No. 82008-2

J.M. JOHNSON, J. (concurring in dissent)—I concur in the dissent written by Justice Fairhurst. I write separately, however, to emphasize two points that the majority fails to consider and that are determinative of the resolution of this case. The first is the fundamental constitutional presumption underlying our jury system that jurors are intelligent and follow the instructions they are given—not inherently susceptible to bias as the majority believes. The second is the historic practice in Washington of situating county courthouses and jails in the same building, especially in rural locales. This practice has never before been held to contaminate jurors. I discuss each of these points in turn.

An abiding faith in the intelligence of juries and their commitment to follow the law has long been a fixture of our jurisprudence. We assume "that jurors are intelligent and responsible individuals." *State v. Lord*, 161 Wn.2d 278-79, 165 P.3d 1251 (2007). This assumption is fundamental to our

democratic system of governance, given that "[a] similar assumption about voters," the pool from which we draw jurors, "underlies our democracy." *Id.* at 279. As another court put it:

> [O]ur system of laws depends upon the assumption that jurors are intelligent. "A juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box."

People v. Barnum, 104 Cal. Rptr. 2d 19, 24 (Cal. Ct. App. 2001) (citation omitted) (quoting *People v. Long*, 38 Cal. App. 3d 680, 689, 113 Cal. Rptr. 530 (Cal. Ct. App. 1974)), *superseded on other grounds*, 29 Cal. 4th 1210, 64 P.3d 788 (2003). The majority contradicts the presumption of juror responsibility, intelligence, and honesty when it summarily concludes that "the average juror would draw a[n] [improper] inference" about a defendant's guilt from the fact that trial was held in a jail courtroom. Majority at 7.

Even if the majority were correct to disregard the assumption of jury intelligence in a particular case, "[a]s further protection, jury panels are instructed and solemnly charged by the court with the duty to avoid bias or prejudice." *Lord*, 161 Wn.2d at 279. "It is to be presumed that the jurors, as sensible and intelligent men, obey[] the instruction of the court. . . ." *State v. Smails*, 63 Wash. 172, 183, 115 P. 82 (1911); *see also Coy v. Iowa*, 487 U.S.

1012, 1035, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988) (Blackmun, J., dissenting) ("[W]e must assume [the jury] to have been intelligent and capable of following [court] instructions . . . ."); *State v. Montgomery*, 163 Wn.2d 577, 605, 183 P.3d 267 (2008) (J.M. Johnson, J., concurring) ("' "Jurors are presumed to be . . . intelligent [and] capable of understanding instructions . . . ."'" (quoting *People v. Carey*, 41 Cal. 4th 109, 130, 158 P.3d 743, 59 Cal. Rptr. 3d 172 (2007) (quoting *People v. Lewis*, 26 Cal. 4th 334, 390, 28 P.3d 34, 110 Cal. Rptr. 2d 272 (2001)))).

In this case, the trial court gave just such an express instruction to the jury, explaining that administrative convenience and scheduling needs—not the dangerousness of the defendant or other impermissible factors—caused the trial to be held in the jail courtroom instead of the courthouse. Verbatim Report of Proceedings (Oct. 3, 2006) at 2. We must presume that the jury was intelligent and capable of understanding, and indeed did follow, this court instruction. *See Smails*, 63 Wash. at 183; *Coy*, 487 U.S. at 1035 (Blackmun, J., dissenting); *Montgomery*, 163 Wn.2d at 605; *see also Samuel v. United States*, 169 F.2d 787, 796 (9th Cir. 1948) ("[S]ince verdicts of juries must be viewed as the work of ordinary intelligent and reasoning

beings, judges will not presume that a jury would find guilt upon an item not proved . . . ."). Given this presumption, the majority is wrong to abruptly conclude that "[h]olding a criminal trial in a jailhouse building involves such a probability of prejudice that . . . it is 'inherently lacking in due process.'" Majority at 7 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986)).

The opposite conclusion is required, as case law from several other jurisdictions shows. Virginia, for example, has held that holding a trial in a courtroom inside of the administrative building of a correctional center does not violate a defendant's fair trial right. *Howard v. Commonwealth*, 6 Va. App. 132, 139, 367 S.E.2d 527, 531 (1988). In *Howard*, the space "in all respects resemble[d] a courtroom," (alteration in original) there was "no indication that the jurors could see the prison from the courtroom itself," and "[t]he jury did not have to pass through gates or other security devices to reach the courtroom." *Id.* at 532. Moreover, since the defendant was being tried for the murder of another inmate, "the jury necessarily had to know that he was [also] an inmate" at the jail. *Id.* Considering these facts, the court found that "the jury could reasonably have concluded that [the] trial was

being conducted in the administration building for reasons of efficiency and convenience" and that "the location . . . did not impermissibly suggest that [the defendant] was guilty . . . or otherwise operate to inherently prejudice him." *Id.* (citing *Holbrook*, 475 U.S. at 570-72).

Courts from states as varied as Mississippi, Utah, California, and Alaska have reached similar conclusions with respect to trials held inside penal institutions. *See Harper v. State*, 887 So. 2d 817, 826 (Miss. Ct. App. 2004) ("[W]e hold that there are such limited circumstances where a trial may be held inside a prison."); *State v. Daniels*, 40 P.3d 611, 618 (Utah 2002) (trying defendant in prison courtroom for murder of fellow inmate was not inherently prejudicial and did not create an unacceptable risk of presenting impermissible factors to jury); *Barnum*, 104 Cal. Rptr. 2d at 25 ("We decline to infer the jury would likely conclude defendant was guilty because the trial occurred inside a state prison, thereby disregarding their instructions and common sense."); *id.* at 26 ("[T]he selective use of in-prison trials is beneficial to the State, the taxpayer and, in some cases, the defendant. It is not an inherently prejudicial practice."); *Bright v. State*, 875 P.2d 100, 109 (Alaska 1994) ("[W]e are unwilling to flatly declare that the Alaska

Constitution prohibits holding a criminal trial in a prison under any and all circumstances."). *But see State v. Lane*, 60 Ohio St. 2d 112, 397 N.E.2d 1338, 1340 (1979) ("By holding a trial within a prison for an offense committed within that same institution, the constitutional right to a fair trial is abridged [because] [t]he presumption of innocence . . . is eroded [and] there is a major interference with the jury's ability to remain impartial . . . .").

The majority's error in assuming that prejudice results from holding criminal trials in jail courtrooms is even more evident when one reflects on the history of the practice in our state. Jails and courtrooms were—and, in approximately one-third of Washington counties, still are—located in the same county courthouses for reasons of convenience and fiscal economy. This was and remains particularly true in sparsely populated rural counties where the tax base can support only the most basic government infrastructure. I remind the court that, for many years, the courthouse that sits just across the street from the Temple of Justice housed both a jail and a courtroom (and one member of this court in fact presided over trials in that courtroom, just a few floors below the jail). I am certain that the proximity of the jail to the courtroom in that courthouse did not infect trials held there with bias or

inherent prejudice, yet the majority's resolution of this case points to the opposite conclusion. Majority at 7 ("holding a trial in a jail courtroom is inherently prejudicial").[1]

To conclude, I agree with Justice Fairhurst that the practice of holding trials in jailhouse courtrooms is not inherently prejudicial. I stress that this conclusion is required by our strong presumption that jurors, as intelligent and sensible individuals, understand and follow the court's instructions to disregard any bias or prejudice. The strength of this conclusion becomes even more apparent when one considers the historic practice of combining jail and court facilities in the same building in many Washington counties. For these two compelling reasons, as well as those articulated by Justice Fairhurst, I join in her dissent. The defendant here received a fair and constitutional trial and was properly convicted of second degree murder by an unbiased jury. I, too, would affirm his conviction.

[1] The jailhouse courtroom at issue in the present case has been in existence for over 20 years. The majority's reasoning suggests that all of the convictions obtained during that time should be overturned or at least questioned because of the inherent prejudice of the courtroom—indeed, it leaves *all* convictions obtained in *all* of the jailhouse courtrooms in our state vulnerable to attack.

AUTHOR:

Justice James M. Johnson

WE CONCUR: