IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

THE REPUBLIC OF THE MARSHALL ISLANDS, Plaintiff-Appellee, v. BARMOJ NAISHER, Defendant-Appellant.	Supreme Court No. 2020-01608 (High Court Criminal Case No. 2019-014) OPINION

BEFORE: CADRA, Chief Justice, SEABRIGHT* and SEEBORG,** Associate Justices

SEABRIGHT, Associate Justice:

I. INTRODUCTION

Defendant-Appellant Barmoj Naisher was convicted by the High Court of first-degree sexual assault under Title 31, Section 213.1(1)(a) of the Marshall Islands Revised Code ("MIRC"), and of second-degree kidnapping under Section 212.1(1)(c) of the same Title. Naisher makes two principal arguments on appeal: First, the sexual-assault conviction cannot stand because there is insufficient evidence that his use of force satisfies the "physical force" requirement of 31 MIRC §§ 213.0(11)(c) and 213.1(1)(a). And second, the kidnapping conviction cannot stand because there is insufficient evidence that he "remove[d]" the victim a

* The Honorable J. Michael Seabright, Chief United States District Judge, District of Hawaii, sitting by designation of the Cabinet.

** The Honorable Richard Seeborg, Chief United States District Judge, Northern District of California, sitting by designation of the Cabinet.

"substantial distance" from where she was found, as required by 31 MIRC § 212.1(1).[1] For the reasons stated below, we disagree with Naisher's arguments and hold there is sufficient evidence supporting both the sexual-assault and kidnapping convictions. Accordingly, we **AFFIRM** both convictions.

II. BACKGROUND

A. Evidence Adduced at Trial

The incident giving rise to this prosecution occurred on Sunday, March 31, 2019, at Jaluit High School on Jaluit Atoll. At that time, Naisher was 51 years old and was a cook at the school's cafeteria; the victim was a 20-year-old female student at the school. The victim testified that she was socializing with other students outside of the cafeteria under the lukowj trees, when Naisher summoned a group of female students, including herself, into the cafeteria. Once they arrived, Naisher told the girls to "go eat," and the girls proceeded to eat inside the cafeteria's kitchen. Naisher then told the girls, with the exception of the victim, to go buy ice lukwor (i.e., coconut smoothies). The girls complied, leaving the victim alone with Naisher for a brief period,

[1] Naisher also argues that the High Court erred by "convicting" him of lesser included offenses of first-degree sexual assault. But, as the Republic acknowledged during oral argument, there are only two convictions in this case: first-degree sexual assault and second-degree kidnapping. This is confirmed by the High Court's statement that the charges of the lesser included sexual-assault offenses "merge[d]" with the first-degree sexual assault, *see RMI v. Naisher*, No. 2019-014, slip op. at 6 (Marsh. Is. Nov. 5, 2020), and by the fact that the High Court sentenced Naisher for only first-degree sexual assault and second-degree kidnapping, *see RMI v. Naisher*, No. 2019-014, slip op. at 7–8 (Marsh. Is. Dec. 1, 2020). Thus, the High Court's statement that there was "sufficient evidence to support verdicts of guilt and convictions" on the lesser included offenses was harmless surplusage and did not result in a conviction for those lesser offenses. *See* Marsh. Is. R. Crim. P. 52(a); *see also RMI v. Menke*, 1 MILR 36, 37 (1986) (per curiam).

but nothing happened during that period, as the girls returned to find Naisher and the victim still in the kitchen.

The girls left shortly thereafter to use the restroom, once again leaving the victim alone with Naisher. The victim testified that Naisher then "pulled" her by the hand into a storage room, a room that is separate from but adjacent to the kitchen. Once in the storage room, Naisher lifted her onto a table and kissed her. The victim further testified that Naisher was "going to do what he wanted" to her, and that she pushed him away and ran outside of the storage room.

According to the victim, Naisher then chased her down and "pulled" her into the neighboring room, the cook's restroom. The cook's restroom, like the storage room, is separate from but adjacent to the kitchen; the doorway to the cook's restroom is only a few feet to the right of the doorway to the storage room (when facing both doorways from the kitchen). While in the cook's restroom, Naisher removed the victim's undergarments and sexually penetrated her.[2] The victim testified that Naisher did not ask for consent, that she did not consent, and that she did not want the sexual act to occur. When questioned whether she did anything during the sexual act, the victim responded "no," but that she was "really afraid or frightened," and "wanted to scream but . . . just couldn't." The victim reported the incident immediately after it occurred.[3]

[2] The victim's testimony as to the sexual penetration was corroborated by another female student who testified that she saw Naisher and the victim having sex in the cafeteria building.

[3] Naisher testified to a different version of events. He admitted that he was working at the cafeteria on March 31, 2019, but he denied having seen or talked to the victim that day.

B. The High Court's Verdict and Findings of Fact

On August 23, 2019, the Republic filed an Information charging Naisher with first-degree sexual assault and second-degree kidnapping, along with lesser included offenses of second-, third-, and fourth-degree sexual assault. *RMI v. Naisher*, No. 2019-014, slip op. at 1–2 (Marsh. Is. Nov. 5, 2020) ("*Conviction Order*"). A bench trial was held in the High Court on October 20, 2020, resulting in convictions of first-degree sexual assault and second-degree kidnapping. *Id.* at 1, 6.

In support of the convictions, the High Court made the following findings of fact: On March 31, 2019, Naisher "unlawfully lured [the victim] from the lukwej trees, through the cafeteria, [and] to the kitchen," where he "forcefully pulled [the victim] by her hand to a storage room off the kitchen." *Id.* at 3. "[The victim] pushed Naisher off and ran out, but Naisher pulled her to the other room, overcoming [her] by physical force." *Id.* "Naisher pulled off [her] undergarments" and sexually penetrated her. *Id.* at 4. Naisher did not ask if the victim "wanted to go to the room," nor did he ask whether "he could penetrate her." *Id.* "[The victim] did not consent to sexual penetration," "she was really afraid," and "[s]he wanted to scream, but could not." *Id.*

The High Court determined that Naisher "is guilty beyond a reasonable doubt on two counts: Count 1, Sexual Assault in the First Degree, having subjected [the victim] to sexual penetration by strong compulsion, in violation of [31 MIRC § 213.1(1)(a)]; and Count 2, Kidnapping, having unlawfully remov[ed] [the victim] a substantial distance from the vicinity where she was found . . . to subject her to a sexual offense [in violation of 31 MIRC § 212.1(1)(c)]." *Conviction Order* at 2. Regarding the sexual-assault conviction, the High Court explained that "Naisher subjected [the victim] to non-consensual sexual penetration . . . ,

overcoming her by physical force . . . . Naisher pulled [the victim] by her arm, lifted her up, and prevented her from fleeing, to subject her to non-consent sexual penetration." *Id.* at 5 (citations omitted). Regarding the kidnapping conviction, the High Court explained that Naisher "unlawfully remov[ed] [the victim] a substantial distance from the vicinity where she was found . . . to subject her to a sexual offense . . . . Naisher lured [the victim] and other young women from lukwej trees 40 feet from the cafeteria, through the cafeteria, and to the kitchen, and when [the victim] was left isolated from others, Naisher, a man almost twice her weight, pulled [her] into rooms off the kitchen area to subject her to non-consensual sexual penetration." *Id.* (citations omitted).

The High Court sentenced Naisher to ten years imprisonment for the first-degree sexual assault, with five years served and five years suspended pursuant to certain conditions, and ten years imprisonment for the second-degree kidnapping, also with five years served and five years suspended pursuant to certain conditions. *See RMI v. Naisher*, No. 2019-014, slip op. at 7–8 (Marsh. Is. Dec. 1, 2020). The sentences are to be served concurrently. *Id.* at 8.

III. STANDARD OF REVIEW

When the High Court conducts a criminal bench trial and finds a defendant guilty, the High Court must state the specific findings of fact supporting the finding of guilt. *See* Marsh. Is. R. Crim. P. 23(c). On appeal, we review the findings of fact for clear error, and the ultimate conviction for sufficiency of the evidence. *See United States v. Vance*, 956 F.3d 846, 853 (6th Cir. 2020) ("In our review of evidentiary sufficiency, we assess a district court's specific factual findings following a bench trial for clear error. . . . Similarly, in reviewing the district court's ultimate finding of a defendant's guilt, we assess [the sufficiency of the evidence]." (citations omitted)); *United States v. Temkin*, 797 F.3d 682, 688 (9th Cir. 2015); *see also RMI v. Menke*, 1

MILR 36, 37 (1986) (per curiam) (stating, when reviewing a jury verdict, that "[f]indings of fact of the High Court cannot be set aside unless clearly erroneous").

"[A] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Hinkson*, 585 F.3d 1247, 1260 (9th Cir. 2009) (internal quotation marks omitted). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985).

"A conviction is supported by the sufficiency of the evidence when 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *RMI v. Kijiner*, 3 MILR 122, 124 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In viewing the evidence in the light most favorable to the prosecution, the [reviewing] court 'may not ask whether a finder of fact could have construed the evidence produced at trial to support acquittal.'" *Id.* (quoting *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010)). Instead, the reviewing court should "defer to all reasonable inferences drawn by the trial court" by viewing the evidence in the light most favorable to the prosecution regardless of whether that evidence is direct or circumstantial. *United States v. Ybarra*, 70 F.3d 362, 364 (5th Cir. 1995).

"Only after [the reviewing court] [has] construed all the evidence at trial in favor of the prosecution [does] [the reviewing court] take the second step, and determine whether the evidence at trial, including any evidence of innocence, could allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *Kijiner*, 3 MILR at 124 (quoting *Nevils*, 598 F.3d at 1164–65). "Once a defendant has been found guilty of the crime

charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319. That preservation mechanism permits a reviewing court to affirm a conviction even when the reviewing court considers a subset of evidence considered by the trial court, so long as there is "still sufficient evidence" to support the conviction. *See United States v. Driggers*, 913 F.3d 655, 659–60 (7th Cir. 2019) (citing *Jackson*, 443 U.S. 307).

IV. DISCUSSION

As charged in this case, both first-degree sexual assault and second-degree kidnapping require the defendant to have applied physical force onto the victim. The High Court, in fact, identified Naisher's pulling the victim into the storage room and the cook's restroom as supporting both convictions. Because the High Court relied on those forcible actions in support of both convictions—and because courts with similar criminal laws have largely rejected kidnapping charges when the forcible asportation of the victim is merely incidental to another offense[4]—we take care to separate the forcible actions supporting the sexual-assault conviction from the forcible actions supporting the kidnapping conviction. Although it may be possible under certain circumstances for the same forcible action to provide support for both a sexual-assault and a kidnapping conviction, we need not consider that possibility in this case, because there is sufficient evidence supporting both the sexual-assault conviction and the kidnapping conviction even when the forcible actions are divided across those convictions. Principally, we

[4] *See* 3 Wayne R. LaFave, Subst. Crim. L. § 18.1(b) (3d ed. 2017, Oct. 2020 update); *see also Gov't of Virgin Islands v. Ventura*, 775 F.2d 92, 97–98 (3d Cir. 1985) ("[W]e cannot assume that any asportation incident to rape, however slight, constitutes kidnapping with intent to commit rape."); *People v. Dominguez*, 39 Cal. 4th 1141, 1150 (2006), *as modified* (Nov. 1, 2006).

divide the two "pulling" actions across the convictions: Naisher's pulling the victim into the storage room supports the kidnapping conviction, while Naisher's pulling the victim into the cook's restroom supports the sexual-assault conviction.

A. The Sexual Assault Conviction

1. First-Degree Sexual Assault Under the MIRC

First-degree sexual assault occurs when a "person knowingly subjects another person to an act of sexual penetration by strong compulsion." 31 MIRC § 213.1(1)(a). In turn, "strong compulsion" means, *inter alia*, "the use of or attempt to use" "physical force" "to overcome a person." 31 MIRC § 213.0(11)(c). This statutory language requires that a defendant apply physical force to the victim in two ways: through the act of sexual penetration, and by overcoming the victim in order to accomplish the penetration. *See id.*; *see also State v. Jones*, 154 Idaho 412, 418, 422 (2013) (holding that Idaho's sexual-assault statute requires "more force than is inherent in the sexual act," i.e., it requires "extrinsic force," because the contrary interpretation would render meaningless the statutory requirement that the victim be "overcome by force").

The elements of first-degree sexual assault by physical force are thus (1) the defendant penetrated the victim's genital or anal opening, however slightly, with any object, including with any part of any person's body; (2) the defendant accomplished the penetration using force sufficient to overcome the reasonable resistance of the victim, regardless of whether the victim physically resisted;[5] and (3) the defendant did so knowingly. 31 MIRC §§ 213.0(11)(c),

[5] The phrase "regardless of whether the victim physically resisted" clarifies that when the victim does not physically resist in a particular case, the question becomes whether the force applied was sufficient to overcome a reasonable victim's will to resist. *See* 2 Wayne R. LaFave, (continued . . .)

213.1(1)(a); *see also State v. Cardus*, 86 Haw. 426, 435–36 (Ct. App. 1997) (defining similar elements for a similar sexual-assault statute).

2. <u>There Is Sufficient Evidence Supporting the Sexual Assault Conviction</u>.

Naisher challenges the second element. He argues there is insufficient evidence that he accomplished the sexual penetration using physical force sufficient to overcome the victim's resistance. Specifically, he argues that the forcible actions evidenced in the record—his "pull[ing] [the victim] by her arm, lift[ing] her up, and prevent[ing] her from fleeing"—do not amount to the kind of physical force sufficient to overcome a victim's reasonable resistance. In support of his argument, Naisher cites decisions from other jurisdictions in which appellate courts have upheld findings of "strong compulsion" by physical force, and he contrasts the facts of those cases with the facts of this case.

Although accurate, Naisher's case summaries are not helpful in delineating the minimum amount of force required for strong compulsion, as the forcible actions in those cases were quite extreme and clearly warranted findings of strong compulsion. *See, e.g.*, *State v. Smith*, 106 Haw. 365 (Ct. App. 2004). Here, we consider only the following two forcible actions in our review of the sexual-assault conviction: Naisher's preventing the victim from fleeing by chasing her down and pulling her into the cook's restroom, and Naisher's removing the victim's clothing. The High Court made findings of fact on those two forcible actions, *see Conviction Order* at 3–4, and relied on those forcible actions, among others, when determining that Naisher was guilty of first-

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Subst. Crim. L. § 17.3(a) (3d ed. 2017, Oct. 2020 update); *see also State v. Cardus*, 86 Haw. 426, 436 (Ct. App. 1997) ("'[S]trong compulsion' denote[s] . . . acts intended to overcome resistance to prohibited sexual conduct." (footnote omitted)). Force that is inherent in the act of sexual penetration is categorically insufficient.

degree sexual assault, *see id.* at 5. The totality of the evidence in the record does not suggest that these factual findings are clearly erroneous.[6]

Ultimately, when viewing the evidence in the light most favorable to the Republic, we are satisfied that a rational trier of fact could have found that Naisher used physical force sufficient to overcome the reasonable resistance of the victim. Naisher's chasing down and pulling the victim into the cook's restroom after she attempted to escape the storage room is similar to the forcible action in *Jones*, 154 Idaho at 422, wherein the defendant "leaned forward to where his body was pushing on [the victim], pinning her hands underneath her so she could not turn around." The Supreme Court of Idaho affirmed the conviction of forcible rape in *Jones* because those actions "seem[ed] in particular less 'incidental' to sex and far more like force employed to overcome [the victim's] resistance." *Id.* Naisher's forcible actions are also similar to those in *State v. Mohammed*, 2020 ND 52, 939 N.W.2d 498 (2020), a case in which the Supreme Court of North Dakota affirmed a conviction of forcible sexual assault. Like Naisher, the *Mohammed* defendant grabbed his victim, pulled her in a different direction, and removed her clothing in order to accomplish the sexual penetration. *See id.*, 939 N.W.2d at 502 (rejecting defendant's argument "that there was no evidence that [the victim] physically resisted any action that would need to be overcome *in the bedroom*," because "[a] victim is not required to resist," and because there was "sufficient evidence that [defendant] used force to compel [the victim] to engage in sexual acts").

[6] Naisher challenges the High Court's factual finding that the victim was "105 pounds." That challenge is beside the point because Naisher admitted at trial that he was capable of lifting the victim. Once it is assumed that Naisher was capable of lifting and thus pulling the victim, all of the forcible actions supporting the sexual-assault and kidnapping convictions become physically plausible.

In sum, there is still sufficient evidence supporting the sexual-assault conviction even setting aside Naisher's actions in the storage room. We thus affirm that conviction.

B. The Kidnapping Conviction

1. Second-Degree Kidnapping Under the MIRC

Kidnapping occurs when a "person unlawfully removes another . . . a substantial distance from the vicinity where he or she is found" for the "purpose[]" of "subject[ing] that person to a sexual offense." 31 MIRC § 212.1(1)(c).[7] A removal is "unlawful" if, *inter alia*, "it is accomplished by force, threat or deception." *Id.* § 212.1(2). The MIRC does not define "deception," but that term traditionally involves an "act of deliberately causing someone to believe that something is true when the actor knows it to be false." *Deception*, Black's Law Dictionary (11th ed. 2019) (also defining "deception" as a "trick intended to make a person believe something untrue.").

The MIRC also does not define "substantial distance." But the comments to the Model Penal Code's kidnapping provision—after which the MIRC's kidnapping provision is modeled[8]—specify that the rationale behind the substantial-distance requirement was to punish

[7] As demonstrated by the element test set forth below, the MIRC defines other forms of kidnapping, including kidnapping for the purposes of collecting a ransom, terrorizing the victim, or interfering with the performance of any governmental or political function, *see* 31 MIRC § 212.1(1)(a)–(e). Kidnapping is a felony of the second degree when the defendant "voluntarily releases the victim, alive and not suffering from serious or substantial injury, in a safe place prior to trial." *Id.* § 212.1(2).

[8] *See* Model Penal Code § 212.1 (2001) (containing nearly identical language as 31 MIRC § 212.1); *see also* Comm. on the Elimination of Discrimination against Women, *Information received from the Marshall Islands on follow-up to the concluding observations on its combined initial to third reports of the Marshall Islands*, U.N. Doc. MHL/FCO/1-3, at 3 (2021) ("In 2011, the [RMI] Criminal Code underwent a major transformation based upon the (continued . . .)

"isolation of the victim from the protection of the law" and to punish removal conduct that was "especially terrifying and dangerous." Model Penal Code and Commentaries § 212.1, cmt. 3, at 222–23 (Am. Law. Inst., Official Draft 1980). In short, the substantial-distance requirement "precludes kidnapping convictions based on trivial changes of location having no bearing on the evil at hand." *Id.* at 223.

Decisions from other jurisdictions confirm that the substantial-distance requirement focuses on whether the removal increased the difficulty of escape, decreased the risk of detection, or otherwise increased the risk of harm by giving the defendant more control over the victim. *See, e.g.*, *State v. Jackson*, 211 N.J. 394, 418–19 (2012) ("[D]efendant isolated [the victim], who was threatened with a gun and in a moving vehicle, thus impeding [the victim]'s ability to obtain assistance. . . . [Defendant] expos[ed] [the victim] to the risk of a serious accident, injury or death by virtue of a desperate attempt to escape . . . ."); *State v. Fasthorse*, 2009 S.D. 106, ¶ 8 (2009) ("[T]aking [the victim] to a remote location increased the risk of harm to her. . . . Most movement of rape victims by their attackers is designed to seclude the victim from possible assistance and to prevent escape—which inevitably increases the risk of harm to the victim." (internal quotation marks omitted)); *State v. Masino*, 94 N.J. 436, 445 (1983) ("[N]either the Model Penal Code nor [the New Jersey kidnapping statute] contemplated 'substantial distance' as a linear measurement." "[A]n actor who takes the trouble to set the scene so that he will have a relatively free hand to deal with his isolated victim is obviously more likely to lead to more dangerous consequences" and should be "adequately punished" by a

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Model Penal Code . . . ."), *available at* https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MHL/CEDAW_C_MHL_FCO_1-3_44587_E.pdf.

kidnapping conviction. (quoting Model Penal Code and Commentaries § 212.1, comments at p. 15 (Am. Law. Inst., Tent. Draft No. 11, 1960))); *State v. Bunker*, 436 A.2d 413, 417 (Me. 1981) ("While the asportation may have been preparatory . . . , we think that the risks of harm and fright to this child, beyond that which she actually suffered, were significantly enhanced by her asportation and isolation.").

Accordingly, the elements of kidnapping in this case are (1) the defendant knowingly removed the victim from the vicinity where the victim was found, using force, threat, or deception; (2) the removal was a substantial distance from the vicinity where the victim was found; and (3) the defendant removed the victim with the intent to subject the victim to a sexual offense. For a removal to have occurred over a "substantial distance," the removal must have increased the risk of harm to the victim under the totality of the circumstances. Factors relevant to that inquiry include whether—relative to the victim remaining in the place where the victim was found—the removal increased the difficulty of escape, decreased the risk of detection, or otherwise increased the risk of harm to the victim by giving the defendant more control over the victim.

2. There Is Sufficient Evidence Supporting the Kidnapping Conviction

Naisher essentially challenges the High Court's findings on the second element, arguing there is insufficient evidence that he removed the victim a substantial distance from where she was found. He principally contends that his pulling the victim into the rooms off the kitchen area was not a removal of a substantial distance because the victim was moved only a "few yards." As for the High Court's finding that Naisher "lured [the victim] . . . from lukwej trees 40 feet from the cafeteria, through the cafeteria, and to the kitchen," Naisher contends that finding is erroneous because there is no evidence in the record that he "lured" the victim anywhere. The

victim's movement from the lukwej trees to the kitchen should not, therefore, be considered in support of the substantial-distance requirement, according to Naisher.

We agree with the latter contention—that the victim's movement from the lukwej trees to the kitchen is not relevant to the substantial-distance requirement—but not because we view the High Court's finding that Naisher "lured" the victim to be erroneous. Rather, even if true, that factual finding is legally irrelevant because it does not demonstrate a removal that was done by force, threat, or deception. Naisher's luring the victim into the kitchen by telling her to "go eat" was not threatening or forceful. Nor was it deceptive, because Naisher did not trick the victim into believing a circumstance was true when he knew it to be false—indeed, the girls did eat food in the kitchen. *See Deception*, Black's Law Dictionary (11th ed. 2019); *see also State v. Holt*, 223 Kan. 34, 42 (1977) ("There is no evidence that [the victim] was taken either by force or deception against his will to any place other than where he always intended to go. . . . [T]o prove deception the state had to introduce evidence to show that the defendant . . . made a false statement pertaining to a present or past existing fact. There was no such evidence."). To the contrary, "luring" involves transparency as to an allurement, not deception as to an allurement. *Cf. Merriam-Webster's Collegiate Dictionary* 741 (Merriam–Webster, Inc., 11th ed. 2014) (defining "lure, v." as "to draw with a hint of pleasure or gain" or to "attract actively and strongly").

Nevertheless, although we agree with Naisher that the victim's movement from the lukwej trees to the kitchen is irrelevant, we disagree with Naisher's principal contention that there is insufficient evidence supporting the High Court's finding on the substantial-distance requirement. Even setting aside the victim's movement from the lukwej trees to the kitchen, and setting aside Naisher's pulling the victim into the cook's restroom, a rational trier of fact could

have found that Naisher removed the victim a substantial distance because pulling the victim from the kitchen into the storage room increased the risk of harm to the victim, regardless of whether the displacement was merely a few yards or a few feet.[9] *See State v. Matarama*, 306 N.J. Super. 6, 21–22 (App. Div. 1997) (affirming denial of motion for acquittal of a kidnapping charge, where there was sufficient evidence supporting a substantial-distance removal because "the victim was dragged twenty-three feet [(roughly eight yards)]" "to a more secluded place where the assailants could more easily attack her without being seen"); *People v. Shadden*, 93 Cal. App. 4th 164, 169–70 (2001) (affirming kidnapping, where there was sufficient evidence supporting a substantial-distance removal because the defendant "dragged [the victim] nine feet from an open area to a closed room"; "the distance was short, but . . . the risk of harm substantial").

Relative to completing the sexual assault in the kitchen, Naisher's pulling the victim into the storage room increased her difficulty of escape, as borne out by the fact that the victim attempted to escape the storage room but was caught by Naisher before she could successfully do so. That asportation also decreased the likelihood of detection, as the trial testimony and exhibits demonstrate that the storage room and the kitchen are separate rooms, and that the storage room is more secluded than the kitchen. Further, that asportation created a more isolated environment

[9] The High Court did not clearly err in finding that Naisher pulled the victim into the storage room. There was testimony from the victim directly supporting that finding. And another student testified that he saw Naisher pull the victim into the cook's restroom after Naisher had "lifted her" up, the implication being that the victim was transferred from the storage room to the cook's restroom, because the victim testified that she was "lifted" up in the storage room. The High Court credited the victim's testimony and drew reasonable inferences from the other student's testimony. We defer to both determinations. *See Ybarra*, 70 F.3d at 364.

in which Naisher was able to better control the victim and thus more effectively carry out the assault, as borne out by the victim's testimony that she thought Naisher was "going to do what he wanted" with her, and that she was "really afraid" and "wanted to scream but . . . just couldn't." Naisher's pulling the victim into the storage room thus markedly increased the risk of harm to the victim, thus satisfying the substantial-distance requirement.[10]

We have considered a subset of evidence considered by the High Court with respect to its finding that the victim was moved a substantial distance, we conclude there is still sufficient evidence supporting that finding and the kidnapping conviction, on the whole.

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[10] Naisher relies on four decisions from appellate courts in other jurisdictions. Three of those decisions stand for the distinguishable proposition that moving a victim *between rooms of a house* during the commission of an assault or burglary is incidental to those crimes and is thus not grounds for a kidnapping conviction—put differently, the movements did not increase the risk of harm to the victims under the totality of the circumstances. *See, e.g.*, *State v. Wolleat*, 338 Or. 469 (2005) ("[The defendant] went into the bedroom where the victim was sleeping, grabbed her by her hair, and pulled her out of bed. Still holding the victim by her hair, defendant dragged her approximately 15 to 20 feet from the bedroom into the living room, where he repeatedly struck her."). The fourth decision is also distinguishable because the central issue in that case was whether the defendant had "confined" the victim for a "substantial period," not whether there was a removal over a substantial distance. *See State v. Cruz-Pena*, 243 N.J. 342 (2020).

V. CONCLUSION

For the foregoing reasons, we **AFFIRM** Naisher's convictions for first-degree sexual assault and second-degree kidnapping.

Dated: November 30, 2021

/s/ Daniel N. Cadra
Daniel N. Cadra
Chief Justice

Dated: November 30, 2021

/s/ J. Michael Seabright
J. Michael Seabright
Associate Justice

Dated: November 30, 2021

/s/ Richard Seeborg
Richard Seeborg
Associate Justice