This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).

STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1052

State of Minnesota,
Respondent,

vs.

Michael Gene Johnson,
Appellant.

Filed May 15, 2017
Affirmed in part, reversed in part, and remanded
Cleary, Chief Judge

Swift County District Court
File No. 76-CR-15-386

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Danielle H. Olson, Swift County Attorney, Benson, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Cleary, Chief Judge; and Reilly, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

In this appeal from the judgment of conviction, appellant Michael Gene Johnson argues that the evidence was insufficient to prove that he committed the second-, third-, and fifth-degree controlled-substance offenses for which he was found guilty and asks this court to reverse. In the alternative, appellant requests that his case be remanded to the district court for resentencing in accordance with the 2016 Drug Sentencing Reform Act (DSRA). Although we reject appellant's arguments, we conclude that the district court erred by convicting appellant of a charge that was not tried. As a result, we affirm in part, reverse in part, and remand to the district court to amend the judgment of conviction.

FACTS

In the early morning of August 15, 2015, Officer McAlpin was patrolling in Swift County and observed a vehicle swerving within its lane. The vehicle crossed the center line, and its brake lights came on. Officer McAlpin activated his emergency lights to initiate a traffic stop. After stopping the vehicle, he approached it and observed four people: a male driver, a female passenger, and two children in the back seat.

Officer McAlpin asked appellant, who was driving the vehicle, for his name. Appellant responded Chris Johnson. After appellant stated that he did not have identification on him, Officer McAlpin asked him to write down his name. Appellant wrote his name as Christopher Gene Johnson and his date of birth as August 24, 1967, and stated that he had a North Dakota driver's license. Officer McAlpin observed that appellant had

droopy eyelids and slow, thick speech. Appellant stated that he was not drinking, and Officer McAlpin did not notice a smell of alcohol on appellant.

Officer McAlpin attempted to verify appellant's identity, but was unable to do so. He again asked appellant for his information. Appellant told him that his name was Christopher Gene Johnson, but gave a new date of birth of August 26, 1967.

Deputy Hoffman arrived to assist Officer McAlpin. While identifying the female passenger, Deputy Hoffman detected the odor of marijuana and observed small chunks of a green, leafy substance on the driver's seat. After he informed Officer McAlpin of his observations, Officer McAlpin spoke with the female passenger. He also smelled marijuana and observed the chunks of a green, leafy substance on the seat. The female passenger produced a driver's license and identified herself as S.S. When asked who the driver was, she responded that he was Chris Johnson.

Officer McAlpin received Christopher Gene Johnson's North Dakota driving record, which included addresses and descriptors of the person. At some point, Officer McAlpin asked appellant for his address, and the address provided did not match the address in the record. Officer McAlpin also noted that appellant's eye color did not match that reported in the record.

From his observations of appellant, Officer McAlpin suspected that he might be under the influence. Officer McAlpin conducted field sobriety tests, including a horizontal-gaze nystagmus test, lack-of-convergence test, walk-and-turn test, one-leg stand

test, and Romberg test.[1] During the horizontal-gaze nystagmus test, Officer McAlpin did not observe anything notable. During the lack-of-convergence test, he noted that appellant was unable to converge his eyes, indicating that appellant might be under the influence of a controlled substance. He concluded that appellant failed the walk-and-turn test because appellant broke the starting position, stepped off the line, missed heel to toe, and used his arms to balance. He observed that appellant swayed and experienced body tremors during the one-leg stand test, indicating that appellant might be impaired. Finally, he observed that appellant experienced body tremors during the Romberg test. After observing appellant's performance on the field sobriety tests, Officer McAlpin concluded that appellant was possibly under the influence of a central-nervous-system stimulant (CNS stimulant). Appellant's pulse rate was 138 beats per minute, also indicating that appellant might be under the influence of a CNS stimulant.

Officer McAlpin arrested appellant and put him in the back seat of his patrol car. During the course of the investigation, police learned that the vehicle belonged to S.S. and that the children in the backseat were appellant's children. Officer McAlpin requested that S.S. consent to a search of her vehicle, but she did not consent. While talking to S.S., Officer McAlpin saw appellant moving in the police car. When Officer McAlpin checked on appellant, appellant blurted out, "My name is Michael Gene Johnson. I have a warrant out in North Dakota. Leave my kids alone."

---

[1] A person who performs a Romberg test tilts his head back, closes his eyes, and guesses the passage of 30 seconds. Drug recognition evaluators use this test to determine if a person is under the influence.

Later that day, police secured a search warrant and searched S.S.'s vehicle. In the trunk area of the vehicle, police found a court document from North Dakota bearing appellant's name, a digital scale, and a bag with methamphetamine and marijuana pipes. On the floor of the front, passenger-side area, police found a scale. Police also took an eyeglass case from the passenger-side floorboard. Inside the eyeglass case, police found a bag containing approximately 3.574 grams of methamphetamine, a bag containing approximately 1.835 grams of methamphetamine, a methamphetamine smoking device, a scoop straw, and an oxycodone pill. In the center console, police found a Ziploc bag containing approximately 0.198 grams of methamphetamine, Ziploc bags of various sizes, and a scoop that field-tested positive for methamphetamine. On the rear, passenger-side floor of the vehicle, police found a black bag containing small Ziploc bags, a spoon with methamphetamine residue on it, a wallet with a casino card bearing appellant's name, and mail bearing appellant's name and S.S.'s name. Police also found seven cell phones in the vehicle.

Appellant was charged with multiple offenses relating to his conduct and the items found in S.S.'s vehicle. In January 2016, the state voluntarily withdrew count 5, and a jury trial commenced on the remaining charges. The jury found appellant guilty of: count 1 – second-degree sale of a controlled substance (possession with intent to sell three or more grams of methamphetamine); count 2 – third-degree possession of a controlled substance (methamphetamine); count 3 – storing methamphetamine paraphernalia in the presence of a child; count 4 – fifth-degree possession of a controlled substance (oxycodone); count 6 – child endangerment; count 7 – third-degree driving while under the influence of a

controlled substance (DWI); count 8 – giving a peace officer a false name; and count 9 – driving after suspension. The district court entered a judgment of conviction on each count of which appellant was found guilty,[2] and imposed sentences on counts 1, 7, and 8. Appellant now challenges the judgment of conviction.

DECISION

I. Sufficiency of the Evidence

Appellant first argues that the evidence produced at trial was insufficient to prove that he committed the second-, third-, and fifth-degree controlled-substance offenses of which he was found guilty. "A defendant bears a heavy burden to overturn a jury verdict." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001). When considering a claim of insufficient evidence, an appellate court reviews the record to determine whether the evidence, viewed in the light most favorable to the conviction, was sufficient to permit jurors to reach the verdict that they did. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). In this review, the appellate court assumes that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *Id.*

---

[2] The state asserts that the district court only entered convictions on counts 1, 7, and 8 and left the remaining counts unadjudicated. At the sentencing hearing, the district court stated that it would adjudicate appellant guilty of counts 1, 7, and 8 and retain the remaining counts. However, the warrant of commitment provides that appellant was convicted of counts 1, 2, 3, 4, 6, 7, 8, and 9.

Appellate courts "look to the official judgment of conviction in the district court file as conclusive evidence of whether an offense has been formally adjudicated." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quotation omitted). Because the warrant of commitment provides conclusive evidence of whether an offense has been adjudicated, the district court adjudicated appellant guilty of counts 1, 2, 3, 4, 6, 7, 8, and 9.

Appellant asserts that the evidence was insufficient to prove that he constructively possessed the methamphetamine and oxycodone pill found in the eyeglass case. The second-degree sale and third-degree possession statutes under which appellant was tried required the state to prove that appellant possessed at least three grams of methamphetamine. Minn. Stat. §§ 152.01, subd. 15a, .022, subd. 1(1), .023, subd. 2(a)(1) (2014). The fifth-degree possession statute under which appellant was tried required the state to prove that appellant unlawfully possessed a "controlled substance classified in Schedule I, II, III, or IV, except a small amount of marijuana." Minn. Stat. § 152.025, subd. 2(a)(1) (2014). The parties agree that this is a constructive-possession case. To prove constructive possession, the state was required to show:

> (a) that the police found the substance in a place under defendant's exclusive control to which other people did not normally have access, or (b) that, if police found it in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.

State v. Florine, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). The state was also required to prove that appellant had knowledge of the nature of the substance. *State v. Ali*, 775 N.W.2d 914, 918 (Minn. App. 2009), *review denied* (Minn. Feb. 16, 2010). Proof that appellant was aware that he possessed a controlled substance satisfies the actual-knowledge requirement. *Id.* at 919.

Here, the police found the eyeglass case, and the methamphetamine and oxycodone pill within it, on the passenger-side floorboard of the vehicle that appellant was driving. Because S.S. was with appellant in the vehicle, the methamphetamine and oxycodone pill

were not found in a place under appellant's exclusive control. The state was required to prove that there was a strong probability that appellant was consciously exercising dominion and control over the methamphetamine and oxycodone pill.

When the state's case rests largely or entirely on circumstantial evidence, a court must apply the circumstantial-evidence analysis described in *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013), and *State v. Al-Naseer*, 788 N.W.2d 469, 473-74 (Minn. 2010). *State v. Sam*, 859 N.W.2d 825, 831 (Minn. App. 2015). Because the state relied on circumstantial evidence to prove appellant's possession of the methamphetamine and oxycodone pill, we apply the circumstantial-evidence analysis here.

Under the circumstantial-evidence standard, appellate courts apply a two-step analysis. *Silvernail*, 831 N.W.2d at 598. First, we identify the circumstances proved at trial, deferring to the jury's acceptance of the proof of these circumstances and rejection of evidence that conflicted with the circumstances proved by the state. *Id.* at 598-99. Like with direct evidence, we construe the conflicting evidence in the light most favorable to the verdict and assume that the jury believed the state's witnesses and disbelieved the defense witnesses. *Id.* at 599. Stated differently, we consider only those circumstances that are consistent with the verdict. *Id.* "The second step is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted). In making this determination, we review the circumstantial evidence as a whole and give no deference to the fact-finder's choice between reasonable inferences. *Id.*; *Al-Naseer*, 788 N.W.2d at 474. The "[c]ircumstantial evidence must form a complete chain that, in view of the evidence as a

whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted). The state need not remove all doubt, but must remove all reasonable doubt. *Id.* We will not overturn a conviction based on mere conjecture. *Id.*

Appellant asserts that the state's only evidence of his constructive possession of the drugs was his presence in S.S.'s vehicle. He argues that the mere fact that he was driving the vehicle was insufficient to prove that he exercised dominion and control over the controlled substances found in the eyeglass case. Although Minn. Stat. § 152.028 (2014) permits an inference that a driver knowingly possesses everything in the vehicle, it does not negate other reasonable inferences. *Sam*, 859 N.W.2d at 832 n.4. However, the state did not rely solely on the fact that appellant drove S.S.'s vehicle, but instead presented additional evidence to prove appellant's guilt.

Construing the evidence in the light most favorable to the verdict and assuming that the jury believed the state's witnesses, the following circumstances were established. Appellant drove the vehicle while under the influence of a controlled substance. When police searched the vehicle, they found: (1) a digital scale, a bag with methamphetamine and marijuana pipes, and a court document from North Dakota bearing appellant's name in the trunk area; (2) a scale and an eyeglass case, which had within it one bag containing 3.574 grams of methamphetamine, one bag containing 1.835 grams of methamphetamine, an oxycodone pill, a methamphetamine smoking device, and a scoop straw, on the floor of the front, passenger-side area; (3) a Ziploc bag containing approximately 0.198 grams of methamphetamine, Ziploc bags of various sizes, and a scoop, which tested positive for

methamphetamine when a preliminary test was performed, in the center console; (4) a black bag containing small Ziploc bags, a spoon with methamphetamine residue on it, a wallet with a casino card bearing appellant's name, and mail bearing appellant's name and S.S.'s name on the rear, passenger-side floor; and (5) seven cell phones in the vehicle.

"Proximity is an important factor in establishing constructive possession." *State v. Porte*, 832 N.W.2d 303, 308 (Minn. App. 2013); *see State v. Cusick*, 387 N.W.2d 179, 180-81 (Minn. 1986) (concluding that the evidence was sufficient to establish defendant's constructive possession of cocaine, despite his girlfriend's testimony that it was hers, when the cocaine was found on the ground at a car crash, inches from defendant's wallet); *State v. Denison*, 607 N.W.2d 796, 800 (Minn. App. 2000) (explaining that the proximity of the drugs to defendant's personal effects supported the inference that defendant possessed the drugs), *review denied* (Minn. June 13, 2000). Here, police found methamphetamine paraphernalia in a black bag that contained mail and a casino card bearing appellant's name. Police also found methamphetamine paraphernalia near a document bearing appellant's name in the trunk area of the vehicle.

At trial, S.S. testified and disclaimed ownership of the items within the eyeglass case, the methamphetamine in the center console, the black bag on the rear, passenger-side floor, and the items within the bag in the trunk area of her vehicle. This court must assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *Silvernail*, 831 N.W.2d at 599; *Porte*, 832 N.W.2d at 309. We are not permitted to reweigh the evidence, but must instead defer to the jury's credibility assessments. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009); *Porte*, 832 N.W.2d at 308-09. As a result, we assume

that the jury credited S.S.'s testimony and believed that she did not own the items that she disclaimed.

Appellant argues that it can be reasonably inferred from the circumstances proved that he knowingly possessed the paraphernalia and used methamphetamine, but did not possess the methamphetamine in the eyeglass case. Considered as a whole, the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. Given S.S.'s testimony that she did not own the methamphetamine or oxycodone pill, the amount of drug paraphernalia in the vehicle, the proximity of appellant's belongings to such paraphernalia, and the fact that appellant drove the vehicle while under the influence of a controlled substance, the only reasonable inference to be drawn is that appellant knowingly possessed the methamphetamine and oxycodone pill in the vehicle. Because this court will not overturn a conviction based on mere conjecture or where possibilities of innocence are unreasonable, we conclude that the evidence was sufficient to establish that appellant knowingly possessed the methamphetamine and oxycodone found in S.S.'s vehicle.

II. Resentencing Under the DSRA

Appellant next asserts that he is entitled to be resentenced under the DSRA, which would reduce his sale-of-a-controlled-substance conviction from a second-degree offense to a third-degree offense. Appellant was found guilty of second-degree sale of a controlled substance in violation of Minn. Stat. § 152.022, subd. 1 (2014), for the sale of three or more grams of methamphetamine.

On May 22, 2016, the DSRA was signed into law. 2016 Minn. Laws ch. 160, at 576-592. On August 1, 2016, the sections of the DSRA under which appellant seeks to be resentenced became effective. 2016 Minn. Laws ch. 160, §§ 4-5, at 579-82. The DSRA amended Minn. Stat. § 152.022 by, inter alia, raising the threshold weight for second-degree sale of a controlled substance from three grams to ten grams, provided the offense does not involve a firearm or three aggravating factors. 2016 Minn. Laws ch. 160, § 4, at 579-80 (codified at Minn. Stat. § 152.022, subd. 1 (2016)). The parties agree that appellant's conduct would constitute third-degree sale of a controlled substance in violation of Minn. Stat. § 152.023, subd. 1 (2016), if the DSRA applied. *See* 2016 Minn. Laws ch. 160, § 5, at 581 (codified at Minn. Stat. § 152.023, subd. 1 (2016)) (defining third-degree sale to include the selling of one or more mixtures containing a narcotic drug).

To determine whether the DSRA applies to appellant's case, this court must interpret the DSRA. The interpretation of a statute is a question of law that appellate courts review de novo. *State v. Noggle*, 881 N.W.2d 545, 547 (Minn. 2016). The purpose of statutory interpretation is to ascertain and effect the legislature's intent. *State v. Leathers*, 799 N.W.2d 606, 608 (Minn. 2011).

The legislature has plainly stated that "[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." Minn. Stat. § 645.21 (2016). Relying on *State v. Coolidge*, 282 N.W.2d 511 (Minn. 1979), appellant argues that he is entitled to resentencing in accordance with the mitigated punishment provisions of the DSRA. In *Coolidge*, the supreme court held that a defendant, whose conviction was not final when a statute mitigating punishment took effect in 1977, should have been sentenced

under the 1977 statute, which repealed the law under which he was convicted and reduced the maximum sentence for his conduct. 282 N.W.2d at 514-15. The supreme court reasoned that "it would be harsh for defendant to receive a 10-year sentence in the spring of 1977, when the legislature was repealing the statute under which defendant was convicted and changed the maximum punishment for his act from 10 years to 1 year." *Id.* at 514. It noted that, under the common law, where a criminal law is repealed without a savings clause, all prosecutions are barred if not reduced to a final judgment. *Id.* The supreme court then held that "a statute mitigating punishment is applied to acts committed before its effective date, as long as no final judgment has been reached." *Id.*

Appellant argues that he is entitled to be resentenced under the DSRA because his judgment of conviction is not yet final. A judgment of conviction becomes final when the availability of appeal has been exhausted and the time for a petition for certiorari has elapsed or the petition has been denied. *Hutchinson v. State*, 679 N.W.2d 160, 162 (Minn. 2004). Because appellant's direct appeal from the judgment of conviction is now before us, the judgment is not yet final. We must determine whether appellant is entitled, under the supreme court's opinion in *Coolidge*, to be resentenced according to the DSRA.

In *Edstrom v. State*, 326 N.W.2d 10, 10 (Minn. 1982), the supreme court clarified when a statute mitigating punishment is to be applied to conduct committed before the mitigating statute's effective date. In *Edstrom*, the supreme court was asked to decide whether a statute that reduced the maximum sentence that could be imposed for a defendant's conduct applied where the defendant's conduct occurred before the ameliorative statute took effect. 326 N.W.2d at 10. The supreme court held that "a statute

mitigating punishment is to be applied to acts committed before its effective date, as long as no final judgment has been reached, *at least absent a contrary statement of intent by the legislature*." *Id.* (emphasis added). Because the legislature had clearly indicated its intent that the criminal-sexual-conduct statutes would not affect crimes committed before the effective date of the act, August 1, 1975, the supreme court declined to apply the new statute to reduce the defendant's sentence for conduct that occurred in March 1975. *Id.*

In circumstances similar to *Edstrom*, this court has declined to apply a statute to conduct that occurred before the statute took effect. In *State v. McDonnell*, this court was asked to determine whether a 2003 statutory amendment applied to appellants' conduct, which occurred before the amendment's effective date. 686 N.W.2d 841, 842-45 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004). Because the legislature explicitly stated that the amendment "is effective August 1, 2003, and applies to violations committed on or after that date," we concluded that the amendment did not apply to appellants' conduct. *Id.* at 846 (quoting 2003 Minn. Laws 1st Spec. Sess. ch. 2, art. 9, § 1, at 1446). Similarly, in *State v. Basal*, we were asked to determine whether a 2007 statutory amendment applied to conduct that occurred in September 2005 where the legislature expressly provided that the 2007 amendment would become effective January 1, 2008. 763 N.W.2d 328, 335-36 (Minn. App. 2009). We declined to apply the amendment, reasoning that the provision of a specific effective date indicated that the legislature did not intend for the amendment to apply to conduct occurring before that effective date. *Id.* at 336.

Here, the legislature indicated that the sections of the DSRA under which appellant seeks to reduce his sentence are applicable only to crimes committed on or after the act's

effective date. Specifically, the legislature stated that Minn. Stat. §§ 152.022-.023 (2016) are "effective August 1, 2016, and appl[y] to crimes committed on or after that date." 2016 Minn. Laws ch. 160, §§ 4-5, at 579-82. This statement clearly provides that the legislature did not intend for the amendments to apply to conduct occurring before August 1, 2016. For this reason, appellant is not entitled to resentencing under the DSRA.

III. Conviction upon a Charge Not Tried

Although neither party has raised the issue, we note that the district court erred by convicting appellant of second-degree possession of a controlled substance. Because this error is obvious from the record, we address it here. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) ("[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities." (quotation omitted)).

From our careful review of the record, we conclude that neither party objected to the error in convicting appellant of second-degree possession of a controlled substance. An appellate court may correct an unobjected-to error only if: "(1) there is error; (2) the error is plain; and (3) the error affects the defendant's substantial rights." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). If the first three prongs of the plain-error doctrine are met, an appellate court "may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Huber*, 877

N.W.2d 519, 522 (Minn. 2016) (alteration in original) (quotations omitted). Because neither party objected to the conviction, we review it for plain-error.[3]

Both the verdict form and the trial transcript reflect that the jury found appellant guilty of third-degree possession of a controlled substance under count 2. However, the warrant of commitment erroneously lists count 2 as second-degree possession of a controlled substance. Appellate courts look to the judgment of conviction as conclusive evidence of whether an offense has been formally adjudicated. *Spann*, 740 N.W.2d at 573; *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999). As a result of the error in the warrant of commitment, the district court convicted appellant of second-degree possession, a charge that was not tried to the jury. "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *Jackson v. Virginia*, 443 U.S. 307, 314, 99 S. Ct. 2781, 2786 (1979) (citing *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 517 (1948)). Relying on a verdict form that states that appellant is guilty of third-degree possession of a controlled substance to enter a conviction of second-degree possession of a controlled substance is error. Because it is well-settled that a court may not convict a defendant of a charge that was not tried, the error was plain.

---

[3] Generally, the plain-error doctrine has been applied to permit review of errors that were not objected to at trial. In *State v. Maurstad*, the supreme court concluded that the plain-error doctrine did not apply where a defendant failed to object to a sentencing error that rendered his sentence illegal under Minn. R. Crim. P. 27.03, subd. 9. 733 N.W.2d 141, 147-48 (Minn. 2007). However, the court considered that the plain-error doctrine might apply to other unobjected-to errors at sentencing. *See id.* at 148 n.5 (explaining that a sentencing error does not ipso facto result in a sentence not authorized by law and that the court's conclusion that a defendant may not forfeit review of his criminal-history score does not create a broad exception to the plain-error rule for sentencing errors). For this reason, we apply the plain-error doctrine here.

We must next determine whether the plain error affected appellant's substantial rights. An error affects substantial rights if it was prejudicial and affected the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). Here, the error affected the outcome of the case as it caused appellant to be convicted of a charge that was not tried.

Because the plain error affected appellant's substantial rights, we must determine whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. We are certain that convicting appellant of a charge that was not tried seriously affects the fairness, integrity, or public reputation of judicial proceedings. As a result, we reverse and remand to the district court to amend the judgment of conviction.[4]

Affirmed in part, reversed in part, and remanded.

---

[4] It also appears that the warrant of commitment erroneously listed count 7 as second-degree DWI rather than third-degree DWI. At trial, the district court instructed the jury on the elements of third-degree DWI. In its instruction, the district court correctly stated that the jury must find one aggravating factor present and that this required the jury to determine whether, at the time of the violation, there was a child in the vehicle under 16 years of age and more than 36 months younger than appellant. *See* Minn. Stat. §§ 169A.03, subd. 3, .26, subd. 1 (2014).

Count 7 of the verdict form asked the jury to determine two questions. First, the jury was asked to determine whether appellant was guilty of DWI in the third degree. The jury found appellant guilty. Second, the jury was asked to determine whether a child, who was under 16 years of age and more than 36 months younger than appellant, was in the vehicle at the time of the violation. The jury answered affirmatively. Following the reading of the verdict, the district court repeated the charges of which the jury found appellant guilty and stated that "the jury has returned a verdict for guilty of . . . Driving While Under the Influence of a Controlled Substance in the Third Degree."

However, count 7 of the warrant of commitment provides that appellant was convicted of second-degree DWI. Because it is clear from the record that the jury was properly instructed on the elements of third-degree DWI and found that all elements were satisfied, no new trial is necessary. On remand, the district court should correct this apparent error in the judgment of conviction.