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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-0715**

State of Minnesota,  
Respondent,

vs.

Kendra Joanne Shulman,  
Appellant.

**Filed April 30, 2018  
Affirmed  
Bratvold, Judge**

Ramsey County District Court  
File No. 62SU-CR-16-2683

Lori Swanson, Attorney General, St. Paul, Minnesota; and

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Joshua Esmay, The Legal Rights Center, Minneapolis, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Larkin, Judge; and Florey,  
Judge.

**UNPUBLISHED OPINION**

**BRATVOLD**, Judge

On appeal from her conviction for second-degree driving while impaired, appellant challenges the district court's denial of her pretrial suppression motion, arguing that the

district court's findings were clearly erroneous, the police lacked reasonable articulable suspicion that appellant was involved in criminal activity at the time of her seizure, and the district court failed to make findings essential to the conviction. We affirm.

## **FACTS**

At around 3:00 a.m. on July 23, 2016, New Brighton police officers DeBoer and Nordhus saw a vehicle parked in the entryway “through-lane” to an apartment complex parking lot. The officers were familiar with the apartment complex and knew that it was a residence for older individuals and individuals with disabilities. The officers saw four people and a parked vehicle—a man and a woman sitting on the curb and a second man standing next to a female, who was sitting inside the vehicle in the front passenger seat. Nordhus testified that he thought “something was wrong with the vehicle, they ran out of gas or something along those lines.” The officers pulled into the parking lot without activating the squad lights and parked behind the vehicle, but did not block it. Both officers testified that this was initially a “welfare check.”

Nordhus testified that he “ran the vehicle” before he exited the squad car and found that it was registered to appellant Kendra Joanne Shulman.<sup>1</sup> Both officers walked over to the group, and the male standing near the car began to walk away. The female in the passenger seat stated, without prompting, that the man walking away had a warrant.

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<sup>1</sup> The district court's order states that Nordhus ran the license plate while DeBoer was arresting the man with the outstanding warrant. Nordhus testified that he ran this check before exiting the squad car.

DeBoer followed the man and instructed Nordhus to stay with the others near the vehicle. DeBoer radioed for backup as he walked.

Nordhus approached Shulman and her two companions to check that “everything was okay” and “if their car was okay.” They responded that everything was fine. Nordhus testified that Shulman seemed intoxicated, stating Shulman was crying, “very emotional,” was not “very cooperative,” and that “you could tell with her demeanor and how she was standing and her mannerisms . . . [she] had consumed some alcoholic beverages.” Nordhus testified that he did not recall specifically asking Shulman her name or if she had been driving. Nordhus asked the group to “stay put until [the officers] figured out what was going on with the male that had walked away.” They complied.

Meanwhile, DeBoer had instructed the man to stop, which he did. Backup officers, Hyland and Kostohryz, arrived. Kostohryz joined DeBoer and they arrested the man for an outstanding warrant. Hyland joined Nordhus and “took over” the conversation with Shulman.

DeBoer returned to the group at the car. Hyland told DeBoer that he thought “they were impaired” and “that we may want to look into a possible DWI investigation.” DeBoer asked the group who was the driver, and Shulman responded that she was and that the car was hers. DeBoer testified that he “immediately” noticed “a strong odor of alcohol” coming from Shulman, her “emotions were up and down, all over,” “her eyes were watery and bloodshot,” and she “appeared intoxicated.” According to DeBoer, Shulman said that she did not feel safe with the police and “was afraid [they] were going to shoot her.” Shulman explained that they were on the way home from a club in Minneapolis, but “had gotten

lost” and “stopped to try to figure out where they were.” DeBoer asked Shulman if she had anything to drink since pulling over, and Shulman said no. Shulman told DeBoer that she had “a couple” of drinks at the club, but thought “she was fine to drive.” DeBoer had Shulman perform field sobriety tests, after which they took her into custody. At the station, Shulman took a breath test, which reported her alcohol concentration as 0.21.

The state charged Shulman with second-degree operation of a motor vehicle under the influence of alcohol in violation of Minn. Stat. § 169A.20, subd. 1(1) (2016) and second-degree operation of a motor vehicle with an alcohol concentration of 0.08 or more, within two hours of operating the vehicle in violation of Minn. Stat. § 169A.20, subd. 1(5).

Shulman filed a motion to suppress “any and all evidence” obtained as a result of the search and “all statements” made during the search. In support of her motion, Shulman argued that the evidence against her was obtained as the result of an unlawful seizure not supported by reasonable, articulable suspicion of wrongdoing. The state responded that Shulman was not seized, and therefore, the evidence was not unlawfully obtained. The court held a contested suppression hearing on October 18, 2016. The district court issued an order denying Shulman’s motion to suppress. The court determined that the officers initially conducted a welfare check and later seized Shulman based on reasonable suspicion that she was driving while impaired.

After the court denied her motion, Shulman waived her right to a jury trial and stipulated to the prosecution’s case under Minn. R. Crim. P. 26.01, subd. 4, to preserve appellate review of the pretrial suppression ruling. On February 7, 2017, the district court considered the stipulated evidence, found Shulman guilty of second-degree operation of a

motor vehicle with an alcohol concentration of 0.08 or more within two hours of operating a motor vehicle, and dismissed the other charge. The district court sentenced Shulman to 365 days, and stayed execution of 335 days for two years. This appeal follows.

## D E C I S I O N

### **I. The district court’s factual findings are supported by the record evidence.**

We will not reverse the district court’s factual findings unless the findings are clearly erroneous or contrary to law. *State v. Anderson*, 733 N.W.2d 128, 136 (Minn. 2007). Findings of fact are clearly erroneous only when the court is “left with a definite and firm conviction that a mistake has been committed.” *Jasper v. Comm’r of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002) (quotation omitted).

Shulman objects to the following finding from the district court’s order:

Office[r] Nordhus spoke to Ms. Shulman in particular because she was the registered owner of the vehicle and because she said she had been the one driving. Officer Nordhus noted an odor of an alcoholic beverage and bloodshot/watery eyes when speaking to Ms. Shulman. This provided reasonable suspicion that she had been operating a vehicle while under the influence of alcohol.

Shulman first argues that there is no evidence that Nordhus approached Shulman because he knew she had been driving and was the registered owner of the car. Shulman points out that Nordhus testified he did not recall asking Shulman her name or if she had been driving. But Nordhus testified that he checked the vehicle registration before he exited the squad car and he determined that the vehicle was registered to Shulman. While Nordhus also testified that he did not ask Shulman her name, she was one of two females at the vehicle. We discern no clear error in the court’s factual findings.

Next, Shulman argues that there was no evidence in the record that Nordhus “noted an odor of alcoholic beverage,” and that this observation was made by DeBoer five minutes later. Shulman argues that the district court conflated Nordhus’s testimony with statements that Shulman made in response to DeBoer’s questions. We are not persuaded. Nordhus testified that Shulman appeared intoxicated, and that he came to that conclusion because Shulman was “very emotional,” was not “very cooperative,” and that he “could tell with her demeanor and how she was standing and her mannerisms . . . [she] had consumed some alcoholic beverages.” DeBoer also testified that Hyland and Nordhus told him, before he questioned Shulman, that they thought Shulman appeared “impaired.”

It is true that the district court incorrectly stated that Nordhus noted “an odor of alcoholic beverage and bloodshot/watery eyes when speaking to Ms. Shulman.” Nordhus did not provide this testimony. But DeBoer did, and he stated that he made these observations “immediately” upon speaking with Shulman. Thus, the district court’s determination that DeBoer detected indicia of intoxication before he questioned Shulman was supported by record evidence. Because the district court had an adequate basis for the findings necessary to its legal conclusions, its findings of fact are not clearly erroneous. *See State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012) (providing that if there is “reasonable evidence” to support the district court’s findings, this court will not disturb them).

## **II. The district court did not err in denying Shulman’s suppression motion.**

Shulman argues that the district court erred in concluding that the stop began as a “welfare check” and that, alternatively, even if the stop began as a welfare check, it progressed to an unconstitutional seizure unsupported by reasonable suspicion.

“When reviewing pretrial orders on motions to suppress evidence, [this court] may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence.” *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). Appellate courts review the district court’s findings of fact under a clearly erroneous standard, but review its legal determinations de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). Deference must be given to the district court’s credibility determinations. *See State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989) (stating that “[t]he weight and credibility of the testimony of individual witnesses” is for the fact-finder to determine).

### **A. The district court correctly determined that the interaction began as a welfare check.**

The district court found that the officers “were authorized to pull over in the parking lot, exit their squad, perform a welfare check and ask what was going on.” Shulman argues that the officers did not complete a “bona fide” welfare check, and the interaction was investigatory.

Both the United States and Minnesota Constitutions guarantee individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Not all contacts between police and a citizen constitute a seizure. *In re Welfare*

of *E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993). “[C]ourts generally have held that it does not by itself constitute a seizure for an officer to simply walk up and talk to a person standing in a public place or to a driver sitting in an already stopped car.” *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980); *see also State v. Klamar*, 823 N.W.2d 687, 692-93 (Minn. App. 2012) (concluding that trooper’s approach of already-stopped vehicle to check welfare of occupants was not a seizure).

The district court’s finding that the officers initially approached Shulman to do a welfare check is supported by the record and is not clearly erroneous. The officers did not activate emergency lights, nor did they block in the vehicle. No weapons were drawn, and the officers approached Shulman and her companions on foot. Both officers testified this was a welfare check and Nordhus specifically stated that: “Well, my initial thoughts were that something was wrong with the vehicle. I mean, if you—if you see people outside of a vehicle, sitting next to the vehicle, you would—I assume that something was wrong with the vehicle, they ran out of gas or something along those lines.” The officers were entitled to approach the parked car in the apartment’s through-lane to check the welfare of its occupants and to offer help if necessary. *See Kozak v. Comm’r of Pub. Safety*, 359 N.W.2d 625, 628 (Minn. App. 1984) (stating that “an officer has not only the right but a duty to make a reasonable investigation of vehicles parked along roadways to offer such assistance as might be needed and to inquire into the physical condition of persons in vehicles”).

Shulman emphasizes that DeBoer testified he thought the car’s presence was “strange or suspicious,” which Shulman argues supports her contention that the officers’ claim of a welfare check is “pretextual.” We are not persuaded. The test is an objective one

from the standpoint of the reasonable person. *Klamar*, 823 N.W.2d at 693. The officers' conduct was consistent with a welfare check. Nordhus's questions to Shulman were about the vehicle, he did not ask for her or her companions' names or identification. This court defers to the district court's credibility determinations and the district court clearly credited the officer's testimony that this was a welfare check. *See Moore*, 438 N.W.2d at 108.

**B. The district court correctly determined that the seizure was supported by reasonable suspicion.**

Shulman argues that the interaction progressed to a seizure unsupported by reasonable articulable suspicion and the fruits of the unconstitutional seizure, including her statements and the results of her breath test, should have been suppressed. *See Harris*, 590 N.W.2d at 97 ("If [defendant] was seized at any point before the police officers had reasonable articulable suspicion to seize him, then he was illegally seized and any evidence gathered thereafter must be suppressed.").

Under Minnesota law, a person is seized only if, given the totality of the circumstances, a reasonable person in that situation would not feel free to terminate the encounter. *Harris*, 590 N.W.2d at 98. Circumstances that might indicate a seizure include the threatening presence of several officers, an officer's display of a weapon, an officer's physical touching of the person, or the officer's use of language or tone of voice indicating that compliance might be compelled. *Id.* (citing *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 1877 (1980)). In the absence of some affirmative display of authority, "otherwise inoffensive contact between a member of the public and the police

cannot, as a matter of law, amount to a seizure of that person.” *Harris*, 590 N.W.2d at 98 (quoting *Mendenhall*, 446 U.S. at 554-55, 100 S. Ct. at 1877).

Shulman contends she was seized when the officers “commanded her companion to stop, called for backup, directed Nordhus to stay with Ms. Shulman, and Nordhus directed Ms. Shulman to ‘stay put.’” Alternatively, Shulman contends that she was seized when the two back up officers arrived and questioned her. Shulman also argues that she was “clearly seized for Fourth Amendment purposes” when DeBoer began to ask “investigatory questions,” expanding the scope of the interaction.

We conclude that Shulman was seized when Nordhus requested that the group “stay put.” The directive from a uniformed officer to “stay put” was a seizure, because at that point most reasonable people would “not have[] felt free to terminate the encounter.” *Harris*, 590 N.W.2d at 104; *see also E.D.J.*, 502 N.W.2d at 783 (“[T]here clearly was a “seizure” once the police directed [the defendant] to stop.”). This directive extended beyond “the mere act of approaching a person who is standing on a public street or sitting in a car that is parked and asking questions,” and resulted in a situation where a reasonable person would not have believed that they were free to terminate the encounter. *See id.* at 782.

Having determined that Shulman was seized when Nordhus directed her to “stay put,” we next consider whether the seizure was constitutionally reasonable. A law enforcement officer may conduct a brief investigatory detention of a person if the officer has a reasonable, articulable suspicion that the person might be engaged in criminal activity. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (citing *Terry v. Ohio*, 392

U.S. 1, 19-21, 88 S. Ct. 1868, 1879-81 (1968)). Reasonable, articulable suspicion exists if “the police officer [is] able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. Reasonable suspicion requires “something more than an unarticulated hunch”; “the officer must be able to point to something that objectively supports the suspicion at issue.” *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quotation omitted); *see also Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880. The reasonable-suspicion standard is not high, *Diede*, 795 N.W.2d at 843, and an actual violation of the law is not necessary. *State v. Haataja*, 611 N.W.2d 353, 354 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. July 25, 2000).

Here, we conclude that Nordhus had reasonable suspicion of criminal activity when he directed Shulman to “stay put.” Nordhus initially approached the group near the parked car for a welfare check. Before exiting the squad car, he “ran the vehicle” and determined that Shulman was the registered owner of the parked car. Nordhus testified that Shulman “appear[ed] intoxicated” immediately upon approaching her, as soon as he began asking her about the car. Nordhus also testified that he asked the group to “stay put” after he learned that the man walking away had a warrant. The totality of these circumstances supports a reasonable, articulable suspicion that Shulman had been driving the car that was registered to her while intoxicated. Thus, Nordhus had a lawful basis to seize Shulman for investigatory purposes.

We agree with Shulman that DeBoer expanded the scope of the investigatory seizure when he began to question Shulman about the consumption of alcohol.<sup>2</sup> “[T]he scope of a [seizure] must be strictly tied to and justified by the circumstances that rendered the initiation of the investigation permissible.” *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). The expansion of the interaction must be justified by a reasonable, articulable suspicion of additional criminal activity. *Id.* When DeBoer asked who was the driver, Shulman immediately responded. DeBoer smelled the odor of alcohol “immediately” upon speaking with Shulman, saw her bloodshot and watery eyes, and observed behavior consistent with intoxication. Only after making these observations did DeBoer ask Shulman about alcohol consumption. Based on the totality of the circumstances, DeBoer had reasonable, articulable suspicion to expand the scope of the inquiry and question Shulman.

This case is strikingly similar to *State v. Klamer*, where we upheld a traffic stop that began as a welfare check and expanded its scope to investigate possible intoxicated driving. 823 N.W.2d 687, 690 (Minn. App. 2012). *Klamer* held that an odor of alcohol and an

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<sup>2</sup> Before oral argument, Shulman filed a letter citing supplemental authority, pursuant to Minn. R. Civ. App. P. 128.05, asking this court to consider *State v. Salo* in support of her contention that DeBoer improperly expanded the scope of the stop, resulting in an impermissible seizure. *See State v. Salo*, No. A17-1296, 2018 WL 700259, at \*2-4 (Minn. App. Jan. 30, 2018). First, unpublished opinions are not precedent. *See Minn. Stat. § 480A.08*, subd. 3(b) (2016) (stating that “[u]npublished opinions of the Court of Appeals are not precedential”); *State v. Ellis-Strong*, 899 N.W.2d 531, 537 (Minn. App. 2017). Second, *Salo* is inapposite, because based on the record, this court determined that the officer was operating on an “unreasonable hunch” when he expanded the scope of the stop. *Id.* at \*2. Here, however, two officers informed DeBoer that Shulman appeared intoxicated and they should look into a “DWI investigation.” Moreover, as discussed above, DeBoer observed indicia of intoxication before he questioned Shulman.

observation of bloodshot and watery eyes, establish reasonable suspicion justifying an officer's expansion of a stop. *Id.* at 696. We conclude that the officers had reasonable suspicion to suspect that Shulman had driven while impaired, ask her to stay put, and then inquire further as additional observations confirmed indicia of intoxication. Therefore, Shulman was not unconstitutionally seized and we affirm the district court's denial of Shulman's suppression motion.

**III. The district court did not err by failing to make findings of fact on essential elements of the charged offense.**

Shulman's case proceeded under Minnesota Rule of Criminal Procedure 26.01, subd. 4. "This rule allows a criminal defendant to plead not guilty; waive all trial-related rights, including his or her right to a jury trial; stipulate to the state's evidence in a trial to the court; and then appeal a dispositive, pretrial ruling." *State v. Myhre*, 875 N.W.2d 799, 802 (Minn. 2016) (citing Minn. R. Crim. P. 26.01, subd. 4). Specifically, the rule provides that "[a]fter consideration of the stipulated evidence, the court must make an appropriate finding, and if that finding is guilty, the court must also make findings of fact on the record or in writing as to each element of the offense." Minn. R. Crim. P. 26.01, subd. 4(h).

Shulman argues that the rule 26.01 proceeding was defective because the district court failed to make factual findings sufficient to support its finding of guilt. Shulman did not object to the proceeding, and an appellate court generally will not consider errors that were not objected to in district court. *See Myhre*, 875 N.W.2d at 804. But an appellate court may review an unobjected-to error under plain-error analysis, and the supreme court recently held "that plain error analysis applies to unobjected-to errors committed under

Rule 26.01, subdivision 4.” *Id.* at 805-06. “In order to meet the plain error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant’s substantial rights.” *Id.* at 804. “If the first three prongs are satisfied, [the appellate court] must consider a fourth factor, whether [the court] should address the error to ensure fairness and the integrity of the judicial proceedings.” *Id.* at 804-05 (quotation omitted).

Shulman was convicted of second-degree driving while impaired. Specifically, Shulman was convicted under Minn. Stat. § 169A.20, subd. 1(5), which provides that it is a crime to operate a motor vehicle when “the person’s alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of the motor vehicle is 0.08 or more.” This offense requires the state to establish that defendant drove, operated, or physically controlled a motor vehicle within the state, and that defendant’s alcohol concentration was 0.08 or more at the time, or within two hours of the time, the defendant drove, operated, or physically controlled the motor vehicle. *See State v. Tanksley*, 809 N.W.2d 706, 709 (Minn. 2012).<sup>3</sup>

In Shulman’s case, the district court made limited oral findings:

I make a finding that each element of this offense has been met,  
including that Ms. Shulman was driving, that there was an

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<sup>3</sup> In addition, for an individual to be convicted of second-degree driving while impaired, two aggravating factors must be present. *See* Minn. Stat. § 169A.25, subd. 1(a) (2016). Here the district court found two aggravating factors: “that there was an appropriate blood alcohol test that resulted in a .21,” and “that there is a prior alcohol revocation from July 25th of 2010.” *See* Minn. Stat. § 169A.03, subd. 3(2) (listing as “[a]ggravating factors” a qualified prior impaired driving incident within ten years and having an alcohol concentration of 0.16 or more).

appropriate blood alcohol test that resulted in a .21, and that there is a prior alcohol revocation from July 25th of 2010, making this a second degree gross misdemeanor-level offense.

We agree with Shulman that the district court erred because it did not explicitly find that Shulman was “measured” within two hours of the time she operated the vehicle and did not find that her act took place within this state. Next, because rule 26.01, subdivision 4(h), explicitly requires the district court to “make findings of fact on the record or in writing as to each element of the offense,” the error is plain. *See State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014) (providing that error is plain if it is clear or obvious in that “it contravenes case law, a rule, or a standard of conduct” (quotation omitted)).

The third prong of the plain-error analysis considers whether the error affected Shulman’s substantial rights. An error affects substantial rights if “the error was prejudicial and affected the outcome of the case.” *Id.* (quotation omitted). An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the proceeding. *Id.* Here, the error did not affect Shulman’s substantial rights. The parties’ filed a stipulation, bearing Shulman’s signature that states:

[Shulman] stipulates to evidence that [] she told police officers that just prior to their arrival, she had been driving her motor vehicle in the City of New Brighton, Ramsey County. She also stipulates to evidence that following her arrest, and within 2 hours of driving her motor vehicle, she was given a Datamaster breath test and found to have a blood alcohol content of 0.21.

Given this signed stipulation, and because the district court found on the record that “each element of this offense ha[d] been met,” we conclude that the error did not affect Shulman’s substantial rights.

Because Shulman cannot show prejudice to her substantial rights, she is not entitled to relief based on this error.

**Affirmed.**