IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **A. DIAZ**

UNITED STATES

v.

Dean A. YOUNG
Corporal (E-4), U.S. Marine Corps

NMCCA 200201120 Decided 26 August 2005

Sentence adjudged 28 September 2001. Military Judge: D.K. Margolin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Air Bases Western Area, MCAS Miramar, San Diego, CA.

CHARLES W. GITTINS, Civilian Appellate Defense Counsel
LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel
LT C.C. BURRIS, JAGC, USNR, Appellate Government Counsel

DIAZ, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his plea, of negligent homicide, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's three assignments of error, the Government's response, the appellant's reply, and the oral arguments of the parties. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

ATC Disqualification

In his first assignment of error, the appellant asserts that the military judge committed plain error by (1) not disqualifying the assistant trial counsel (ATC) from participating in the appellant's case once the military judge discovered at the initial Article 39(a), UCMJ, session that the ATC had represented a Government witness in a related disciplinary proceeding; and (2) allowing the trial counsel to use the ATC's trial notes after the military judge granted a subsequent defense motion to disqualify the ATC. We disagree.

Our superior court has held that a counsel's "[p]rior representation may lead to disqualification on either of two independent grounds. First, an attorney may be disqualified if the current representation is adverse to a former client, and the prior representation of that client involved the same or a substantially related matter. Second, an attorney may be disqualified if there is a reasonable probability that specific confidences from the prior representation may be used to the disadvantage of the former client." *United States v. Humpherys,* 57 M.J. 83, 87 (C.A.A.F. 2002)(internal citations omitted). Additionally, a military accused may assert prosecutorial misconduct (and thereby seek counsel's disqualification) stemming from an attorney's prior representation of a third party. *United States v. Golston,* 53 M.J. 61, 64 n.1 (C.A.A.F. 2000).

Here, the appellant is asserting a claim of prosecutorial misconduct under *Golston*. A military accused "may challenge prosecutorial methods as a 'due process violation' . . . and secure relief if they are "of sufficient significance to result in the denial of the [accused's] right to a fair trial." *Id.* at 64 (internal footnote and citations omitted).

As a general rule, however, an accused's failure to raise timely objections or seek appropriate relief constitutes waiver of an issue on appeal, absent plain error. RULE FOR COURTS-MARTIAL 801(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). *See also United States v. Hustwit,* 33 M.J. 608, 616 (N.M.C.M.R. 1991) (noting that failure to seek disqualification of a trial counsel before trial on the merits may result in waiver "unless the defense can demonstrate that due diligence would not have disclosed the facts surrounding the prosecutor's prior involvement with the accused.").

We note that the civilian attorney who is before us on the appellant's behalf also represented him at trial. At an Article 39(a), UCMJ session, the appellant was arraigned and reserved the filing of motions. During that same session, the ATC disclosed that he had represented a Government witness in a related disciplinary proceeding. At that time, the military judge stated, "Captain Paez [appellant's detailed defense counsel], you're on notice of the issue obviously and you and Mr. Gittins

are aware of it and you can file any motion that you deem appropriate at the appropriate time." Record at 62.

Armed with this knowledge, the appellant and his counsel elected not to seek the ATC's disqualification until after the prosecution had begun its presentation of evidence. Moreover, the appellant's belated motion to disqualify the ATC was not based on a claim of constitutional or structural error (as the appellant now presses on appeal) but rather because the defense believed that it might call the ATC to impeach his former client's testimony.

With the benefit of a proper motion before him, the military judge granted the request to disqualify the ATC from further participation in the trial.[1] At that point, the trial counsel requested that he be allowed to use the ATC's trial notes summarizing the testimony taken up to the time of the defense motion. Despite being prompted by the military judge, the appellant's counsel did not object. Nevertheless, the military judge independently reviewed the ATC's notes before allowing the trial counsel to use them.

Given the appellant's decision to forego litigating the disqualification motion at the beginning of the trial, we decline to find plain error. Instead, we find that the appellant forfeited any issue arising from the ATC's participation in his court-martial up to the point where the military judge granted the defense motion to disqualify. We further find that the appellant forfeited any issue regarding the trial counsel's use of the ATC's notes by failing to object when prompted by the military judge.

In any event, assuming without deciding that (1) the ATC should have been disqualified *sua sponte* at the outset of the trial[2]*;* and (2) the trial counsel should not have been allowed to use the ATC's trial notes, it remains the appellant's burden to demonstrate prejudice. *See Golston,* 53 M.J. at 66-67.

Here, the appellant alleges no prejudice, insisting instead that these issues amount to "structural errors" that defy harmless error analysis. The cases, however, do not support such a claim, *see Golston,* 53 M.J. at 64, and this factual record is not a proper vehicle to create new law. We are satisfied that the appellant suffered no prejudice from the ATC's limited participation in the trial. Moreover, after reviewing the ATC's notes ourselves, we find that the appellant suffered no prejudice from the military judge's unopposed decision to allow the trial

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[1] Ultimately, the defense declined to call the ATC.

[2] In that regard, we note that the witness gave written consent to his former lawyer's participation as ATC for the appellant's trial. Appellate Exhibit LV.

counsel to use these materials at trial. Accordingly, we decline to grant relief.[3] Art. 59, UCMJ.

Factual and Legal Sufficiency

I.

The appellant also contends that the evidence presented at trial was factually and legally insufficient to support his conviction for negligent homicide. We disagree.

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court [of Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt." *Id*. at 325.

The appellant was originally charged with dereliction of duty and involuntary manslaughter. Following a successful defense motion to re-open the Article 32, UCMJ, investigation, the appellant's command dismissed the original charges and preferred new charges alleging dereliction of duty, involuntary manslaughter, and reckless endangerment, in violation of Articles 92, 119, and 134, UCMJ.

Just prior to announcing his special findings on the merits, the military judge dismissed the dereliction of duty and reckless endangerment charges after determining that they were lesser included offenses of the involuntary manslaughter charge. He found the appellant not guilty of involuntary manslaughter, but guilty of the lesser-included offense of negligent homicide.

To convict the appellant of negligent homicide, the Government was required to prove:

(1) That a certain person is dead;
(2) That this death resulted from the act or failure to act of the accused;
(3) That the killing by the accused was unlawful;
(4) That the act or failure to act of the accused which caused the death amounted to simple negligence; and

[3] Although we resolve this issue against the appellant, we discourage court-martial detailing authorities from making counsel assignments that are virtually guaranteed to generate appellate issues and which, regardless of their merit, do not reflect well on the military justice system. *See Humpherys,* 57 M.J. at 89 n.5.

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 85b.

The appellant disputes the sufficiency of the evidence supporting the second and fourth elements of the offense. We have carefully considered the evidence presented at trial, "giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). We conclude that the evidence is both legally and factually sufficient to support the appellant's conviction.

II.

On 4 September 2000, the appellant was the senior noncommissioned officer aboard a P-19A, crash, fire and rescue truck (hereinafter "Truck No. 48"). On that day, the crew of Truck No. 48 was engaged in an operational check of their vehicle. The appellant was assigned as the vehicle's roof turret operator; Lance Corporal (LCpl) Aaron Elliott was assigned as the vehicle's driver[4], and Corporal (Cpl) Jason Hoyer (then a LCpl) was the vehicle's third crewmember.

The roof turret is one of four devices aboard the P-19A used to deliver water and other agents to extinguish fires. The P-19A also houses a separate bumper turret, handline, and structural panel used to pump water and other firefighting agents. Water is pumped to the roof turret by engaging the "agent selector valve," which is located on the vehicle's control panel between the driver and the turret operator seats. Once the agent selector valve is engaged, the roof turret operator can deliver water or other fire-fighting agents through the turret by operating a push-button valve located on the turret's handle.[5] In the same way, the driver can deliver water or other agents through the bumper turret by opening a ball valve attached to that turret. Unless and until the agent selector valve is engaged, neither the roof or bumper turrets can disperse water or other agents.

Also conducting an operational check that day in the same training area was the crew of P-19A crash, fire, and rescue truck No. 45 (hereinafter "Truck No. 45"). LCpl Daniel Yaklin was assigned to Truck No. 45. He was responsible for operating the

[4] Although LCpl Elliott believed that he was the crew chief of Truck No. 48, he also acknowledged that he remained subject to the appellant's orders.

[5] When not operating the roof turret, the turret operator sits in the center right portion of the P-19A cabin. The turret operator's seat folds down to provide a platform for the turret operator to stand on when engaging the roof turret.

"handline", or the hard rubber hose stored onboard the P-19A. The other Truck No. 45 crewmembers were Cpl Conley (the rescueman), Cpl Strickland (the driver/operator) and LCpl Templeman (the roof turret operator).

Both P-19A crews were conducting what is known as a "wetcheck," that is, they were firing water through the two turrets and operating the handline to ensure that these devices were functioning properly. During this evolution, the crew of Truck No. 45 playfully sprayed water in the direction of the appellant's truck. The appellant and his crewmates retaliated by engaging in a maneuver known as a "pump and roll."

A "pump and roll" is a fire fighting procedure of limited application. In a "pump and roll", the P-19A truck travels at a speed of between 10-15 mph, while the crew simultaneously engages the bumper and roof turrets to deliver water or other fire-fighting agents. It is used when approaching a burning aircraft and is intended (through the application of water and other firefighting agents from a moving P-19A truck) to create a path for the P-19A's rescueman to extract any injured aircraft crewmembers.[6] The appellant's vehicle did not have a rescueman aboard on the date of the offense.

With the appellant's acquiescence (if not his outright consent)[7], LCpl Elliott drove Truck No. 48 through a gate at the north end of the training area. Elliott then turned the vehicle around and initiated a "pump and roll" by barreling through the gate in the direction of Truck No. 45, with the intent to spray the offending crew with water from the truck's bumper and roof turrets.[8]

Just before beginning the "pump and roll," LCpl Elliott opened the ball valve on the bumper turret. At or near the same time, the appellant assumed his position on the roof turret. Two witnesses testified that there would have been no reason for the appellant to assume his post on the roof turret while the vehicle was running, unless he was intending to operate the turret. Record at 184, 251.

As LCpl Elliott drove in the direction of Truck No. 45 (but before his vehicle re-entered the gate), he engaged the agent selector valve, thus allowing water to flow to the two turrets.

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[6] The appellant's command had a standing policy prohibiting "pump and rolls" (except when responding to actual emergencies) because of safety and mechanical concerns. It is not clear, however, that the appellant or his crewmates were aware of that policy.

[7] Although the record conflicts on this point, Cpl Hoyer testified that the appellant affirmatively shook his head in response to LCpl Elliott's request that they retaliate for the dousing inflicted by Truck No. 45. Record at 337.

[8] *See* Appellate Exhibit L, which contains a demonstrative layout used by several witnesses to describe the relative positions of the vehicles as the events unfolded.

According to Elliott, he was about 75-100 yards away from Truck No. 45 when water began flowing from the roof turret. When Truck No. 48 began its maneuver, LCpl Yaklin was standing just outside of his vehicle, attempting to retract its handline. Although LCpl Elliott saw Yaklin outside the left side of his vehicle, he pressed forward, traveling at a speed in excess of the recommended limit for a "pump and roll."

The appellant, as the senior Marine in Truck No. 48, made no effort to stop LCpl Elliott. To the contrary, as specifically found by the military judge, the appellant engaged the roof turret as his vehicle sped toward LCpl Yaklin's position. The volume of water flowing from the vehicle's bumper and roof turrets made it impossible for LCpl Elliott to see in front of him. Tragically, the appellant's truck struck and killed LCpl Yaklin.

The military judge determined that the appellant's act of engaging the roof turret, thereby increasing the flow of water, was negligent. The military judge further determined that the appellant's negligence was a proximate cause of the death of LCpl Yaklin. Based upon our independent review of this record, and for the reasons set forth below, we conclude that the evidence is legally and factually sufficient to support these findings.

III.

The appellant argues that his conviction must be set aside because (1) some of the prosecution's witnesses were themselves charged and convicted of offenses related to LCpl Yaklin's death and thus, were accomplices whose testimony was inherently unreliable; and (2) the testimony was inconsistent in certain particulars. In our view, however, so long as the prosecution presents competent evidence as to each element of the offense, it is for the fact-finder in the first instance to evaluate the credibility of witnesses and resolve any inconsistencies. *United States v. Damatta-Olivera,* 37 M.J. 474, 477 (C.M.A. 1993); *United States v. Reed,* 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). On appeal, of course, we must ourselves be convinced of the appellant's guilt beyond a reasonable doubt. "Reasonable doubt, however, does not mean the evidence must be free from conflict." *Reed,* 51 M.J. at 562 (citation omitted).

Our analysis of this issue is no different merely because some (but not all) of the prosecution's witnesses might properly be labeled accomplices to the appellant's crime. We acknowledge that the standard under military law for considering accomplice testimony remains somewhat uncertain. Prior to the 1984 revision of the Manual for Courts-Martial, "a conviction [could not] be based upon uncorroborated testimony given by an accomplice in a trial for any offense if the testimony [was] self-contradictory, uncertain, or

improbable." MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969 Revised ed.), ¶ 74a(2).

The 1984 Manual, however, moved this paragraph to the non-binding discussion section to RULE FOR COURTS-MARTIAL 918(c), where it remained at the time of the appellant's court-martial. *See* Discussion R.C.M. 918(c). In *United States v. Williams,* 52 M.J. 218, 221-22 (C.A.A.F. 2000), our superior court appeared to suggest that the corroboration requirement for self-contradictory accomplice testimony was no longer necessary because of the 1984 Manual change. Despite that statement, however, the *Williams* court analyzed the relevant facts in light of the R.C.M. 918(c) discussion, determined that the evidence was legally sufficient, and affirmed. *Id.* at 222.

In *United States v. Bigelow,* 57 M.J. 64 (C.A.A.F. 2002), our superior court considered a claim of error based on a military judge's failure to give the complete standard instruction on accomplice testimony contained in the Military Judge's Benchbook. *Id.* at 66. The judge in *Bigelow* instructed the members that accomplice testimony may be motivated by self-interest, including receiving a grant of immunity or clemency. She supplemented that language with a general credibility instruction and further advised the members as to a particular witness' bad character for truthfulness. *Id.*

Instead of relying on the language contained in the discussion to R.C.M. 918(c), however, the military judge instructed the members that "[a]lthough you should consider the testimony of an accomplice with caution, you may convict the accused based solely upon the testimony of an accomplice, as long as that testimony wasn't self contradictory, uncertain, or improbable." *Id.* The military judge also instructed the members to consider the testimony of an accomplice with "caution," "whereas the standard instruction admonishes the members twice to consider accomplice testimony with 'great caution.'" *Id.* at 66. Finally, the military judge omitted that portion of the standard instruction that covers how to determine if accomplice testimony is corroborated. *Id.*

In considering the claim of instructional error, our superior court in *Bigelow* again emphasized that the corroboration requirement contained in the Manual appears in the non-binding discussion section of R.C.M. 918(c). *Id.* at 67. Concluding that its prior case law might have erroneously imposed a mandatory requirement for the use of the standard benchbook instruction, the CAAF affirmed the military judge's tailored language:

> [All that is required under military law] is that the critical principles of the standard accomplice instruction . . . be given, not necessarily the standard instruction itself, word for word. Indeed, the standard instruction may in some cases be an overstatement or an oversimplification. Appellant has not cited any instructions from civilian criminal law cases that employ language similar to the standard Benchbook instruction.

Id.

While *Williams and Bigelow* place the continued vitality of the non-binding discussion in R.C.M. 918(c) in substantial doubt, *see United States v. Barlow,* 58 M.J. 563, 566-67 (N.M.Ct.Crim.App. 2003), *rev. denied,* 59 M.J. 166 (C.A.A.F. 2003), what remains unclear is the scope of cases (if any) where our superior court might require application of the non-binding discussion on accomplice testimony. In light of this uncertainty, we will give the appellant the benefit of the doubt and apply the language of the discussion to the facts of this case.

IV.

As we consider the legal and factual sufficiency of the evidence to convict the appellant, we note first that the case was tried before a military judge, who is presumed to know and apply the law, including that which applies to accomplice testimony. Although the military judge acknowledged some of the uncertainty that we have discussed above regarding the proper analytical framework for considering accomplice testimony, we are confident that he applied the relevant law, including his obligation to "consider the testimony of an accomplice with caution" while nevertheless retaining the option to "convict the accused based solely upon the testimony of an accomplice, as long as that testimony wasn't self-contradictory, uncertain, or improbable." *Bigelow,* 57 M.J. at 66.

The critical factual issue in this case was whether the appellant engaged the roof turret of his vehicle, and thus further obstructed the view of LCpl Elliott as Truck No. 48 sped by the victim's stationary vehicle. As an initial matter, because we consider LCpl Hoyer an accomplice, we have attached no weight to his internally inconsistent testimony regarding the appellant's affirmative shake of the head in response to LCpl Elliott's request that they retaliate for Truck No. 45's dousing.

Even without this evidence, however, the military judge had before him undisputed testimony that the appellant was assigned as his vehicle's roof turret operator on the day LCpl Yaklin was killed. Further, Cpl Strickland (the driver/operator of Truck No. 45) testified that she saw the appellant's truck immediately before it began its fatal "pump and roll." She told the military judge that, "I saw somebody standing in the roof turret and there

was water coming out of the bumper turrets[,]" although it was only a slight stream because the pump was not fully engaged. Record at 398. Strickland further testified that water was not coming out of the roof turret at that time. Record at 429.[9]

Strickland's testimony was consistent with that of LCpl Elliott, who testified that (1) as soon he turned his vehicle around in the direction of Truck No. 45, he saw the appellant rise to reach through the turret; and (2) he opened the ball valve on the bumper turret and then engaged the pump immediately before re-entering the gate; and (3) he did not recall the roof turret begin spraying water until he was through the gate and approximately 75-100 yards away from Truck No. 45. Record at 443-45. Strickland's testimony was also consistent with that of LCpl Hoyer, who saw the appellant stand up in the roof turret after Elliott engaged the ball valve for the bumper turret, but before Elliott engaged the pump. Record at 338-39.

The appellant argues that Cpl Strickland's testimony is not reliable because she was an accomplice. While we take issue with the appellant's characterization of Strickland, we need not decide the matter to resolve the appeal. Assuming that Cpl Strickland was an accomplice, her testimony was certain and clear and, in any event, was corroborated by the fact that the appellant had been assigned as the roof turret operator for Truck No. 48. Moreover, as we have previously noted, two other witnesses who were well-versed in the operation of the P-19A truck testified that there would have been no reason for an individual to be standing on the roof turret while the vehicle was moving, unless that person was intending to operate the turret. Record at 184, 251.

Finally, LCpl Elliott testified that, although he was uncertain as to the precise sequence, the roof turret was engaged at some point during the execution of the pump and roll (either before or after he engaged the bumper turret), because it was this combined water flow that completely compromised his vision. Record at 446-47.

The trial defense team aggressively attacked LCpl Elliott's credibility, as well as his recollection of the events. In determining whether LCpl Elliott's testimony "was self-contradictory, uncertain, or improbable," however, we look to see whether it (or the testimony of any of the other alleged accomplices) was "facially unreliable." *Williams,* 52 M.J. at 222 ("'[t]estimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the

[9] Cpl Strickland also testified that, shortly after the tragic incident, the appellant told her that "he felt really bad because he knew that – he said that he was always the one to instigate things, but this time it wasn't funny." Record at 405. We view this as some evidence of the appellant's consciousness of guilt.

laws of nature.' *United States v. Bermea,* 30 F.3d 1539, 1552 (5th Cir. 1994)"). We hold that the relevant testimony, taken as a whole, was reliable. We also find that the evidence summarized above is alone sufficient to support the military judge's special finding that the appellant in fact engaged the roof turret, which action contributed to the death of LCpl Yaklin.

We consider one other argument raised by the appellant as to the sufficiency of the evidence. At trial and at oral argument, the appellant insisted that there was no credible evidence that he activated the roof turret, because it was equally likely that he stood up during the "pump and roll" to turn off the water. The military judge's initial special findings rejected that argument, concluding that, if this had been the appellant's intent, he could have simply turned off the flow of water by toggling the agent selector valve inside the cabin. Record at 539-40.

During sentencing, the defense presented expert testimony that such an action could have damaged the truck's transmission and pump, and also made the vehicle more difficult to control. The appellant then asked the military judge to reconsider his findings in light of this evidence. The military judge denied that request and, prior to authentication, made additional written findings supporting his determination as to the appellant's guilt. Appellate Exhibit LXV.

We have considered this particular contention and remain convinced beyond a reasonable doubt of the appellant's guilt. Regardless of any possible damage to the truck, the evidence was undisputed that the quickest way for the appellant to stop the flow of water was to toggle the agent selector valve inside the cabin. The appellant's alternative theory does not cast a reasonable doubt as to the sufficiency of the evidence supporting the appellant's conviction and we decline to accept it.

Although we are satisfied of the appellant's guilt beyond a reasonable doubt based on the theory accepted by the military judge at trial, we also conclude that the appellant was guilty of negligent homicide based on his **failure to act.** As we noted earlier, a military accused may be convicted of negligent homicide based on a negligent failure to act. MCM, Part IV, ¶ 85.

We recognize that an appellate court may not affirm a conviction on a theory not presented to the trier of fact. *United States v. Riley,* 50 M.J. 410, 416 (C.A.A.F. 1999). In this case, however, the appellant was originally charged with dereliction of duty, involuntary manslaughter, and reckless endangerment. And although the military judge dismissed the specification alleging dereliction of duty, he did so only after determining that it was a lesser included offense of involuntary manslaughter. While the correctness of that ruling is not before

us, we conclude that the allegations contained within the dereliction of duty charge remained part of the prosecution's theory of guilt as to involuntary manslaughter and criminally negligent homicide.

The appellant was also on notice of his obligation to defend against all of the factual bases alleged in the original charges, including the theory that the appellant's failure to act caused the death of LCpl Yaklin. As a result, it would be entirely consistent with "basic notions of due process," *see Riley,* 50 M.J. at 415, to consider an alternative theory of guilt on appeal.

In our view, even if LCpl Elliott was nominally designated as the crew chief of Truck No. 48 on 4 September 2000, the appellant cannot escape the responsibility to act imposed on him by virtue of his rank as a noncommissioned officer. *See generally, United States v. Thompson,* 22 M.J. 40, 41 (C.M.A. 1986)(stating that, "noncommissioned officers, by virtue of their rank and authority, have certain leadership responsibilities required of them by law and custom). Thus, even if the appellant did not encourage or otherwise sanction LCpl Elliott's reckless acts, and even if he did not otherwise engage the roof turret, the appellant also did nothing to stop the sequence of events that led to a fellow Marine's death.

We conclude that the appellant's failure to act under these circumstances was, if not willful, at least negligent, and that such negligence was a proximate cause of LCpl Yaklin's death. This alternative theory provides an independent basis for finding the appellant guilty beyond a reasonable doubt of negligent homicide. *See generally United States v. Garner,* 43 M.J. 435, 437 (C.A.A.F. 1996)(stating that, where alternative theories of guilt are sustainable on the evidence of record, it does not matter which theory a trier of fact accepts).

V.

To summarize, the military judge determined that the prosecution's evidence, in the form of the exhibits, a demonstration of the operation of the P-19A, and the prosecution's witnesses (not all of whom were accomplices), was sufficiently credible as to the elements of negligent homicide, and he resolved any inconsistencies in that proof against the appellant.

After reviewing the entire record, we conclude that the evidence is legally sufficient to support the appellant's conviction for negligent homicide on the theory expressed by the military judge at trial. Even after considering the testimony of the alleged accomplices in this case with the caution required by law, we nonetheless find that it was facially reliable and independently corroborated in all material respects. Additionally, we are ourselves convinced of the appellant's guilt

beyond a reasonable doubt, either because, as the military judge determined, the appellant acted in concert with LCpl Elliott to proximately cause the death of LCpl Yaklin or, because the appellant had a duty to stop his subordinate's reckless acts and negligently failed to do so. Accordingly, we decline to grant relief.

Companion Case

In his third assignment of error, the appellant asserts that the CA's action is fatally defective because it relies on a Staff Judge Advocate's Recommendation that failed to mention two companion cases. Even if the CA erred, however, we decline to grant relief.

The appellant is correct in that the CA is required to reference companion cases in his action. *See* Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7C, § 0151a(2)(Ch.3, 27 Jul 1998).[10] The purpose of this requirement, is to ensure that the CA makes an informed decision when taking action on a court-martial conviction. *See United States v. Ortiz*, 52 M.J. 739, 741 (N.M.Ct.Crim.App. 2000). A CA's failure to consider companion cases, however, will not warrant relief absent a showing of prejudice. *See United States v. Swan*, 43 M.J. 788, 792 (N.M.Ct.Crim.App. 1995).

Assuming that the two cases mentioned in the appellant's assigned error are indeed companion cases, the appellant fails to allege how he has been prejudiced by the CA's omission. In that regard, it appears that the CA in this case was also the CA in the two purported companion cases. If so, he clearly would have been aware of his action in those cases. Additionally, the CA considered the appellant's record of trial before taking his action. Since the record references the punitive action taken in the two cases, the CA would have been reminded about them before taking action in the appellant's case. As a result, we are convinced that the CA's failure to list companion cases in his action, even if error, did not materially prejudice the substantial rights of the appellant.

[10] Contrary to the appellant's claim, however, a Staff Judge Advocate is not required to list companion cases in his post-trial recommendation. *See* R.C.M. 1106.

Conclusion

For the reasons set forth above, we affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court