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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LEANDRE MARIQUE McCLANAHAN,

Defendant and Appellant.

A142345

(Solano County  
Super. Ct. No. VCR217777)

Leandre Marique McClanahan participated in a home invasion that resulted in convictions of first degree residential burglary (Pen. Code, §§ 459, 460, subd. (a)),<sup>1</sup> first degree residential robbery in concert (§§ 211, 212.5, subd. (a), 213, subd. (a)(1)(A)), and forcible oral copulation (§ 288a, subd. (c)(2)), together with true findings that (1) the burglary was committed while someone other than an accomplice was present in the residence (§§ 667.5, subd. (c)(21)) and (2) the oral copulation was committed during a burglary (§ 667.61, subd. (e)(2)). McClanahan was sentenced to 15 years to life in prison. He raises only one issue on appeal: the judge failed to give the jurors any instruction on the finding under section 667.5, subdivision (c)(21) making the burglary a violent felony, namely that the burglary was committed when “another person, other than an accomplice, was present in the residence.” We conclude the court had no sua sponte duty to instruct further on the violent felony allegation because the victim occupant was a non-accomplice as a matter of law. Therefore, the court did not err in failing to instruct

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<sup>1</sup> Statutory references, unless otherwise noted, are to the Penal Code.

sua sponte on the meaning of “accomplice” or to give other guidance to the jury in making the violent felony finding.

## I. BACKGROUND

### A. *The Prosecution’s Case*

Twenty-year-old O.C. lived in a two-story home in Benicia with her mother and brother. On the night of October 1, 2010, she was home alone in her upstairs bedroom. About 7:00 p.m., while browsing on Facebook, she messaged her ex-boyfriend, Brent Williams, telling him, “If anything bad happens to me, I’m gonna fuck you up.” She explained at trial that Williams had threatened her because he did not want her talking with Joshua Crutchfield, her new boyfriend. She also posted on Facebook that she was home alone.

Suddenly, between 8:00 and 8:30 p.m., O.C.’s bedroom door burst open and four Black men entered. They were all wearing hooded sweatshirts with the hoods pulled up and bandanas covering the lower part of their faces. One of the men approached O.C. and put a gun to her head and a towel over her eyes. He asked if she had a safe. O.C. said she did not and told him, “You can take whatever you want, just don’t kill me.”

The man took her downstairs with the towel covering her eyes and led her into the pantry off the kitchen. He closed the pantry door and told her to get on her knees and “suck him up.” She heard the man undo his belt and pull down his zipper. He put his penis into her mouth and held her head. After a while he ejaculated into her mouth and told her to swallow it. She swallowed some and spit the rest onto a pantry shelf and into the towel covering her eyes.

Just then the house alarm, a loud blaring siren, went off. A loud voice emanating from the alarm said the front door and garage door were open. The alarm was so loud you could hear it outside, even a few houses away. O.C.’s assailant told her to turn it off. He covered her eyes with his hand. She walked to the alarm panel in the kitchen and turned it off. The man then took her back into the pantry and told her to “jack him off,” and she complied.

During this time she could hear people running up and down the stairs. Someone told the man with her in the pantry to hurry. He replied, "I'm almost done, D." The man soon left, and O.C. heard people running out of the house. Forty-five minutes to an hour had passed since the men first burst into her bedroom. When she left the pantry she saw the front door was open. She called her best friend and asked her to call the police.

Police arrived sometime before 10:00 p.m. in response to a 911 call. O.C. was distraught and crying. Police found no signs of forced entry anywhere in the house but did find an open window in the kitchen. That window was normally closed and locked. Every window in the house, including the open kitchen window, had a sensor that would set off the alarm if moved. The kitchen window screen was lying on the ground outside the window, along with a hairbrush, which was not dirty or weathered. The evidence technician examined the pantry with a special light that reveals bodily fluids, including sperm. She found no evidence of sperm on the pantry floor or shelves.

The house had been ransacked. Drawers had been opened and the contents scattered. Numerous items were missing from the house, including a laptop, a gaming system, a digital camera and a television.

O.C. was taken to the hospital where a nurse took a swab of her mouth. She had not had anything to drink and had not rinsed out her mouth since the time the intruder ejaculated. When it was later examined, there was no sperm on the swab from O.C.'s cheek.

A Department of Justice criminalist determined the towel that had been used to cover O.C.'s eyes had sperm cells on it. There was no way to determine exactly when the sperm was deposited on the towel. The criminalist developed a DNA profile from the sperm on the towel. She checked the profile against a databank of DNA profiles of people who had been arrested or convicted, but there were no hits and the investigation stalled.

On January 24, 2013 a police technician collected an oral buccal swab from McClanahan after he was convicted of auto burglary. In March 2013, two and a half years after the invasion of O.C.'s home, the criminalist working the case matched the

DNA profile from the sperm on the towel with McClanahan's DNA. The DNA profile would occur at random in approximately 1 in 4.2 sextillion African Americans.

The detective assigned to the case learned that McClanahan knew someone named DeLeon McBride, potentially the "D" name the man in the pantry had mentioned. The detective obtained photographs of McClanahan and McBride from the Department of Motor Vehicles and showed them to O.C. She thought McClanahan looked familiar but did not know how she knew him. But when she saw McBride's photograph she identified him as an ex-boyfriend she had dated for about a year. She then remembered McClanahan was a friend of McBride's she had met once. McBride had been to her house a lot, though O.C. claimed he had never brought McClanahan with him. O.C. had broken up with McBride in May or June 2010. O.C. denied having oral sex with McClanahan prior to October 1, 2010.

B. *The Defense Case*

The defense was one of mistaken identity and alibi. McClanahan took the stand and denied participating in the burglary of O.C.'s house on October 1, 2010. He also denied forcing her to perform oral sex. McClanahan testified he had met O.C. through McBride, and she had given him consensual oral sex in her home a few weeks before the burglary, after O.C. and McBride had broken up. McClanahan testified O.C. became upset when he ejaculated in her mouth. She jumped up from the couch and left the room, but he did not know where she went or what she did. Shortly after she returned, he left the house and never saw her again. McClanahan also testified to an alibi—backed up by his mother, aunt, girlfriend and brother—that he was at his mother's house on the night of the home invasion, helping her prepare to leave for a flight to Florida.

In addition to contesting his own role in the home invasion, McClanahan's trial attorney questioned whether the crime actually occurred as recounted by O.C., pointing out certain facts in evidence suggesting the burglary may have been committed by O.C.'s friends. As McClanahan's trial counsel argued, "Something does not add up here." He argued that O.C. might have been "making it up" and that some of the facts were "suspicious", but he never argued expressly that O.C. was an accomplice, nor did he

request an instruction defining “accomplice” or in any other way suggest that the violent felony allegation required further guidance for the jury.<sup>2</sup> He never explicitly suggested that O.C. had given the burglars consent to enter the home or assisted them in gaining entry.

C. *The Trial Court Proceedings*

An information filed on October 21, 2013 charged McClanahan with aggravated kidnapping (§ 209, subd. (b)(1)) (count one), forcible oral copulation (§ 288a, subd. (c)(2)) (count two), residential robbery in concert (§§ 211, 212.5, subd. (a), 213, subd. (a)(1)(A)) (count three), and residential burglary (§ 459) (count four). The information also specially alleged that (1) a person other than an accomplice was present in the residence during the commission of the burglary (§ 667.5, subd. (c)(21)) ; (2) the forcible oral copulation was committed during a burglary<sup>3</sup> (§ 667.61, subd. (e)(2)); (3) McClanahan kidnapped the victim in connection with the forcible oral copulation; (4) he personally used a dangerous or deadly weapon in the commission of the forcible oral

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<sup>2</sup> Of course, portraying O.C.—an emotional and sympathetic witness—as an accomplice to the burglary of her own home would have carried with it a significant risk that the jury would be offended by such a suggestion and all the more likely to convict. The defense attorney, in fact, acted inconsistently with an intention to convince the jury O.C. was an accomplice. He did not present a consent defense to burglary (see “Consent” in Bench Notes to CALCRIM No. 1700), instead relying on an alibi, which was inconsistent with a consent defense. And, had O.C. been an accomplice—or even arguably an accomplice—the jury should have been instructed that accomplice testimony must be corroborated and should viewed with caution to the extent it tends to incriminate the defendant. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569; *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1273–1274; see CALCRIM Nos. 334 & 335.) Yet, defense counsel did not request such instruction, and McClanahan does not claim on appeal this was ineffective assistance of counsel, for good reason, since it suggests a tactical decision on counsel’s part to forgo a claim that O.C. was an accomplice. While perhaps not sufficient to result in a forfeiture of the instructional issue on appeal (see *People v. Avalos* (1984) 37 Cal.3d 216, 229), trial counsel’s conduct tends to suggest O.C.’s complicity was not submitted to the jury as a serious response to the violent felony allegation.

<sup>3</sup> The information also alleged that McClanahan committed the burglary for the purpose of oral copulation (§ 667.61, subd. (d)(4)), but that allegation was later dismissed at the People’s request.

copulation (§ 667.61, subd. (e)(1), (e)(3)); and (5) he personally used a firearm in the commission of the kidnapping, robbery and oral copulation (§§ 12022.5, subd. (a)(1) & 12022.53, subd. (b)) .

On March 26, 2014 the jury found McClanahan not guilty of kidnapping, but guilty of robbery in concert, forcible oral copulation, and residential burglary. It found McClanahan did not use a firearm during any offense, but found he did commit the oral copulation during a burglary and found a person other than an accomplice was present during the burglary.

On June 13, 2014 the trial court sentenced McClanahan to 15 years to life under the one-strike law for forcible oral copulation because the offense was committed during a burglary. (§ 667.61, subds. (b), (e)(2).) On that count he received actual presentence credits only. (§ 2933.5, subd. (a)(2)(K).) The court imposed concurrent sentences of six years for the robbery and four years for the burglary and stayed both sentences under section 654, awarding McClanahan 395 custody credits (344 actual days, plus 51 days of conduct credit) on each count, reduced pursuant to section 2933.1.

## II. DISCUSSION

The prosecution alleged the burglary was “a violent felony within the meaning of Penal Code 667.5(c) in that another person, other than an accomplice, was present in the residence during the commission of the . . . offense.” The jury found this allegation true. McClanahan argues the true finding must be vacated because the judge gave the jury no instruction on the elements of the finding, specifically failing to define the word “accomplice” and failing to instruct the jury that the prosecutor bore the burden of proving the finding true beyond a reasonable doubt.<sup>4</sup>

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<sup>4</sup> The court instructed, however, in connection with other special allegations, “The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.” We agree with the People that this repeated instruction eliminated any prejudice from the failure to give a more pinpointed burden of proof instruction on the violent felony finding, assuming for purposes of argument it had a sua sponte duty to so instruct.

Section 667.5, subdivision (c)(21) provides that a residential burglary is a violent felony where “it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.” This finding is significant because it brings the crime within the statutory definition of a “violent felony” (§ 667.5, subd. (c)), which in turn limits presentence and post-conviction custody credits to which the individual is entitled.<sup>5</sup> (§ 2933.1.) A defendant convicted of residential burglary alone without the special finding is entitled to one-for-one presentence conduct credits under section 4019 and may earn up to 50 percent good time/work time credits in prison under section 2933 and corresponding regulations, whereas a defendant convicted of a violent felony as defined in section 667.5, subdivision (c) is limited to 15 percent credit both before sentencing and while in prison under section 2933.1, subdivisions (a) and (c).<sup>6</sup> (*People v. Singleton* (2007) 155 Cal.App.4th 1332, 1336–1337.) A finding that a burglary was committed while a non-accomplice was present in the residence thus potentially has the effect of increasing a defendant’s actual time spent in custody.

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<sup>5</sup> A true finding also subjects a defendant to a three-year sentence enhancement for each prior prison term (§ 667.5, subd. (a)), but no prior prison terms were involved in this case. A violent felony finding normally also will increase a defendant’s exposure in the event of a future crime by making the burglary a strike (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1)), although any first-degree burglary is also a strike as a “serious felony” (§ 1192.7, subd. (c)(18)). In this case, McClanahan’s convictions for forcible oral copulation and robbery were also strikes because they, too, were violent felonies. (§ 667.5, subd. (c)(5) & (c)(9).) McClanahan will thus be eligible for a third strike sentence in the event of a future serious or violent felony conviction, even if the violent felony finding on the burglary were to be vacated. (§ 667, subd.(e)(2)(A) & (C).) Hence, it appears the only consequence of the true finding for this defendant is the limitation on his credits, both before and after conviction. Even that consequence has only the most remote chance of affecting defendant’s actual time in prison; the sentence on the burglary conviction was stayed under section 654, and hence the calculation of his credits on that count is a rather academic point.

<sup>6</sup> Section 2933.1, subdivision (a) provides, “Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of work time credit, as defined in Section 2933.” That section also imposes the 15 percent cap on presentence credits otherwise available under section 4019. (§ 2933.1, subd. (c).)

Assuming without deciding that the court had a sua sponte instructional duty in connection with a violent felony allegation (see *People v. Banks* (2014) 59 Cal.4th 1113, 1152, overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 386 [willful, deliberate and premeditated aspects of attempted first degree murder]; *People v. Jones* (1997) 58 Cal.App.4th 693, 708-709, & fn. 9 [one-strike finding, even though a “ ‘penalty provision’ ” or “ ‘alternative sentencing scheme,’ ” rather than an enhancement]), we nevertheless find no cause to vacate the true finding.

McClanahan’s theory that the jury could reasonably have found there was no non-accomplice present at the time of the burglary is apparently premised on the notion that O.C. herself may have been an accomplice to the burglary by leaving a window open for the burglars, turning off the alarm, signaling to the burglars when no one else was home, or otherwise assisting the burglars in gaining entry into her family’s home. The factual theory advocated by McClanahan on appeal, as we understand it, is that O.C. may have allowed some of her friends to enter the family home for the purpose of stealing from her mother. In fact, most of the items taken in the burglary were taken from the bedrooms of either O.C.’s mother or brother, although a few were taken from O.C.’s bedroom. It is inconceivable that O.C. would have consented to all that occurred after the burglars entered, and McClanahan’s convictions for robbery and forcible oral copulation negate any possibility that O.C. agreed to submit to those acts. Still, under McClanahan’s theory, once inside, the burglars (or at least one of them) could have turned against O.C. and subjected her to the robbery and the forced oral copulation independently of any prior consent by her to assist in the burglary.

McClanahan claims he was entitled to further instruction because there was evidence from which the jury could have inferred that O.C. assisted the burglars in gaining entry into the house. For instance, there was no evidence of a forced entry. A window that was always kept locked had been left open. Every window in the house, including the open kitchen window, had a sensor that would set off the alarm if moved. Yet, the alarm did not go off before the four men burst into O.C.’s bedroom. Indeed,

none of the neighbors ever did hear an alarm go off during the entire time the burglary was in progress.

In addition, four of O.C.'s friends, Crutchfield (her boyfriend), LeAndre Owens (a close friend who went by the name Dray), Jackie Sarabia (her best friend) and Nora Vega (who was dating Owens), had been over to O.C.'s house the night before the robbery. Owens had a hairbrush with him that looked like the hairbrush police found outside the open kitchen window after the burglary. And inexplicably, when shown a picture of Vega by the police, O.C. would not identify her. A witness who had been visiting his girlfriend across the street from O.C.'s home, testified that, as he was pulling out of his girlfriend's driveway between 9:00 and 10:00 p.m., he saw a dark blue compact sedan parked in front of O.C.'s house. O.C. testified that her boyfriend, Crutchfield, drove a car matching that description. The witness from across the street then saw a Black or Hispanic man enter the front door of O.C.'s house. O.C. herself believed Crutchfield had participated in the burglary. After the crime she cut off all contact with him and the other friends who had visited her the night before. Thus, unlike most burglaries, there was some evidence in this case from which the jury could have concluded, as a factual matter, that O.C. was somehow involved in the burglary.

The People claim the jury's guilty verdict on the burglary charge necessarily negated a finding that O.C. was an accomplice because a burglary, by definition, involves nonconsensual entry. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1054 ["Nonconsensual entry with felonious or larcenous intent . . . is the definition of burglary itself."].) McClanahan argues, on the other hand, the burglars' entry still would have been felonious vis-à-vis O.C.'s mother, and thus McClanahan's burglary conviction alone does not negate the possibility that O.C. was an accomplice. We accept McClanahan's analysis to a point, but conclude there was no sua sponte duty to instruct on the violent felony finding. Ordinarily a person's status as an accomplice is a question of fact for the jury. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90–92.) But because O.C. could not, as a matter of law, have been convicted of burglarizing her own residence, we conclude the court did not err in omitting instruction on the violent felony allegation.

As a general rule, if an occupant of the premises consents to a burglar's entry, knowing of and endorsing his or her felonious intent, it constitutes a defense to burglary. (*People v. Superior Court (Granillo)* (1988) 205 Cal.App.3d 1478, 1485–1486 [where an undercover officer invited a potential buyer of stolen property into his warehouse of stolen goods in order to catch would-be buyers, no burglary occurred]; see generally, *People v. Frye* (1998) 18 Cal.4th 894, 954, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390 [occupant's consent to defendant's entry did not preclude a burglary conviction because consent did not confer unconditional possessory right to enter]; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1397–1400 (*Felix*) [defendant claimed he had permission to enter sister's home; burglary conviction upheld where there was no evidence his sister gave express permission for him to enter in her absence, or that she knew of his intent to take her property at the time of entry]; *People v. Salemm* (1992) 2 Cal.App.4th 775, 780–781 (*Salemm*) [salesman committed burglary when he entered home to sell fraudulent securities, even though he was invited in, because homeowner did not know of his felonious intent].) Lack of consent, however, is not an element of burglary that the prosecutor must prove; rather, consent is an affirmative defense. (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1302–1309 [defendant entered pawnshop with manager's permission, who knew defendant intended to sell stolen DVDs inside; improper burden of proof instruction on consent defense was prejudicial]; *Felix*, *supra*, 23 Cal.App.4th at p. 1397.) Because lack of consent is not an element of burglary, it cannot be said that McClanahan's burglary conviction in and of itself determined that McClanahan's entry into O.C.'s home was nonconsensual.

And despite the fact that knowing consent by an occupant ordinarily relieves the entering defendant of criminal liability for burglary, the same is not true when a consenting occupant allows the burglar to enter into a shared living space, knowing the person entering intends to commit a felony against a *different* occupant. Thus, where a husband consented to a would-be killer's entry into his family's home, knowing and endorsing his felonious intent to murder the wife, the would-be killer was still guilty of burglary because the target of the intended murder was a different occupant. (*People v.*

*Clayton* (1998) 65 Cal.App.4th 418, 421–424; cf. *People v. Sigur* (2015) 238 Cal.App.4th 656, 668–674 (*Sigur*) [13-year-old’s consent to allow adult male to enter family home and have sex with her did not invalidate the man’s burglary conviction; his entry was still a violation of the mother’s possessory interest in the home, and she had not given consent].) Applying the rule of *Clayton* to our facts, if O.C. consented to the burglars’ entry into the house for purposes of stealing her *family members’* property, then McClanahan could still have been convicted of burglary. The conviction did not negate a factual finding that O.C. somehow participated in the burglary.

But that is not the same as saying the jury lawfully could have found her to be an accomplice within the meaning of section 667.5, subdivision (c)(21). An accomplice is defined as “one who is liable to prosecution for the identical offense charged against the defendant on trial . . . .” (§ 1111; see generally, *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 429; *People v. Stankewitz, supra*, 51 Cal.3d at pp. 90–91.) We conclude the court had no sua sponte duty to define the term “accomplice” or to otherwise instruct the jury on the violent felony allegation because, as a matter of law, O.C. was not liable to prosecution for burglarizing her own home. Because an adult occupant has an “unconditional possessory right to enter” his or her home, O.C. could not have been convicted of burglary. (*People v. Gauze* (1975) 15 Cal.3d 709, 714 [“defendant cannot be guilty of burglarizing his own home”; burglary must be committed by someone who had “no right to be in the building”]; accord, *People v. Pendleton* (1979) 25 Cal.3d 371, 382 [“The law after *Gauze* is that one may be convicted of burglary even if he enters with consent, provided he does not have an unconditional possessory right to enter”]; *Sigur, supra*, 238 Cal.App.4th at pp. 668–674; *Clayton, supra*, 65 Cal.App.4th at p. 421 [“when the defendant has an absolute right of entry into the apartment he is charged with burglarizing, he cannot be guilty of burglary”]; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 32 [“a person cannot burglarize his own home”]; *Andrew I., supra*, 230 Cal.App.3d at p. 578 [“one cannot be convicted of burglary when he or she has an unconditional possessory right to enter the property”]; *Salemme, supra*, 2 Cal.App.4th at p. 781 [“since burglary is a breach of the occupant’s possessory rights, a

person who enters a structure enumerated in section 459 with the intent to commit a felony is guilty of burglary except when he or she (1) has an unconditional possessory right to enter as the occupant of that structure or (2) is invited in by the occupant who knows of and endorses the felonious intent”]; *People v. Brown* (1992) 6 Cal.App.4th 1489, 1497, fn. 3 [same].)

As a 20-year-old adult who lived in the home at the time of the burglary, O.C. was clearly an occupant with an “unconditional possessory right to enter.” If the People were to prosecute O.C. for burglary, the burden would be on them to prove O.C. did *not* have an unconditional possessory right to enter the house. (*People v. Davenport* (1990) 219 Cal.App.3d 885, 892.) Any such showing would be impossible. McClanahan knew the Benicia house to be her home and never disputed she lived there. It is actual occupancy that establishes an unconditional possessory right to enter in this context, not title to the property. (Cf. *People v. Sears* (1965) 62 Cal.2d 737, 746, overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 494, 509–510, fn. 17 [burglary conviction proper where husband had moved out of family home three weeks before burglary and had no right to enter without permission]; *Sigur, supra*, 238 Cal.App.4th at p. 674 [13-year-old girl did not have unconditional possessory interest in her mother’s home]; *People v. Ulloa* (2009) 180 Cal.App.4th 601, 606–610 [burglary conviction upheld even though defendant’s name was on the lease, where he was not actually living in the apartment]; *People v. Gill* (2008) 159 Cal.App.4th 149, 158–161 [husband who had surrendered keys to wife “waived” any claim to an unconditional possessory right to enter and could be convicted of burglary]; *People v. Smith* (2006) 142 Cal.App.4th 923, 929–932 [though marital home was community property, estranged husband subject to restraining order committed burglary when he entered and assaulted his wife]; *Andrew I., supra*, 230 Cal.App.3d 578–579 [minor did not have unconditional possessory right to enter his mother’s home because he had moved out a week or two earlier; he therefore could not have conferred on his friend such a right; “ ‘one may be convicted of burglary even if he . . . enters with consent, provided he . . . does not have an unconditional possessory right to enter’ ”]; *In re Richard M.* (1988) 205 Cal.App.3d 7, 12–17 [minor did not have a right

to enter his parents' house because he lived at a youth rehabilitation center; that they were legally obligated to provide for him did not give him a claim of right to their property].) There was ample evidence to show that O.C. had an unconditional possessory right to enter the family home, which negated her exposure to a prosecution for burglary, and thus there was no need for the court to instruct on the meaning of "accomplice" for purposes of the violent felony allegation.

Even assuming for purposes of argument that further instruction should have been given, we see no reasonable possibility the jury would have found O.C. to be an accomplice to burglary. The jury's verdicts show they credited her testimony over McClanahan's. O.C.'s distraught state throughout the investigation tends to confirm that she was a victim and nothing else. Where there was no direct evidence that she consented to or facilitated the burglars' entry into the house, and where a proper instruction would have informed the jury of the foregoing legal principles, the supposition that the jury would have found she was an accomplice in the burglary is too speculative to call for reversal, even under the stringent test of *Chapman v. California* (1967) 386 U.S. 18, 24, which the parties agree is the applicable standard. (Cf. *People v. Prieto* (2003) 30 Cal.4th 226, 256–257 [*Chapman* standard applies to erroneous instruction on special circumstance]; see also fn. 5, *ante*.)

### **III. DISPOSITION**

The judgment is affirmed.

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Streeter, J.

We concur:

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Ruvolo, P.J.

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Reardon, J.