior to admitting the October 14 evidence, the trial court did not hold a jury-out hearing, it did not find clear and convincing evidence that this Defendant

committed the prior act, nor did it outline why the probative value of the October 14 evidence outweighed the danger of unfair prejudice. See Tenn. R. Evid. 404(b). We therefore conclude that the trial court did not substantially comply with the procedure mandated by Rule 404(b) and review the admissibility of this evidence de novo. DuBose, 953 S.W.2d at 652-53.

We need not resolve whether the October 14, prior act of vandalism was relevant to prove the Defendant's state of mind under any of the theories advanced by the State. We conclude that the admission of the October 14 prior act of vandalism had minimal probative value and was unfairly prejudicial. The State repeatedly relied on the October 14 vandalism at trial, using it to portray the Defendant as someone who engaged in similar conduct on multiple occasions. This is precisely the type of propensity reasoning Rule 404(b) forbids. Here, the October 14 vandalism invited the jury to infer that the Defendant acted in conformity with a prior act and thus was likely guilty of the October 16 vandalism. We therefore conclude that the October 14 vandalism was inadmissible under Rule 404(b) and should have been excluded under every theory advanced by the State. Because admission of this evidence was error, the judgment must be reversed unless the State establishes harmlessness.

D. Harmless Error. The State argues that the error was harmless because the victim and his wife's testimony "provided overwhelming proof of [the Defendant's] guilt for the October 16" incident. The Defendant asserts that the effect of erroneous admission of propensity evidence with no limiting instructions allowed the jury to convict the Defendant not based on evidence of the October 16 incident, but because of his conduct on October 14 and "the assumption that past conduct is indicative of present guilt." We agree with the Defendant.

Because the trial court erroneously admitted evidence of the October 14 incident, we review the error under Rule 36(b)'s harmless-error standard. Tenn. R. App. P. 36(b); State v. Reynolds, 635 S.W.3d 893, 928 (Tenn. 2021). Under this standard, a defendant must show that the error more probably than not affected the judgment. State v. Rodriguez, 254 S.W.3d 361, 371-72 (Tenn. 2008) (quoting Tenn. R. App. P. 36(b)); see also State v. Ely, 48 S.W.3d 710, 725 (Tenn. 2001); State v. Harris, 989 S.W.2d 307, 315 (Tenn. 1999). In making that determination, we consider the record as a whole and the extent to which the State relied on the inadmissible evidence. Rodriguez, 254 S.W.3d at 372 (citing State v. Gilliland, 22 S.W.3d 266, 274 (Tenn. 2000)). "The greater the amount of evidence of guilt, the heavier the burden on the defendant to demonstrate that a non-constitutional error involving a substantial right more probably than not affected the outcome of the trial." Id. (citing State v. Toliver, 117 S.W.3d 216, 231 (Tenn. 2003); State v. Francis, 669 S.W.2d 85, 91 (Tenn. 1984)). Whether an error was harmless "does not turn upon the existence of sufficient evidence to affirm a conviction or even a belief that the jury's verdict is correct."

Rodriguez, 254 S.W.3d at 371-72 (quoting Tenn. R. App. P. 36(b)). Rather, this court must determine what impact the error may have had on the jury's decision-making. Id. (internal citations omitted).

Here, the record shows that the State repeatedly invoked the October 14 incident in its opening statement, witness examinations, and closing arguments. The State's repeated reliance on the October 14 incident effectively invited the jury to infer that because the Defendant engaged in the same destructive conduct two days earlier, he must have done so again on October 16. We note the State's comments during closing argument that on October 14, the Defendant fired his BB gun at the victim's minor daughter. This was particularly inflammatory and unfairly prejudicial because the Defendant's actions may have been perceived as harmful to a child. By continually referencing the earlier event, presenting undifferentiated photographs, and eliciting testimony that did not distinguish between the two dates, the State used the October 14 incident not for any permissible purpose under Rule 404(b), but to suggest a propensity for the charged misconduct.

More specifically, the State presented testimony and photographs that did not distinguish between damage to the home from October 14 and damage to the home on October 16. The victim's daughter testified solely about October 14, and the State elicited home repair-cost testimony from the victim without clarifying whether the costs related to the indicted conduct. Indeed, the State offered no proof to establish repair value specific to October 16. As a result, the jury was allowed to consider undifferentiated propensity evidence in determining the Defendant's guilt for the indicted offense. The State's persistent references to the October 14 evidence in opening statement, witness examinations, and closing argument without a limiting instruction from the trial court, invited the jury to view the two events as a single course of conduct, blurring the distinction between the indicted offense and inadmissible character evidence. Given the State's substantial reliance on the prior bad act to explain and support the indicted offense, and the absence of clear proof distinguishing the home damage attributable to October 16, the evidentiary error more probably than not affected the verdict. We therefore conclude the trial court's error warrants reversal and a new trial.

II. Sufficiency of the Evidence. We review the Defendant's remaining issue so as not to pretermitt and in the event of further appellate review. The Defendant contends that the evidence was insufficient to prove the value of the damage to the victim's property. Specifically, the Defendant argues that the only evidence presented at trial to prove the damage to the victim's property was testimony from the victim about his insurance deductibles. The Defendant further states that the State did not present any photographs of the damage to the car, and while there were photographs of the house, the victim testified that he had not yet made any repairs. In response, the State asserts that the evidence

presented at trial was sufficient to prove the value of the damage to the victim's property and to sustain the Defendant's conviction. We agree with the State.

"Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict." State v. Hanson, 279 S.W.3d 265, 275 (Tenn. 2009) (citing State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992)). "Appellate courts evaluating the sufficiency of the convicting evidence must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" State v. Wagner, 382 S.W.3d 289, 297 (Tenn. 2012) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); see Tenn. R. App. P. 13(e). When this court evaluates the sufficiency of the evidence on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. State v. Davis, 354 S.W.3d 718, 729 (Tenn. 2011) (citing State v. Majors, 318 S.W.3d 850, 857 (Tenn. 2010)).

Guilt may be found beyond a reasonable doubt where there is direct evidence, circumstantial evidence, or a combination of the two. State v. Sutton, 166 S.W.3d 686, 691 (Tenn. 2005); State v. Hall, 976 S.W.2d 121, 140 (Tenn. 1998). The standard of review for sufficiency of the evidence "'is the same whether the conviction is based upon direct or circumstantial evidence.'" State v. Dorantes, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting State v. Hanson, 279 S.W.3d 265, 275 (Tenn. 2009)). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses' testimony, and reconcile all conflicts in the evidence. State v. Campbell, 245 S.W.3d 331, 335 (Tenn. 2008) (citing Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). Moreover, the jury determines the weight to be given to circumstantial evidence, and the inferences to be drawn from this evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury. Dorantes, 331 S.W.3d at 379 (citing State v. Rice, 184 S.W.3d 646, 662 (Tenn. 2006)). When considering the sufficiency of the evidence, this court "neither re-weighs the evidence nor substitutes its inferences for those drawn by the jury." Wagner, 382 S.W.3d at 297 (citing State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997)).

We review all evidence presented at trial, even evidence that should have been excluded. State v. McLawhorn, 636 S.W.3d 210, 237 (Tenn. Crim. App. Oct. 20, 2020) (citing State v. Longstreet, 619 S.W.2d 97, 100-01 (Tenn. 1981), overruled in part on other grounds by State v. Leveye, 796 S.W.2d 948, 953 (Tenn. 1990)); State v. Gilley, 297 S.W.3d 739, 763 (Tenn. Crim App. Aug. 13, 2008)); State v. Franklin, 585 S.W.3d 431, 457 (Tenn. Crim. App. June 28, 2019) (citing Longstreet, 619 S.W.2d at 97). The remedy for the erroneous admission of prejudicially harmful evidence is "reversal for trial error,

not dismissal of the conviction.” State v. Binkley, No. M2001-00404-CCA-R3-CD, 2002 WL 517138, at *4 (Tenn. Crim. App. Apr. 5, 2002) (citing Longstreet, 619 S.W.2d at 100-01), perm app. denied (Tenn. Nov. 4, 2002).

The jury convicted the Defendant of vandalism of property greater than \$1,000 but less than \$2,500, a Class E felony. To prove the offense of vandalism, the State was required to establish that the Defendant knowingly “cause[d] damage to or the destruction of any real or personal property of another . . . knowing that the person does not have the owner’s effective consent.” Tenn. Code Ann. § 39-14-408(b), (c) (stating that acts of vandalism are to be punished as theft under Tenn. Code Ann. § 39-14-105). Specifically, Tennessee Code Annotated section 39-11-106 (39) defines “[v]alue” as follows:

(A) Subject to the additional criteria of subdivisions (a)(39)(B)-(D), “value” under this title means:

- (i) The fair market value of the property or service at the time and place of the offense; or
- (ii) If the fair market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense;

Tenn. Code Ann. § 39-11-106(39)(A)-(B) (2022); see also State v. Lindsey, No. E2011-00052-CCA-R3-CD, 2012 WL 5392156, at *5 (Tenn. Crim. App. Nov. 5, 2012), perm. app. denied (Tenn. Mar. 21, 2013). For a vandalism offense, “the value of the property includes the fair market value of repairing, cleaning, and restoring the property.” Id. § 39-11-106(39)(E) (2022).

Viewing the evidence in the light most favorable to the State, the record shows that on October 14 the Defendant shot his BB gun into the vinyl siding of the victim’s home. The victim was alerted of the damage by his minor daughter, who had heard something pass by her before getting her father. The victim did not call the police, hoping that it was an accident. Two days later, on October 16, the Defendant shot his BB gun a second time at the victim’s car and home. Both the victim and his wife testified that they observed the Defendant shooting, heard the noise as the pellets hit the house, and saw a dent in the car and three or four small holes in the house. The victim and his wife testified that they did not give the Defendant their consent to shoot his BB gun at their car and house. The State presented photographs of the holes in the victim’s home at trial. While the State did not present photographs of the damage to the victim’s car, the victim testified that he paid a \$500 insurance deductible to repair the damage on his car and that it had been repaired.

The victim was asked what his insurance deductible on his homeowner's policy was, and he testified that it was \$1,000 "out of pocket." The victim begrudgingly agreed that the \$1,000 was a fair estimate of the property damage to his home. He opined that he believed it may have been more, although he stated he was biased. The victim agreed that he had not repaired the damage to his home. The Defendant takes issue with the victim's testimony as to the repair cost to his home. However, the owner of the property is permitted to testify about his opinion of the value of their property. See Tenn. R. Evid. 701(b); State v. Pilgram, No. E2004-00242-CCA-R3-CD, 2005 WL 602380, at *5 (Tenn. Crim. App. Mar. 14, 2005). Moreover, the value of the cost of repairs is an appropriate means of determining the value of the damage sustained to the vandalized property. Id. Finally, the Defendant asserts that the State's evidentiary burden was unmet because the victim had yet to repair the damage to the home by the time of trial. This court has previously held that the elements of the offense of vandalism do not require the State to show that the property was actually replaced or repaired. Rather, the proof must show "only that the cost of repair or replacement be established." See State v. Goldberg, No. M2017-02215-CCA-R3-CD, 2019 WL 1304109, at *9 (Tenn. Crim. App. Mar. 20, 2019); State v. Lindsey, III, No. E2011-00052-CCA-R3-CD, 2012 WL 5392156, at *5 (Tenn. Crim. App. Nov. 5, 2012).

Accordingly, based on the above evidence, we conclude that a reasonable juror could have determined the essential elements of vandalism beyond a reasonable doubt. The Defendant is not entitled to relief. However, as previously discussed, because the trial court erred in admitting evidence of a prior bad act, and that error was prejudicial, we must vacate the Defendant's conviction, and reverse and remand for new trial.

CONCLUSION

For the foregoing reasons, we vacate the Defendant's conviction and reverse the judgment of the trial court and remand for a new trial consistent with this opinion.

s/ ***Camille R. McMullen***

CAMILLE R. MCMULLEN, JUDGE