

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1863**

State of Minnesota,
Respondent,

vs.

Gregory Maurice Oats, Jr.,
Appellant.

**Filed January 26, 2026
Affirmed in part, reversed in part, and remanded
Larkin, Judge
Dissenting, Larson, Judge**

Ramsey County District Court
File No. 62-CR-21-2620

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant
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Considered and decided by Reyes, Presiding Judge; Larkin, Judge; and Larson,
Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his convictions of first- and third-degree criminal sexual
conduct, arguing that they are the product of a double-jeopardy violation and that the

district court abused its discretion in an evidentiary ruling. He also challenges his sentence, arguing that the district court abused its discretion by denying his request for a continuance and by imposing a lifetime conditional-release term. We affirm appellant's conviction, but we reverse and remand to vacate the lifetime conditional-release term.

FACTS

Respondent State of Minnesota charged appellant Gregory Maurice Oats, Sr.¹ with first- and third-degree criminal sexual conduct, alleging that he sexually penetrated the victim, E.H., on numerous occasions from 2009 to 2011, when she was under the age of sixteen, and from 2011 to 2013 when she was sixteen and seventeen years old. The case was tried to a jury. Oats was represented by court-appointed counsel before trial. And he had court-appointed co-counsel at trial. One of the attorneys was referred to as lead counsel.

Before trial, Oats moved the district court to exclude photographs and screenshots of text messages between Oats and the victim (the photographs). The district court denied the motion as it pertained to 12 of the 18 challenged photographs.

During the prosecution's opening statement at trial, defense counsel interrupted and requested a bench conference. After that conference, the district court excused the jury. Next, the district court judge informed the attorneys that she had just realized that three years earlier, she handled prior cases involving the victim and Oats. After a recess—during

¹ The amended complaint identifies Oats as "Gregory Maurice Oats, Jr." However, Oats's attorney informed the district court that Oats's correct title is "Senior," and not "Junior." Although we use "Sr." here, we do not change the case caption. *See* Minn. R. Civ. App. P. 143.01 (directing that the title of the action not be changed on appeal).

which Oats conferred with counsel regarding the possibility of the judge's recusal—Oats's attorney informed the district court that Oats wanted the judge to recuse. The district court judge agreed that she should recuse. The judge told the parties that she was going to “let the jury go” and require the parties to schedule a new trial-management conference. The district court and the parties selected a date approximately two months later for the new trial-management conference.

Prior to that conference, which was before a newly assigned district court judge, Oats moved the district court to dismiss the charges on double-jeopardy grounds. The district court denied that motion, reasoning that Oats “precipitated” and consented to the mistrial.

The second jury found Oats guilty of first- and third-degree criminal sexual conduct. A day before the scheduled sentencing hearing, Oats's lead counsel requested a continuance and did not appear for sentencing as scheduled, due to a medical condition. But co-counsel was present. The district court denied a continuance, reasoning that lead counsel and co-counsel had sufficient time to prepare a sentencing argument, that co-counsel had participated in the trial of the case, and that co-counsel “was in an excellent position” to advocate for Oats. Co-counsel argued for a downward dispositional departure.

The district court entered judgments of conviction for first- and third-degree criminal sexual conduct and sentenced Oats to serve two consecutive prison terms. The district court also ordered a ten-year conditional-release term for the first-degree offense and a lifetime conditional-release term for the third-degree offense.

Oats appeals.

DECISION

I.

Oats contends that the district court erred by denying his motion to dismiss the charges on double-jeopardy grounds. The United States and Minnesota Constitutions prohibit putting a person in jeopardy twice for the same offense. U.S. Const. amend. V; Minn. Const. art. I, § 7. “[T]he constitutional prohibition against trying a defendant twice for the same offense is fundamental, a sine qua non of American and Minnesota due process standards.” *State v. Olson*, 609 N.W.2d 293, 303 (Minn. App. 2000), *rev. denied* (Minn. July 25, 2000).

Generally, jeopardy attaches once a jury is impaneled and sworn. *State v. McDonald*, 215 N.W.2d 607, 609 (Minn. 1974). When a mistrial has been declared before a verdict, “the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the double jeopardy clause bars retrial.” *State v. White*, 369 N.W.2d 301, 304 (Minn. App. 1985) (citing *Illinois v. Somerville*, 410 U.S. 458, 467 (1973)), *rev. denied* (Minn. Aug. 20, 1985). Even after the jury is impaneled, the district court may, in some circumstances, abort the proceedings and retry the defendant without violating double-jeopardy. *White*, 369 N.W.2d at 304.

The standards used to determine whether a defendant may be retried after a trial ends in a mistrial are as follows:

If a mistrial is declared with the defendant’s consent, he is deemed to have waived any double jeopardy claim he might otherwise have. If, on the other hand, the defendant wishes to proceed to a verdict by the jury and the court declares a mistrial over the defendant’s objection, the double jeopardy clause will

bar retrial unless the mistrial was dictated by “manifest necessity” or the “ends of public justice.” The only circumstance in which the defendant’s consent to a mistrial does not operate as a waiver of the right to claim double jeopardy is where the prosecutor or the judge intentionally provokes the defendant to request the mistrial.

Id. (citations omitted).

A defendant’s consent to a mistrial need not be express; it may be implied from the totality of the circumstances. *Id.* Although a failure to object to a mistrial may not, in and of itself, constitute consent, it is a factor to be considered. *Id.* Caselaw establishes that defense counsel can impliedly waive a defendant’s objection to a mistrial by remaining silent when the district court announces its decision to release a sworn jury after trial has commenced and by agreeing to the setting of a new trial date.

For example, in *White*, we concluded that defense counsel impliedly consented to a mistrial, reasoning that

defense counsel was given an adequate opportunity to make his position known, but he failed to say anything indicating he wished to proceed with the trial. The record shows he understood that the trial court and the prosecutor intended a retrial. His responses appear calculated to encourage the trial court to grant a mistrial, without making his consent express. Under these circumstances the only reasonable conclusion is that defense counsel impliedly consented to the mistrial.

369 N.W.2d at 304 (citation omitted).

And in *State v. Hunter*, we affirmed the district court’s finding that the defense counsel consented to a mistrial.² 815 N.W.2d 518, 522 (Minn. App. 2012). In doing so, we relied on *White* stating:

When defense counsel has adequate opportunity to state a position on a mistrial but fails to assert that the defendant wants to continue with trial, and when the record shows that defense counsel understood that the district court and prosecutor intended a retrial, the only reasonable conclusion is that defense counsel impliedly consented to the mistrial.

Id. (quotation omitted). We noted that “Hunter’s attorney never objected to the declaration of a mistrial, never tried to dissuade the court from declaring a mistrial, and never proffered or advocated for any other alternative.” *Id.*

We now turn to the alleged double-jeopardy violation in this case, which we review de novo. *State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999). Whether or not Oats consented to a mistrial—through his counsel—is a factual determination, which we review for clear error. *Hunter*, 815 N.W.2d at 522.

The relevant facts in this case are similar to those in *White* and *Hunter*. Oats’s jury trial began in March 2024. During the prosecutor’s opening statement, the district court judge realized that she had previously presided over other matters involving the victim and Oats. The district court excused the jury, and the judge explained her involvement in the

² On appeal to this court, Hunter argued that “the right to consent or object to a mistrial lies personally with the defendant.” *Hunter*, 815 N.W.2d at 522. Because that issue was raised for the first time on appeal, we declined to address it. *Id.* Oats has not raised that issue in this case. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (recognizing that “the accused has the ultimate authority to make certain fundamental decisions regarding the case,” including “whether to plead guilty, waive a jury, [or] testify in his or her own behalf”).

victim's prior cases to the parties. The judge told the parties that after she presided over the victim's adoption of her sister's children, "we realized there was a missing signature, and I took the certificate to her apartment, which at that time, I believe was in Shoreview right off of County Road E, and . . . I took the adoption certificate there, had her sign it." The judge also said that she presided over the child-protection and termination of parental rights cases involving the victim's child. Oats was the alleged father of that child.

After receiving this information, the state indicated that it was willing to proceed with the trial, but defense counsel stated, "I am processing the information still." The district court granted a recess. After the recess, the following exchange occurred:

[THE COURT:] So off the record we also agreed at this point to terminate – not terminate the trial, but just end the day now, give me time to confer with the Board of Judicial Standards and determine whether I am compelled to recuse. At this point, if any party is asking me to recuse, I'll do it.

[LEAD DEFENSE COUNSEL:] We are, Judge. That's what I was –

THE COURT: That wasn't clear to me.

[LEAD DEFENSE COUNSEL:] Okay. That was our conversation, is that, given the nature of adoption cases . . . in speaking with Mr. Oats, and we talked about it for a while, I think he just – he doesn't feel comfortable with it. *And so we are asking Your Honor to recuse.*

THE COURT: I am recusing. I completely understand that. *I will let the jury go, and before these parties leave, let's set this on for the next trial management conference date, please.*

(Emphasis added).

Next, the district court and the parties selected a date in May 2024 for a trial-management conference. Prior to that conference, Oats moved the district court to dismiss the charges against him on double-jeopardy grounds. The district court denied that motion reasoning:

Here, the mistrial was precipitated by the defendant. The defendant asked the Judge to recuse herself. That precipitated the mistrial. No conduct by the State had anything to do with the mistrial. And, in fact, the State requested that [the] Judge [] continue. When [the] Judge [] recused, page five of the transcript makes it clear that she immediately declared a mistrial. At no time did the defendant request the invocation of Rule 26.03, subdivision 14, or any other remedy. There was no objection. The lack of objection constitutes consent.

See Minn. R. Crim P. 26.03, subd. 14 (1) (“If a judge is unable to preside over pretrial or trial proceedings due to death, illness, or other disability, any other judge in the district, once familiar with the record, may finish the proceedings or trial.”). The district court summed up its position as follows: “The defense got exactly what the defense asked for. If the defense objected to the mistrial, the defense had an obligation to state that objection.”

The circumstances here are similar to those in *White*. The record shows that defense counsel understood that the district court and the prosecutor intended to proceed with a new trial, before a different judge, with a different jury, and at a later date—as indicated by defense counsel’s agreement to set a trial-management conference to be held months after the district court judge announced that she would recuse herself from the case and excuse the jury. Yet, defense counsel did not say or do anything to indicate that Oats wanted to proceed with the trial immediately, instead of excusing the jury. As we noted in *White*, “[u]ntil the jury was actually excused, the court might have reconsidered its

intention to declare a mistrial.” 369 N.W.2d at 304 (quotation omitted). *White* supports the district court’s finding of implied consent in this case.

As to *Hunter*, although the district court in this case did not use the word “mistrial,” there could be no other conclusion given the judge’s statement that she was going to recuse herself from the case as Oats had requested, “let the jury go,” and require the parties to schedule a new trial-management conference before a different judge.³ Defense counsel did not object to that procedure and did not proffer or advocate for any other alternative. As we said in *Hunter*, “the only reasonable conclusion is that defense counsel impliedly consented to the mistrial.” 815 N.W.2d at 522 (quoting *White*, 369 N.W.2d at 304).

Oats asserts that he did not consent to a mistrial and that he requested only that the first trial judge recuse herself. But the case on which Oats relies, *Olson*, is readily distinguishable. 609 N.W.2d at 293. In *Olson*, we held that a “*pro se* defendant who is not given opportunity to object or to consult with standby counsel, does not impliedly consent to a prosecutor’s request for a mistrial merely by failing to object.” *Id.* at 296 (emphasis added). *Olson* is distinguishable on its face because Olson was unrepresented at trial, whereas Oats had court-appointed co-counsel. In addition, unlike Olson, Oats had an opportunity to confer with counsel regarding the possibility of recusal and to state his position on that issue *before* the district court announced its decision to recuse, to “let the jury go,” and to schedule a new trial-management conference before a new judge.

³ A mistrial occurs when a “judge brings [a trial] to an end without a determination on the merits because of a procedural error or serious misconduct occurring during the proceedings.” *Black’s Law Dictionary* 1198 (12th ed. 2024).

Moreover, *Olson* involved sensitive right-to-counsel concerns that are not at issue here. As we explained:

Olson was not given the opportunity to object to the mistrial or to confer with his standby counsel on this issue. Immediately after the prosecutor's request for a mistrial, the district court stated, "Well, I agree that I should declare a mistrial, and will do so. . . . So a mistrial is declared and it's at the instance of the Defendant and his conduct." *Olson, at this point appearing pro se, was not even given the opportunity to object. He was not given the opportunity to confer with standby counsel. The record shows no attempt by the district court or the prosecutor to insure that appellant had the time or the opportunity to confer with standby counsel [], and the record is devoid of any inference that . . . [Olson's] standby counsel, even impliedly consented to the mistrial. The record shows only that [the] public defender [] straightforwardly, and with professional decorum, stood his ground and pointed out the alleged impropriety of his initial appointment and the failure to ever formally certify [Olson] as indigent and entitled to a public defender at the taxpayers' expense. . . .*

As a layman, Olson could not possibly have understood the import of failing to object to the prosecutor's request for a mistrial. He likely assumed that he was better off with a mistrial so he could get time to talk to an attorney because the record shows that the district court and the prosecutor implied to Olson that this mistrial was in the form of a continuance to help Olson with trial preparation. Olson had absolutely no idea that a district court judge might not be able to declare a mistrial after the jury had been sworn and guarantee the state the right to a second prosecution without his consent.

As noted, Olson did not have the chance to confer with standby counsel, who, at least, would have informed him of the consequences of consenting to a mistrial. Olson was never given the opportunity to make an informed decision whether to object to the prosecutor's mistrial request. Under the circumstances, Olson was effectively denied the chance to meaningfully challenge the prosecutor's request for a mistrial.

Id. at 300 (Emphasis added).

We further emphasized that our decision was based on the facts that Olson was without legal representation and was not given an opportunity to confer with standby counsel regarding the mistrial motion noting:

At oral argument, the state argued that somehow Olson must have affirmatively consented to the mistrial because, “Well, Olson certainly knew there was going to be another trial.” Our only response can be, “So what.” *The fact that Olson was told there was going to be another trial only means that a pro se defendant was told by a sitting judge that there was going to be another trial.* All Olson could do at that point was assume that there would be one because the judge said so. *That is far, far less than being told the serious implication of a mid-trial mistrial and being told exactly what his consent would mean, and being told he could make up his mind to consent, or not, after a reasonable time to confer with an attorney. None of that was done.* Thus, Olson’s “knowing” that there was going to be a second trial is nowhere near the equivalent of “assuming” that he waived his constitutional right not to be tried twice for the same offense.

. . . .

In this sensitive framework, where the district court was trying to do the right thing for a pro se defendant, Olson had to have been given a full opportunity to address the propriety of a mistrial, especially in light of the fact that Olson’s consent would likely be a waiver of the defense of double jeopardy. . . .

We conclude that, under these circumstances, Olson did not impliedly consent to the mistrial by failing to object to the prosecutor’s request for a mistrial.

Id. at 301-02 (emphasis added).

The circumstances in this case are nothing like those in *Olson*, and they do not present a comparable “sensitive framework.” This is not a case in which a *pro se defendant* was without the benefit of legal advice when the state requested a mistrial. Oats had been represented by court-appointed counsel throughout the proceeding. In fact, his lead

counsel began representing him in June 2022, and the mistrial occurred nearly two years later in March 2024. Oats and his counsel were able to discuss the district court’s warning that recusal may be necessary, and the record does not suggest that counsel was in any way prevented from voicing an objection to the district court’s expressly stated intent to “let the jury go” and schedule a new trial-management conference, that is, to grant a mistrial.

And although the district court may have incorrectly stated that Oats’s “lack of objection constitutes consent,” we do not read that statement in isolation. Given defense counsel’s failure to object and willingness to participate in the scheduling of a new trial-management conference to be held two months later before a new judge, “the only reasonable conclusion is that defense counsel impliedly consented to the mistrial.” *White*, 369 N.W.2d at 304. Thus, the district court did not clearly err by finding that Oats impliedly consented to a mistrial, and a retrial was not barred on double-jeopardy grounds.

II.

Oats contends that the district court abused its discretion by admitting the photographs of text messages between Oats and the victim, arguing that its ruling violated the best-evidence rule.

“Evidentiary rulings rest within the sound discretion of the district court, and we will not reverse an evidentiary ruling absent a clear abuse of discretion.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted). Oats bears the

burden to establish that the district court abused its discretion and that he was prejudiced as a result. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Under Minn. R. Evid. 1002, an original writing, recording, or photograph is generally required to prove its contents. But other evidence of the contents of a writing, recording, or photograph is admissible if “[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.” Minn. R. Evid. 1004(1). If the original is not produced, the jury is entrusted to determine, as a question of fact, whether the secondary evidence correctly reflects the contents of the original. Minn. R. Evid. 1008 1977 comm. cmt.

In this case, the victim testified that she no longer had the cell phone that contained the original text messages, and there is no evidence that the victim destroyed the phone or the original text messages in bad faith. As to the photographs of the text messages, the district court noted that Oats and the victim were “the only two individuals who were engaged in the communication through these texts.” The victim authenticated the photographs during her testimony, specifically agreeing when the state asked her if they were accurate reproductions. Under these circumstances, we discern no abuse of discretion in the district court’s decision to admit the photographs and to allow the jury to determine whether they correctly depicted the original text messages. In sum, the district court acted within its discretion in ruling that the photographs were admissible.

III.

Oats contends that the district court abused its discretion by denying his request for a continuance and sentencing him even though his lead co-counsel was unavailable for the sentencing.

We review a district court's denial of a continuance request for an abuse of discretion. *State v. Courtney*, 696 N.W.2d 73, 81 (Minn. 2005). In determining whether to grant a continuance request, the district court considers the facts and circumstances surrounding the request. *State v. Fagerstrom*, 176 N.W.2d 261, 264 (Minn. 1970); *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998). "The reviewing court must examine the circumstances before the [district] court at the time the motion was made to determine whether the [district] court's decision prejudiced [the] defendant by materially affecting the outcome of the trial." *State v. Turnipseed*, 297 N.W.2d 308, 311 (Minn. 1980).

On appeal, Oats claims the district court's denial of his continuance request implicated his constitutional right to counsel by depriving him of "his right to be represented by the attorney with whom he had a meaningful attorney-client relationship." He argues that his lead counsel was the "attorney of record" and the one with whom he had developed an "attorney-client relationship." He also argues that the district court's decision was arbitrary because it focused on the victim's availability to make her victim-impact statement.

"[T]he right of an indigent defendant to court-appointed defense counsel is not an unbridled right to be represented by counsel of [the defendant's] choosing." *State v. Munt*, 831 N.W.2d 569, 586 (Minn. 2013) (quotation omitted). And we are not persuaded that

lead counsel's absence from the sentencing hearing materially affected the district court's sentencing decisions. As the district court reasoned, it was "rather clear" that Oats was "extremely well represented" by counsel at the sentencing hearing, "who obviously came here extremely well prepared and did a fair amount of independent research." Indeed, Oats has not explained how lead counsel's presence or representation at the sentencing hearing would have prompted a different outcome. And he has not identified any resulting prejudice that materially affected the outcome of the sentencing hearing. *See State v. Vance*, 254 N.W.2d 353, 359 (Minn. 1977) (finding no abuse of discretion because the defendant was "provided with a competent and able public defender who had thoroughly investigated the facts and was prepared for trial"); *Worthy*, 583 N.W.2d at 278 (concluding the [district] court did not abuse its discretion in the denial of a continuance because "both court-appointed attorneys were experienced, competent, and prepared to try the case.").

In sum, the district court did not abuse its discretion by denying Oats's request to continue the sentencing hearing.

IV.

Finally, Oats contends that the district court improperly imposed a lifetime conditional-release term because he does not have a prior sex-offense conviction. Whether a sentence conforms to the requirements of a statute is a question of law that we review de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

A person convicted of third-degree criminal sexual conduct is subject to a ten-year conditional-release term. Minn. Stat. § 609.3455, subd. 6 (2010). But if "the offender has

a previous or prior sex offense conviction,” the offender is subject to a lifetime conditional-release term. Minn. Stat. § 609.3455, subd. 7(b) (2010).

In imposing a lifetime conditional-release term for Oats’s third-degree criminal-sexual-conduct conviction, the district court treated the companion first-degree criminal-sexual-conduct conviction as a prior sex-offense conviction. Oats argues that he did not have a prior sex-offense conviction for the purposes of Minn. Stat. § 609.3455, subd. 7(b), because the district court simultaneously convicted him of the first- and third-degree criminal-sexual-conduct offenses.

A prior sex-offense conviction does not result for the purposes of Minn. Stat. § 609.3455, subd. 7(b), “[w]hen an offender is convicted simultaneously of multiple sex offenses in the same hearing.” *State v. Brown*, 937 N.W.2d 146, 151 (Minn. App. 2019). That is what happened in this case. At sentencing, the district court stated: “I now convict and adjudicate you guilty of the following two felony offenses: First-Degree Criminal Sexual Conduct and Third-Degree Criminal Sexual Conduct.”

Because Oats did not have any criminal-sexual-conduct convictions before the sentencing hearing and the district court simultaneously convicted him of both criminal-sexual-conduct offenses, the district court improperly imposed a lifetime conditional-release term. Accordingly, we reverse the imposition of the lifetime conditional-release term and remand for the district court to vacate that term.

Affirmed in part, reversed in part, and remanded.

LARSON, Judge (dissenting)

I respectfully dissent from the majority’s decision that Oats’s retrial did not violate his double-jeopardy rights. Both the United States and Minnesota Constitutions guarantee that a criminal defendant will not be put in jeopardy twice for the same offense. U.S. Const. amend. V; Minn. Const. art. 1, § 7.¹ This guarantee has its origins in “Greek and Roman times” and was well-established in our common law “long before this Nation’s independence.” *Benton v. Maryland*, 395 U.S. 784, 795 (1969). At the heart of the guarantee, and “one that is deeply ingrained” in our jurisprudential system, “is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense.” *United States v. Scott*, 437 U.S. 82, 87 (1978) (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)). To do so subjects the individual “to embarrassment, expense and ordeal and compel[s] [them] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent [they] may be found guilty.” *Id.* (quoting *Green*, 355 U.S. at 187-88).

“Jeopardy generally attaches when a jury is impaneled and sworn.” *Lerma*, 25 N.W.3d at 46. “This is so because the prohibition of the double jeopardy clause is . . . ‘against being twice put in jeopardy.’” *State v. McDonald*, 215 N.W.2d 607, 609 (Minn. 1974) (quoting *Ball v. United States*, 163 U.S. 662, 669 (1896)). But there are circumstances where “even after the jury has been impaneled and sworn . . . the [district]

¹ Oats does not argue that the double-jeopardy standard under the Minnesota Constitution differs from the United States Constitution, and the Minnesota Supreme Court has not resolved this question. *See State v. Lerma*, 25 N.W.3d 40, 46 n.5 (Minn. 2025). Therefore, this dissent assumes the same legal standard applies under both constitutional provisions.

court may abort the proceedings and retry the defendant without violating the double jeopardy clause.” *Id.* at 609. When a district court declares a mistrial, “the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.” *State v. Long*, 562 N.W.2d 292, 296 (Minn. 1997) (quoting *Illinois v. Somerville*, 410 U.S. 458, 467 (1973)).

Whether double jeopardy bars retrial after a district court declares a mistrial “depends on whether the defendant consented or objected to the mistrial.” *Lerma*, 25 N.W.3d at 46. If the defendant consents, either expressly or impliedly, the defendant is deemed to have waived double-jeopardy protections. *State v. White*, 369 N.W.2d 301, 304 (Minn. App. 1985), *rev. denied* (Minn. Aug. 20, 1985). But if the district court declares a mistrial without the defendant’s consent, a retrial can only occur if there was a “manifest necessity” for terminating the first trial. *Long*, 562 N.W.2d at 296.

Here, the majority concludes that Oats impliedly consented to a mistrial by looking at the totality of the circumstances. *See White*, 369 N.W.2d at 304 (noting the totality-of-the-circumstances standard when reviewing whether a defendant consented to a mistrial). But in the context of a proceeding in which the district court abruptly dismissed the jury and no one—not the judge, prosecutor, or defense counsel—uttered the word “mistrial,” I respectfully disagree that we can infer that Oats consented to being tried twice for the same offense.

First, we have explicitly held that a failure to object to a mistrial “*alone is not consent.*” *State v. Hunter*, 815 N.W.2d 518, 522 (Minn. App. 2012) (emphasis added); *see also State v. Olson*, 609 N.W.2d 293, 300 (Minn. App. 2000) (“[T]he failure to object to a

mistrial may not, standing alone, constitute consent. It is simply a factor to be considered.” (citation omitted)), *rev. denied* (Minn. July 25, 2000). And we have applied this legal principle both when the defendant was represented by counsel and self-represented. *See Hunter*, 815 N.W.2d at 522 (defendant represented by counsel); *Olson*, 609 N.W.2d at 300 (defendant self-represented). Thus, while we may consider the failure of Oats’s counsel to object in determining whether Oats impliedly consented to a mistrial, standing alone this fact is insufficient.²

Second, the majority asserts that there are other circumstances indicating that Oats impliedly consented to a mistrial, namely: (1) Oats was represented by counsel; (2) Oats asked the district court judge to recuse, which precipitated the mistrial; (3) Oats’s counsel could have objected “[u]ntil the jury was actually excused,” *White*, 369 N.W.2d at 304 (quotation omitted); and (4) Oats’s counsel participated in scheduling another trial-management conference. As to whether these facts show—in the totality of the circumstances—that Oats impliedly consented to a mistrial, the Supreme Court’s decision in *United States v. Jorn* is instructive. 400 U.S. 470 (1971).

In *Jorn*, the defendant was charged with preparing fraudulent tax returns. *Id.* at 472. The government intended to call five taxpayers for whom the defendant had prepared returns. *Id.* At defense counsel’s urging, and prior to direct examination, the district court warned the first taxpayer of his constitutional rights. *Id.* at 472-73. This led the district court to conclude that none of the five taxpayers had been provided adequate constitutional

² Notably, the district court’s decision to deny Oats’s motion to dismiss was premised on the improper legal conclusion that “[t]he lack of objection constitutes consent.”

warnings. *Id.* at 473. The district court “proceeded to discharge the jury; he then called all the taxpayers into court, and informed them of their constitutional rights and of the considerable dangers of unwittingly making damaging admissions in these factual circumstances. Finally, he aborted the trial so the witnesses could consult with attorneys.” *Id.* After the matter “was set for retrial . . . but on pretrial motion by the defendant,” the district court dismissed the case on the ground that a second prosecution would violate the double-jeopardy clause. *Id.* On appeal from that decision, the Supreme Court agreed with the district court. With respect to the lack of objection, the Supreme Court concluded:

It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so.

Id. at 487. Thus, the Supreme Court concluded that the double-jeopardy clause barred the second prosecution even though the defendant was represented by counsel, it was at defense counsel’s urging that the district court questioned the first taxpayer (precipitating the mistrial declaration), defense counsel failed to object (even in the intermediate time before the trial was “aborted”), and, ostensibly, defense counsel participated in setting the retrial date.

The same is true here. While Oats’s counsel asked for recusal, did not object in the intervening time before the jury was excused, and participated in setting a new trial-management conference date, the record plainly shows the district court made an abrupt decision to abort the proceedings without asking either party their position, considering the

constitutional implications for Oats, and actually uttering the word “mistrial.” This is “nowhere near the equivalent of ‘assuming’” that Oats understood that he was waiving his constitutional right not to be tried twice for the same offense. *See Olson*, 609 N.W.2d at 301.

The majority also relies on our prior opinions in *White* and *Hunter* to conclude the totality of the circumstances demonstrate that Oats impliedly consented to a mistrial. But both are readily distinguishable. In both cases, conversations about a mistrial occurred *before* the district court declared a mistrial. In *White*, following a mistrial motion from the prosecution, the parties had an extensive discussion on the record, including the district court directly asking defense counsel, “Do I have a right to do it?” and defense counsel responding, “Sure you do.” 369 N.W.2d at 302. We reasoned that the defendant impliedly consented to the mistrial because “defense counsel was given an adequate opportunity to make his position known [before the district court made its decision], but he failed to say anything indicating he wished to proceed with the trial.” *Id.* at 304. In *Hunter*, defense counsel refused to take a position about mistrial. 815 N.W.2d at 522. On the record, “[t]he district court described its in-chambers discussion with counsel” that occurred *before* the district court made its decision as “extensive.” *Id.* The district court noted that defense counsel did not object to a mistrial during that conversation, “never tried to dissuade the court from declaring a mistrial,” and “never proffered or advocated for any other alternative.” *Id.* Under these circumstances, we agreed with the district court that the defendant impliedly consented to a mistrial. *Id.*

Here, unlike *White* or *Hunter*, the district court did not give Oats any opportunity to make his position known about a mistrial before it dismissed the jury. In fact, the conversation between the district court and counsel related exclusively to the judge's *recusal*—not to the fate of the trial proceedings themselves. And nothing in the record indicates that the parties agreed that a recusal was equivalent to—or would necessarily result in—a mistrial. Thus, neither *White* nor *Hunter* is controlling.

In sum, we are faced with a situation where the district court ordered a mistrial abruptly, without uttering the word “mistrial,” and without allowing the parties any opportunity to state their position before it made its decision. Under such circumstances, we cannot fairly infer that Oats understood he was waiving his constitutional right not to be tried twice for the same offense. Therefore, I would conclude the district court declared a mistrial without Oats's consent.

The question, therefore, remains whether a “manifest necessity” existed that allowed the district court to declare a mistrial without Oats's consent. *See Long*, 562 N.W.2d at 296. “A high degree of necessity—not absolute necessity—must exist before a mistrial is appropriate.” *Id.* “Although Minnesota appellate courts have not established ‘clear-cut guidelines as to what constitutes manifest necessity,’ on review, one consideration is ‘whether the court adequately assessed less drastic alternatives.’” *State v. Roeschelein*, 776 N.W.2d 480, 484 (Minn. App. 2009) (quoting *Long*, 562 N.W.2d at 296). “We also examine whether the district court gave ‘careful consideration to the defendant's interest in having the trial concluded in a single proceeding.’” *Id.* (quoting *Long*, 562 N.W.2d at 296).

On this issue, our decision in *Roeschelein* controls the outcome. There, “[t]he record [did] not reflect that the [district] court considered the possibility of remedies short of mistrial to address its concerns about the trial, nor did the [district] court ask counsel for suggestions about addressing its concerns.” *Id.* at 485. We concluded that the absence of a record demonstrating that the district court even *considered* alternatives was dispositive—even if, as a factual matter “no less drastic alternatives to a mistrial would have been effective.” *Id.*

Here, as Oats notes, there was a viable alternative to a mistrial the district court could have considered. Under Minn. R. Crim. P. 26.03, subd. 14(7),

If a judge is unavailable for any reason under this rule [including “recusal”], the chief judge of the judicial district must assign another judge within the district to hear the matter. If no other judge in the district is available, the chief judge must notify the chief justice. The chief justice must assign a judge of another district to preside over the matter.

Rather than explore this alternative or consider the constitutional implications for Oats, the district court summarily declared a mistrial without making any findings bearing on the manifest necessity to do so. Our caselaw is clear; “we cannot conclude that a mistrial was manifestly necessary when the defendant did not consent to a mistrial and the district court did not consider less drastic alternatives.” *Roeschelein*, 776 N.W.2d at 485. And reversal of the conviction on double-jeopardy grounds is the consequence for failing to consider less-drastring alternatives. *Id.*

The protection against being twice put in jeopardy is “deeply ingrained” in our jurisprudential system and cannot easily be set aside. *See Scott*, 437 U.S. at 87 (quoting

Green, 355 U.S. at 187). Because Oats did not consent to a mistrial and the district court failed to provide a record to show a mistrial was manifestly necessary, I would conclude the second prosecution in this case violated the double-jeopardy clause.