

2019 WL 409140
Supreme Court, Appellate Division,
Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
George EVERSON, Defendant–Appellant.

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KA 16–01429

Entered: February 1, 2019

Synopsis

Background: Defendant was convicted in the Onondaga County Court, Anthony F. Aloï, J., of criminal **possession** of a weapon in the second degree and criminal **possession** of a controlled substance in the third degree. Defendant appealed.

[Holding:] The Supreme Court, Appellate Division, held that evidence was legally sufficient to support conviction of criminal **possession** of a weapon in the second degree.

Affirmed.

West Headnotes (3)

[1] Criminal Law



Defendant failed to preserve for appellate review his contention that his conviction for criminal **possession** of a controlled substance in the third degree was not supported by legally sufficient evidence, where defendant did not argue in his motion for a trial order of dismissal that there was legally insufficient evidence to establish the element of **possession** under that count.

[Cases that cite this headnote](#)

[2] Weapons



To meet its burden of proving defendant's **constructive possession** of a gun, for purposes of a charge of third-degree criminal **possession** of a weapon, the prosecution has to establish that the defendant exercised dominion or control over the gun by a sufficient level of control over the area in which it was found. N.Y. Penal Law §§ 10.00(8), 265.03(3).

[Cases that cite this headnote](#)

[3] Weapons



Evidence was legally sufficient to establish that defendant exercised dominion or control over area in which gun was found, and thus, defendant **constructively possessed** the gun, supporting conviction of criminal **possession** of a weapon in the second degree; notwithstanding that the area was accessible to other people, the gun was found wrapped in baby clothing, having fallen from a playpen inside the apartment where defendant resided with his small children and their mother, thus the evidence went beyond defendant's mere presence in residence at time of execution of search warrant and established a particular set of circumstances from which a jury could infer **possession** of the contraband. N.Y. Penal Law §§ 10.00(8), 265.03(3).

[Cases that cite this headnote](#)

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloï, J.), rendered February 5, 2016. The judgment convicted defendant, upon a jury verdict, of criminal **possession** of a weapon in the second degree and criminal **possession** of a controlled substance in the third degree.

Attorneys and Law Firms

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WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

MEMORANDUM AND ORDER

*1 It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal **possession** of a weapon in the second degree (Penal Law § 265.03[3]) and criminal **possession** of a controlled substance in the third degree (§ 220.16[1]). Defendant's conviction arises out of the seizure from his apartment of, inter alia, a loaded .38 caliber handgun and 103 bags of heroin during the execution of a search warrant. Defendant shared the apartment with his two young children and their mother.

[1] Defendant contends that his conviction is not supported by legally sufficient evidence inasmuch as the People failed to establish that he had **constructive possession** of either the gun or the drugs. That contention is preserved for our review, however, only with respect to the criminal **possession** of a weapon count inasmuch as defendant did not argue in his motion for a trial order of dismissal that there was legally insufficient evidence to establish the element of **possession** under the criminal **possession** of a controlled substance count (see *People v. Gray*, 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 652 N.E.2d 919 [1995]).

[2] In reviewing the legal sufficiency of the evidence, we must “determine whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People” (*People v. Williams*, 84 N.Y.2d 925, 926, 620 N.Y.S.2d 811, 644 N.E.2d 1367 [1994]; see *People v. Boyd*, 145 A.D.3d 1481, 1482, 43 N.Y.S.3d 641 [4th Dept. 2016], *lv denied* 29 N.Y.3d 947, 54 N.Y.S.3d 377, 76 N.E.3d 1080 [2017]). “To meet their burden of proving defendant's **constructive possession** of the [gun], the People had to establish that defendant exercised dominion or control over [the gun] by a sufficient level of control over the

area in which [it was] found” (*People v. Lawrence*, 141 A.D.3d 1079, 1082, 34 N.Y.S.3d 827 [4th Dept. 2016], *lv denied* 28 N.Y.3d 1029, 45 N.Y.S.3d 380, 68 N.E.3d 109 [2016] [internal quotation marks omitted]; see Penal Law § 10.00[8]).

[3] Contrary to defendant's contention, there is legally sufficient evidence that he exercised dominion or control over the area in which the gun was found and thus **constructively possessed** it, notwithstanding that the area was accessible to other people (see *People v. Tuff*, 156 A.D.3d 1372, 1375, 68 N.Y.S.3d 273 [4th Dept. 2017], *lv denied* 31 N.Y.3d 1018, 78 N.Y.S.3d 288, 102 N.E.3d 1069 [2018]). Exclusive access is not required to sustain a finding of **constructive possession** (see *id.*), and “several individuals may **constructively possess** an object simultaneously, provided each individual exercises dominion and control over the object or the area in which the object is located” (*Boyd*, 145 A.D.3d at 1482, 43 N.Y.S.3d 641 [internal quotation marks omitted]). Here, the gun was found wrapped in baby clothing, having fallen from a playpen inside the apartment where defendant resided with his toddlers. Thus, the evidence “went beyond defendant's mere presence in the residence at the time of the search and established ‘a particular set of circumstances from which a jury could infer **possession**’ of the contraband” (*People v. McGough*, 122 A.D.3d 1164, 1166, 998 N.Y.S.2d 232 [3d Dept. 2014], *lv denied* 24 N.Y.3d 1220, 4 N.Y.S.3d 608, 28 N.E.3d 44 [2015], quoting *People v. Bundy*, 90 N.Y.2d 918, 920, 663 N.Y.S.2d 837, 686 N.E.2d 496 [1997]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v. Danielson*, 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 880 N.E.2d 1 [2007]), we conclude that the verdict with respect to both crimes is not against the weight of the evidence (see generally CPL 470.15[5]; *People v. Bleakley*, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 [1987]; *People v. Stephenson*, 104 A.D.3d 1277, 1278, 960 N.Y.S.2d 823 [4th Dept. 2013], *lv denied* 21 N.Y.3d 1020, 971 N.Y.S.2d 502, 994 N.E.2d 398 [2013], *reconsideration denied* 23 N.Y.3d 1025, 992 N.Y.S.2d 808, 16 N.E.3d 1288 [2014]).

*2 Contrary to defendant's contention, his sentence is not unduly harsh or severe. Finally, we have considered defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

All Citations

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