

NO. 34316-9-II  
Clark County No. 05-1-01922-1

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**MIRASLAV SHUGANI**

**Appellant.**

---

**BRIEF OF APPELLANT**

---

ANNE CRUSER/WSBA #27944  
Attorney for Appellant

P. O. Box 1670  
Kalama, WA 98625  
360 - 673-4941

FILED  
COURT RECORDS  
CLERK  
05 SEP -8 AM 11:35  
STATE OF WASHINGTON  
BY SP 0  
DENTY

PM 9/5/06

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR..... 1

    1. MR. SHUGANI’S WAIVER OF HIS RIGHT TO A JURY TRIAL WAS NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE. .... 1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR..... 1

    1. MR. SHUGANI’S WAIVER OF HIS RIGHT TO A JURY TRIAL WAS NOT KNOWING, VOLUNTARILY, AND INTELLIGENTLY MADE AND HE IS ENTITLED TO A NEW TRIAL..... 1

C. STATEMENT OF THE CASE..... 1

    1. PROCEDURAL HISTORY ..... 1

    2. FACTUAL HISTORY..... 1

D. ARGUMENT..... 5

    1. MR. SHUGANI’S WAIVER OF HIS RIGHT TO A JURY TRIAL WAS NOT KNOWING, VOLUNTARILY, AND INTELLIGENTLY MADE AND HE IS ENTITLED TO A NEW TRIAL..... 5

E. CONCLUSION..... 9

**TABLE OF AUTHORITIES**

**Cases**

*Bellevue v. Acrey*, 103 Wn.2d 203, 691 P.2d 957 (1984)..... 7  
*In re James*, 96 Wn.2d 847, 640 P.2d 18 (1982) ..... 7  
*Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938) ..... 8  
*Seattle v. Crumrine*, 98 Wn.2d 62, 653 P.2d 605 (1982)..... 7  
*State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994)..... 7, 8  
*United States Ex.Rel. Negron v. New York*, 434 F.2d 386 (1970) ..... 9, 10

**Statutes**

RCW 2.43.010 ..... 8  
RCW 2.43.030 ..... 3, 5, 8  
RCW 2.43.060 (1)..... 6  
RCW 2.43.080 ..... 9, 10  
RCW 9A.40.090..... 1

**Constitutional Provisions**

Washington State Constitution Article 1, Section 21 ..... 7

**A. ASSIGNMENT OF ERROR**

**1. MR. SHUGANI'S WAIVER OF HIS RIGHT TO A JURY TRIAL WAS NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE.**

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

**1. MR. SHUGANI'S WAIVER OF HIS RIGHT TO A JURY TRIAL WAS NOT KNOWING, VOLUNTARILY, AND INTELLIGENTLY MADE AND HE IS ENTITLED TO A NEW TRIAL.**

**C. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY**

The Clark County Prosecuting Attorney charged the Appellant, Miraslav Shugani, by Amended Information with the charge of Luring contrary to RCW 9A.40.090. CP 6-7. Mr. Shugani was convicted following a bench trial of one count of Luring. CP 10, RP 125. Mr. Shugani was given a standard range sentence. CP 14. This timely appeal followed. CP 24-25.

**2. FACTUAL HISTORY**

Mr. Shugani speaks Russian as a first language. RP 18. He is not a United States citizen and, at the time of trial, had been in the United States for four years. RP 89. A Russian interpreter assisted Mr. Shugani at his arraignment. RP 18. At the trial readiness hearing on January 5<sup>th</sup>, 2005, the clerk of the court advised the court this case was an “interpreter

matter,” however the interpreter was never identified or sworn-in. RP 7-10. No mention was made of whether this interpreter was a certified interpreter. RP 7-10. At this hearing defense counsel advised the court: “We are electing to have a bench trial rather than a jury trial. We’ve gone over that with Mr. Shugani in some detail. We’re executing a written waiver for the Court...” RP 7. The Report of Proceedings was not clear on whom defense counsel was referring to when he said “we’ve,” and the written waiver contained no interpreter declaration or any other indication that the form had been read to Mr. Shugani by a certified interpreter in the Russian language. CP 29, RP 7-10.

The written waiver executed utilized the form for waiver of the right to a speedy trial, with the word “jury” substituted in for the word “speedy” in three places. CP 29. The court gave a lengthy speech on the record to Mr. Shugani advising him of the nature of the right to a trial by jury and explaining to him the difference between trial to a jury and trial by a judge. RP 9-10. The court concluded by asking Mr. Shugani “Do you wish to have a trial before a jury or before a judge?” RP 9-10. Mr. Shugani, speaking through the unidentified, un-sworn interpreter, replied “Before a judge.” RP 10. The court asked “Has anyone threatened you or promised you a reward to make you choose a judge instead of a jury?” RP

10. Mr. Shugani replied “No.” RP 10. The court accepted the waiver.  
RP 10.

The bench trial commenced on January 10<sup>th</sup>, 2005. At the commencement of the proceedings, the court swore in the interpreter, as required by RCW 2.43.050. The interpreter was not identified for the record and the record contains no indication of whether he or she was a certified interpreter as required by RCW 2.43.030.

Defense counsel advised the court, after the Prosecutor’s opening statement but before the State called its first witness, that he believed it was not necessary for Mr. Shugani to have the assistance of the interpreter throughout the trial. RP 18. Defense counsel noted that he had met and spoken with Mr. Shugani both with and without an interpreter. RP 18. He stated that at a prior hearing he believed an interpreter was not necessary, however “then we got into court and the understanding seemed to have broken down at that point. So I’ve been conscientious since then to use an interpreter as much as possible.” RP 18-19. He then told the court that the interpreter would be needed only for “standby” purposes. RP 19. Mr. Shugani did not execute a written waiver of his right to an interpreter. Clerk’s Papers, Report of Proceedings. The court asked Mr. Shugani “Mr. Shugani, are you able to understand the proceedings at this time?” Mr.

Shugani replied “Yes.” RP 19. The court then elected to proceed with the interpreter on standby. RP 19.

When Mr. Shugani testified during the trial, he spoke through the interpreter. RP 88. The testimony at trial established that ten year-old A.C. was walking alone through Bagley Park in Vancouver, Washington. RP 30. She was walking home from a meeting at her school. RP 29. Mr. Shugani and another young man were situated in the woods near the bridge that A.C. was walking on, when one of them whistled at her. RP 33. After the whistle, one of the young men said words to the effect “Come here, sweetie. We’ll make sure you have fun with us in the forest and we’ll make sure you have a good time.” RP 33. A.C. testified that the location of the young men would be an effective place to hide away from someone, such as if one were playing hide and seek. RP 36. Neither of these two young men was known to A.C. RP 41. A.C. identified one of the young men as Mr. Shugani. RP 33. A.C.’s reported the incident to her brother, who subsequently called 911. RP 43.

Neither Mr. Shugani nor the other young man had the permission of A.C.’s mother to take her, or be with her, in a secluded location. RP 57. Mr. Shugani conceded, during his testimony, that he and the other young man were in a location that was obscured from the public. RP 92. They had chosen that location because they were unlawfully consuming alcohol.

RP 92. Mr. Shugani denied that he or the other young man attempted to lure or entice A.C. into the woods. Mr. Shugani testified that the other young man threatened to kill A.C. because A.C. saw them drinking and threatened to call the police. RP 93-94. Mr. Shugani testified he was talking on his cell phone during this exchange. RP 94. The court found Mr. Shugani guilty of Luring.

**D. ARGUMENT**

**1. MR. SHUGANI'S WAIVER OF HIS RIGHT TO A JURY TRIAL WAS NOT KNOWING, VOLUNTARILY, AND INTELLIGENTLY MADE AND HE IS ENTITLED TO A NEW TRIAL.**

RCW 2.43.030 (1) provides that **“Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings.”** RCW 2.43.050 provides that **“Before beginning to interpret, every interpreter appointed under this chapter shall take an oath affirming that the interpreter will make a true interpretation to the person being examined of all the proceedings in a language which the person understands, and that the interpreter will repeat the statements of the person being examined to the court or agency conducting the**

**proceedings, in the English language, to the best of the interpreter's skill and judgment." RCW 2.43.060 (1) provides that: "The right to a qualified interpreter may not be waived except when: (a) A non-English-speaking person requests a waiver; and (b) The appointing authority determines on the record that the waiver has been made knowingly, voluntarily, and intelligently."**

When Mr. Shugani appeared for a trial readiness hearing on January 5<sup>th</sup>, 2005, he was evidently assisted by an interpreter but the interpreter was never sworn-in as required by RCW 2.43.050. At this trial readiness hearing, Mr. Shugani executed a written waiver of his right to a jury trial utilizing a form intended for waiving the right to a speedy trial. Although defense counsel told the court "we've" reviewed the form with Mr. Shugani, he did not indicate to whom he was referring. Although it might be a reasonable inference that he was referring to the un-sworn interpreter, that is not clear from the record.

Article 1, Section 21 of the Washington State Constitution guarantees that an accused shall enjoy the right to a trial by jury. Constitutional rights may only be waived by knowing, intelligent, and voluntary acts. *State v. Stegall*, 124 Wn.2d 719, 724, 881 P.2d 979 (1994); *Bellevue v. Acrey*, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). "The burden of proving the waiver of a constitutional right rests with the

State, not the defendant.” *Stegall* at 730, citing *In re James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982); *Seattle v. Crumrine*, 98 Wn.2d 62, 65, 653 P.2d 605 (1982). “The validity of any waiver of a constitutional right, as well as the inquiry required by the court to establish waiver, will depend on the circumstances of each case, including the defendant’s experience and capabilities.” *Stegall* at 725, citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019 (1938).

Here, Mr. Shugani waived his constitutional right to a jury trial without the benefit of a sworn, certified interpreter. The State cannot meet its burden of proving to this court that Mr. Shugani’s waiver of his right to a jury trial was knowing, intelligently, and voluntarily made where there is no record that the interpreter was certified as required by RCW 2.43.030 (1), or even qualified as contemplated by RCW 2.43.030 (2), and no oath was ever administered to the interpreter as required by RCW 2.43.050.

The trial court failed to comply with RCW 2.43.050 by failing to administer the oath to the interpreter assisting Mr. Shugani, and this error cannot be considered harmless. RCW 2.43.010 states: “It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal

proceedings unless qualified interpreters are available to assist them.”

Pursuant to that statutory mandate, RCW 2.43.050 requires: “Before beginning to interpret, every interpreter appointed under this chapter shall take an oath affirming that the interpreter will make a true interpretation to the person being examined of all the proceedings in a language which the person understands, and that the interpreter will repeat the statements of the person being examined to the court or agency conducting the proceedings, in the English language, to the best of the interpreter’s skill and judgment.” Further, RCW 2.43.080 provides that all interpreters serving in a legal proceeding shall abide by the code of ethics established by Supreme Court rule.

It has been held that the right to an interpreter for a non-English speaking person is constitutional in nature. In *United States Ex. Rel. Negron v. New York*, 434 F.2d 386 (1970), the Second Circuit held that the right to an interpreter for a non-English speaking defendant is as fundamental as the right to confront adverse witnesses, as guaranteed by the Sixth Amendment, and the right to consult with one’s attorney. The Court analogized the right to an interpreter with the right to be present at one’s own trial. *Negron* at 389. In *Negron*, the defendant had been provided an interpreter sporadically throughout the proceedings, and rather than make a true interpretation, the interpreter simply summarized

the testimony of the witnesses. Moreover, the Court held that the defendant's "passive acquiescence" to this arrangement could not be deemed a waiver on his part of his fundamental right to an interpreter. *Negron* at 390.

Here, no oath was given as strictly required by RCW 2.43.050. Additionally, there is nothing in the record about whether the interpreter was certified as required, or whether he was familiar with the ethical obligations of an interpreter as established by Supreme Court rule, as required by RCW 2.43.080. The requirement to take an oath should not be regarded as a disposable formality; it is no less important than the oath taken by a witness as a condition of giving testimony in a legal proceeding. Further, we cannot discern whether the interpreter was certified or familiar with the ethical obligations of an interpreter. What we can discern is that the interpreter was never administered the required oath. Because of the wholesale non-compliance by the Court of the clear requirements of RCW 2.43, the State cannot meet its burden of proof, upon review before this court, that Mr. Shugani knowingly, intelligently, and voluntarily waived his right to a jury trial at the January 5<sup>th</sup>, 2005 readiness hearing. Mr. Shugani is entitled to a new trial.

**E. CONCLUSION**

Mr. Shugani's conviction should be reversed and his case  
remanded for a new trial.

RESPECTFULLY SUBMITTED THIS 5<sup>th</sup> day of September, 2006.

  
\_\_\_\_\_  
ANNE M. CRUSER, WSBA# 27944  
Attorney for Mr. Shugani

## **APPENDIX**

### **1. § 2.43.010. Legislative intent**

It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

It is the intent of the legislature in the passage of this chapter to provide for the use and procedure for the appointment of such interpreters. Nothing in chapter 358, Laws of 1989 abridges the parties' rights or obligations under other statutes or court rules or other law.

### **2. § 2.43.030. Appointment of interpreter**

(1) Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings.

(a) Except as otherwise provided for in (b) of this subsection, the interpreter appointed shall be a qualified interpreter.

(b) Beginning on July 1, 1990, when a non-English-speaking person is a party to a legal proceeding, or is subpoenaed or summoned by an appointing authority or is otherwise compelled by an appointing authority to appear at a legal proceeding, the appointing authority shall use the services of only those language interpreters who have been certified by the administrative office of the courts, unless good cause is found and noted on the record by the appointing authority. For purposes of chapter 358, Laws of 1989, "good cause" includes but is not limited to a determination that:

(i) Given the totality of the circumstances, including the nature of the proceeding and the potential penalty or consequences involved, the services of a certified interpreter are not reasonably available to the appointing authority; or

(ii) The current list of certified interpreters maintained by the administrative office of the courts does not include an interpreter certified in the language spoken by the non-English-speaking person.

(c) Except as otherwise provided in this section, when a non-English-speaking person is involved in a legal proceeding, the appointing authority shall appoint a qualified interpreter.

(2) If good cause is found for using an interpreter who is not certified or if a qualified interpreter is appointed, the appointing authority shall make a preliminary determination, on the basis of testimony or stated needs of the non-English-speaking person, that the proposed interpreter is able to interpret accurately all communications to and from such person in that particular proceeding. The appointing authority shall satisfy itself on the record that the proposed interpreter:

(a) Is capable of communicating effectively with the court or agency and the person for whom the interpreter would interpret; and

(b) Has read, understands, and will abide by the code of ethics for language interpreters established by court rules.

**3. § 2.43.050. Oath**

Before beginning to interpret, every interpreter appointed under this chapter shall take an oath affirming that the interpreter will make a true interpretation to the person being examined of all the proceedings in a language which the person understands, and that the interpreter will repeat the statements of the person being examined to the court or agency conducting the proceedings, in the English language, to the best of the interpreter's skill and judgment.

**4. § 2.43.060. Waiver of right to interpreter**

(1) The right to a qualified interpreter may not be waived except when:

(a) A non-English-speaking person requests a waiver; and

(b) The appointing authority determines on the record that the waiver has been made knowingly, voluntarily, and intelligently.

(2) Waiver of a qualified interpreter may be set aside and an interpreter appointed, in the discretion of the appointing authority, at any time during the proceedings.

**5. § 2.43.080. Code of ethics**

All language interpreters serving in a legal proceeding, whether or not certified or qualified, shall abide by a code of ethics established by supreme court rule.

**6. § 9A.40.090. Luring**

A person commits the crime of luring if the person:

(1) (a) Orders, lures, or attempts to lure a minor or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public or into a motor vehicle;

(b) Does not have the consent of the minor's parent or guardian or of the guardian of the person with a developmental disability; and

(c) Is unknown to the child or developmentally disabled person.

(2) It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety,

or welfare of the minor or the person with the developmental disability.

(3) For purposes of this section:

(a) "Minor" means a person under the age of sixteen;

(b) "Person with a developmental disability" means a person with a developmental disability as defined in RCW 71A.10.020.

(4) Luring is a class C felony.

FILED  
COURT OF APPEALS

U5 SEP -8 AM 11:35

STATE OF WASHINGTON

BY YJN  
CLERK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, ) Court of Appeals No. 34316-9-II  
Respondent, ) Clark County No. 05-1-01922-1  
vs. ) AFFIDAVIT OF MAILING  
MIRASLAV SHUGANI, )  
Appellant. )

ANNE M. CRUSER, being sworn on oath, states that on the 5<sup>th</sup> day of September 2006, affiant placed a properly stamped envelope in the mails of the United States addressed to:

Arthur Curtis  
Clark County Prosecuting Attorney  
P.O. Box 5000  
Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

AFFIDAVIT OF MAILING - 1 -

**Anne M. Cruser**

*Attorney at Law*  
P.O. Box 1670  
Kalama, WA 98625  
Telephone (360) 673-4941  
Facsimile (360) 673-4942  
anne-cruser@kalama.com

1  
2  
3  
4 Mr. Miraslav Shugani  
3005 St. John's Boulevard #21  
5 Vancouver, WA 98661

6 and that said envelope contained the following:

- 7 (1) BRIEF OF APPELLANT  
8 (2) VERBATIM REPORT OF PROCEEDINGS (TO MR. CURTIS)  
9 (3) R.A.P. 10.10 (TO MR. SHUGANI)  
10 (4) AFFIDAVIT OF MAILING

11 Dated this 5<sup>th</sup> day of September 2006,

12  
13   
14 ANNE M. CRUSER, WSBA #27944  
15 Attorney for Appellant

16  
17  
18 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of  
Washington that the foregoing is true and correct.

19  
20  
21 Date and Place: September 5<sup>th</sup>, 2006, Kalama, Washington

22  
23 Signature: Anne M. Cruser