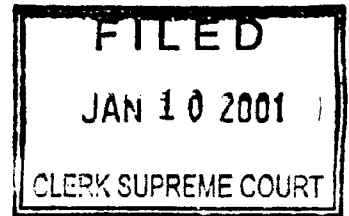


IN THE COURT OF APPEALS OF IOWA

No. 0-698 / 99-1064
Filed January 10, 2001



STATE OF IOWA,
Appellee,

vs.

GLEN MUZINGO,
Appellant.

Appeal from the Iowa District Court for Linn County, Lynne E. Brady,
Judge.

The defendant appeals the district court's denial of his motion for
correction of sentence. **AFFIRMED.**

Glen Muzingo, Fort Madison, pro se.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, Denver D. Dillard, County Attorney, and Russell G. Keast, Assistant
County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Miller, JJ.

VOGEL, J.

Glen Muzingo appeals the district court's denial of his motion for correction of sentence. Because we find Muzingo failed to properly preserve error on this issue, we affirm.

Background facts. Muzingo was convicted of attempted murder, first-degree arson, and willful injury in April 1991. The underlying incident involved Muzingo leaving an explosive device in his estranged wife's vehicle, which exploded and caused her serious injury. Muzingo's convictions were affirmed on appeal in October 1992. On May 7, 1999, Muzingo filed a motion for correction of sentence, raising a double jeopardy claim regarding his 1991 sentencing. The trial court overruled this motion and Muzingo now appeals.

Scope of review. When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. *Rinehart v. State*, 234 N.W.2d 649, 658 (Iowa 1975); *State v. Jeffries*, 417 N.W.2d 237, 239 (Iowa App. 1987).

Error preservation. Muzingo raises a double jeopardy claim for the first time in his motion for correction of sentence. Error, however, has not been preserved on this issue as he did not raise it before the district court at the time of his trial or on direct appeal. See generally *Bailey v. State*, 493 N.W.2d 419 (Iowa App. 1992).

Double jeopardy. Even if we were to find error had been preserved, Muzingo's issues on appeal would fail on the merits. He claims attempted

murder and willful injury are lesser included offenses of first degree arson. If it is possible to commit one crime without committing another, each offense is separate and not a lesser-included offense of the other. *State v. Taylor*, 596 N.W.2d 55, 57 (Iowa 1999). While there may be some common elements of proof between the three charges Muzingo was convicted of, none is a lesser included offense of another because each contained some distinct elements not included in the other charges. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932). Applying the legal elements test noted in *State v. Schmitz*, 610 N.W.2d 514, 516 (Iowa 2000), we agree with the State that neither attempted murder nor willful injury is a lesser included offense of first-degree arson.

Muzingo further contends the consecutive sentences ordered for the three convictions violate double jeopardy protections because they stem from a single act. Although all three convictions arose from Muzingo's single act of placing an explosive device in his estranged wife's car, his conduct violated three separately proscribed acts and, hence, are punishable as separate evils. *State v. Butler*, 415 N.W.2d 634, 637 (Iowa 1987). When the legislature provides separate punishment for each crime, there is no double jeopardy violation. *Id.*

Accordingly, we affirm.

AFFIRMED.