Waiver and Plain Error Review

The Case Law Framework

BY JOHN R. WEBB AND ALEX GANO

This article examines Colorado Supreme Court and Court of Appeals opinions on the relationship between waiver and plain error review in criminal cases. It also considers questions left unanswered by this case law.

In 2018 and 2019, the Colorado Supreme Court decided four criminal cases that clarified the relationship between waiver and plain error review by emphasizing that waiver requires the intentional relinquishment of a known right: *People v. Rediger*,[1] the companion case *People v. Smith*,[2] *Phillips v. People*,[3] and its companion case *Cardman v. People*.[4] This article examines these and other relevant cases and looks at Court of Appeals opinions that have applied *Rediger* and *Smith*. It concludes by considering unresolved issues concerning waiver in criminal cases.

Unpreserved Error in Criminal Cases

Colorado Rule of Criminal Procedure 52(b) provides for plain error review of unpreserved errors,[5] which are often described as "forfeited."[6] Because plain error review is not a constitutional right,[7] states may strike the balance between plain error and waiver differently.

In Colorado, to warrant reversal the unpreserved error must be obvious and "so undermine[] the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction."[8] The Colorado Supreme Court has not embraced the narrower federal formulation under the similar federal rule.[9]

But not all unpreserved errors merit plain error review. An error that defense counsel invited[10] or that the defendant or counsel waived does not.[11] Either situation ends review on direct appeal, leaving the defendant to seek relief for ineffective assistance of counsel under Crim. P. 35(c), unless the defendant personally waived that right.[12]

Waiver and Jury Instructions

Jury instructions provided the context for the 2018 Supreme Court opinions that considered whether alleged but unpreserved errors had been waived.

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Rediger involved a jury instruction that erroneously addressed a different statutory subsection than the indictment described. A division of the Court of Appeals concluded that the error had been waived based on defense counsel's response to the trial court's questions about the prosecutor's proposed instructions, "Yes. Defense is satisfied."[13] A unanimous Supreme Court disagreed.

The Supreme Court set the tone by noting that "mere acquiescence to a jury instruction does not constitute a waiver without some record evidence that the defendant intentionally relinquished a known right."[14] The Court identified two considerations: "Waiver, in contrast to invited error, is the *intentional* relinquishment of a *known* right or privilege. We do not presume acquiescence in the loss of fundamental constitutional rights, and therefore indulge every reasonable presumption against waiver."[15]

Turning to the record, the Court discerned "no evidence that Rediger['s counsel] considered objecting to the erroneous instruction but then, for some tactical or other reason, rejected the idea."[16] Nor did the record contain "any evidence that Rediger['s counsel] knew of the discrepancy between the People's tendered jury instructions and the charging document."[17] The attorney general's assertion that Rediger's counsel confirmed he had reviewed the proposed instructions before trial missed the mark. While "these facts confirm that Rediger's counsel read the proposed instructions, they do not show Rediger's or counsel's knowledge of the discrepancy between the jury instructions and charging document . . . ."[18]

Smith, a unanimous decision announced the same day, likewise dealt with instructional error. The trial court had modified an instruction at the request of Smith's counsel.[19] Otherwise, when asked whether the court's instructions were acceptable, defense counsel stated, "'They are acceptable, Judge.'"[20] In an unpublished opinion, a division of the Court of Appeals rejected the attorney general's argument that

defense counsel had waived other instructional errors. It reviewed for plain error, found a simple variance that prejudiced the defendant, and reversed.[21] The Supreme Court agreed. Tracking *Rediger*, the Court explained:

> Likewise, in this case, a search of the record before us reveals no evidence that Smith, by stating that the instructions generally were "acceptable" to him, intended to relinquish a known variance claim. As in *Rediger*, no evidence suggests that Smith considered objecting to the alleged variance but then for some reason, tactical or otherwise, decided against it. Indeed, the parties and the trial court appear never to have discussed or acknowledged the pertinent differences between Smith's charging document and the proposed jury instructions or the implications of those differences.[22]

Simply put, *Rediger* and *Smith* construed waiver narrowly.

Hinojos-Mendoza *and* Stackhouse

Two earlier Colorado Supreme Court opinions, *Hinojos-Mendoza v. People*[23] and *Stackhouse v. People*,[24] not cited in either *Rediger* or *Smith*, could be read as suggesting a broader approach to waiver of errors that did not involve jury instructions.

Hinojos-Mendoza involved the admission of a laboratory report without the testimony of the technician who had prepared it, as allowed by CRS § 16-3-309(5).[25] The Court treated defense counsel's failure to request that the technician testify in person as a waiver of the confrontation issue raised on appeal.[26] The court explained: "[W]e presume that attorneys know the applicable rules of procedure. Given this knowledge, we can infer from the failure to comply with the procedural requirements that the attorney made a decision not to exercise the right at issue."[27]

Stackhouse dealt with an appellate challenge to a complete courtroom closure during voir dire to which defense counsel had not objected during trial. The Court held that the issue had been waived.[28] Citing the presumed knowledge language, the Court explained that "defense counsel must object to a known closure to preserve appellate review on public trial grounds."[29] And it warned that "[a]llowing a defense attorney who stands silent during a known closure to then seek invalidation of an adverse verdict on that basis would encourage gamesmanship . . . ."[30]

But as discussed below, in light of *Phillips*, the continued viability of these cases—at least for purposes of finding waiver—has been clouded.

> "In *People v. Allgier*, the division addressed an issue left unresolved in *Rediger*—'exactly what "known" means in evaluating whether defense counsel intentionally relinquished a known right.'"

The Court of Appeals Interprets Rediger

Several divisions of the Court of Appeals have addressed waiver post-*Rediger*. The following four cases are illustrative.

In *People v. Tee*, the defendant contended that a midtrial discussion between two jurors—overheard by a court employee—suggested predeliberation warranting a mistrial.[31] The division concluded that defense counsel had waived a mistrial based on these discussions because

- from the time the issue arose, "the trial court and defense counsel were involved in an ongoing, interactive exchange";[32]
- counsel's questioning of the court employee showed that "counsel recognized the predeliberation concern";[33] and
- after the court had questioned the first juror, counsel said, "I didn't hear anything at this point that would make me want to move for a mistrial based on the fact that the jurors looked engaged in a deliberate guilt or not guilt process to me."[34] Then, following questioning of the second juror, counsel asked only that the court read the jury instruction on burden of proof. After the court had done so, counsel sought no further relief.[35]

In *People v. Allgier*, the division addressed an issue left unresolved in *Rediger*—"exactly what 'known' means in evaluating whether defense counsel intentionally relinquished a known right."[36] Defense counsel had repeatedly said "no objection" when, while cross-examining the defendant, the prosecutor offered several firearms into evidence, one by one.[37] But on appeal the defendant contended that the prejudicial effect of admitting this arsenal constituted plain error under CRE 403.[38] A split division rejected the attorney general's waiver argument. Noting the absence in the trial court of any reference to Rule 403, the majority observed, "[a]ctual recognition seems to be what *Rediger* [] requires to find a waiver."[39]

More recently, two 2019 cases rejected waiver arguments under *Rediger*. Faced with a similarly unpreserved instructional error plus an indication that defense counsel had acquiesced in the instructions, the majority in *People v. Ramirez* discerned no waiver.

> We see no indication in the record that defense counsel recognized the error in application of the deadly force jury instruction. There would be no rational, strategic reason for the defense to want such an erroneous instruction to be given. Indeed, counsel's expression that he believed the instruction to be "a correct statement of the law" shows that he failed to notice that it was an *incorrect* statement of the law *as applied* to the first, second, and third degree assault charges in this case.[40]

In *People v. Bott*,[41] the division dealt with the retroactivity of *People v. LaRosa*, which had replaced the corpus delicti rule with a trustworthiness standard.[42] Because defense counsel had argued only for the trustworthiness standard in the trial court, the attorney general argued that the defendant waived his argument based on the corpus delicti rule on appeal. The division disagreed and explained:

> [A]s a prerequisite to waiver, we must find that the defendant (or his counsel) knew of the right before relinquishing it. The record suggests the opposite: that everyone involved[] misunderstood the import or scope of *LaRosa*'s retroactivity analysis. There is simply no evidence that Bott "intended to relinquish his right to be tried" in accordance with due process.[43]

The division in *Bott* distinguished *People v. Murray*[44] and *People v. Kessler*[45]—both of which had found waiver—because "[i]n those cases, the divisions assumed that the defendants knew of the error and so focused on the intentionality of the defendants' acquiescence."[46]

Suppression Issues

The Supreme Court's most recent foray into the waiver thicket in *Phillips* and *Cardman* involved the admissibility of evidence that had not been challenged either at a suppression hearing or during trial on grounds that could have been raised at such a hearing. Some prior precedent suggested waiver under these circumstances.[47] Justice Samour authored both decisions, writing for a 4-3 majority.

In *Phillips*, the defendant failed to preserve challenges to statements he had made at the police station following a *Miranda* waiver as the fruit of an earlier unwarned custodial interrogation.[48] In an unpublished decision, a division of the Court of Appeals held that Phillips waived these challenges.[49] Citing *Rediger* for the proposition that we "do not presume acquiescence" in the loss of constitutional rights, but instead "indulge every reasonable presumption against waiver," the Supreme Court reversed.[50]

The majority's opinion began by recognizing that the case concerned "a nonfundamental right which could be waived by defense counsel for strategic or other reasons" and that "a waiver need not be express; it can be implied."[51] But it reminded readers "[t]hat Rediger's counsel had an opportunity to review the prosecution's proposed instructions before trial, confirmed he had done so, and stated he was 'satisfied' with them was not evidence that he impliedly intended to relinquish the right to object to a constructive amendment of the complaint."[52] Then, comparing the erroneous jury instruction in *Rediger* to the suppression hearing, the majority concluded:

> Phillips did not waive his unpreserved claims. There is no evidence that defense counsel intended to relinquish Phillips's right to challenge the admissibility of the police-station statements . . . including pursuant to the grounds advanced for the first time on appeal.[53]

The majority reiterated, "the record before us is barren of any indication that defense counsel considered raising the unpreserved contentions before the trial court but then, for a strategic or any other reason, discarded the idea."[54]

> "The majority explained, 'As we made clear in *Rediger*, without any evidence that defense counsel intended to relinquish the right in question, we cannot infer that a waiver of that right occurred.'"

To the majority, the attorney general's citation to *Stackhouse* and *Anderson v. People*,[55] on which *Stackhouse* had relied, fell short in three ways. First, in *Stackhouse* and *Anderson*, the Supreme Court inferred waiver because defense counsel in each case was clearly aware of the trial's public closure,[56] but the majority discerned no indicia of similar awareness in *Phillips*. Second, in *Stackhouse*, there were "sound strategic reasons to waive the right to a public trial," because the defendant was being tried on charges of sexual assault on a minor, but no similar strategic reasons appeared in *Phillips*.[57] Third, while recognizing the "concern in *Stackhouse* that a finding of no waiver would encourage gamesmanship[,]" the majority "perceive[d] no real danger of sandbagging" in *Phillips* because, "[b]y failing to raise a contention related to the suppression of evidence, a defendant runs the significant risk that the factual record will be insufficiently developed to establish plain error."[58]

The attorney general's reliance on *Hinojos-Mendoza* fared no better because the majority held that it "was impliedly supplanted by *Rediger*."[59] The majority explained, "As we made clear in *Rediger*, without any evidence that defense counsel intended to relinquish the right in question, we cannot infer that a waiver of that right occurred."[60]

In *Cardman*, announced the same day as *Phillips*, the defendant argued for the first time on appeal that his confession had been induced by improper police conduct.[61] Reversing a divided division of the Court of Appeals, the Court tracked *Phillips*, rejected waiver, and reviewed for plain error. The majority explained:

> There is no evidence that defense counsel intended to relinquish Cardman's right to challenge the admissibility of the confession, including on voluntariness grounds. The record is barren of any indication that defense counsel considered raising the unpreserved claim before the trial court but then, for strategic or any other reason, discarded the idea. Given that Cardman's counsel clearly (and understandably) wanted

the confession excluded from the trial, what benefit could he have obtained from his failure to present an *additional* ground to contest its admissibility? None comes to mind.[62]

The majority was "equally hard pressed to think of any strategic advantage [counsel] could have gained by refraining to raise an argument that should have convinced the trial court to suppress" the confession, especially "[i]nasmuch as defense counsel asked the trial court to suppress Cardman's [other] statements, there is no basis to believe that he decided against raising the voluntariness issue for strategic or other reasons."[63]

Unanswered Questions

While the case law discussed above has limited waiver and expanded plain error review by emphasizing that waiver requires the intentional relinquishment of a known right, some questions remain unanswered, including:

1. Does the new heightened scrutiny before finding a waiver apply to errors that lack constitutional significance? *Rediger*, *Smith*, *Phillips*, and *Cardman* all involved rights of constitutional significance[64] that could be waived by counsel.[65] But the waiver question might arise in the context of trial errors that lack constitutional significance, such as most evidentiary issues and some jury instruction challenges.[66]

The Supreme Court gave no hint that its heightened standard for waiver had constitutional underpinnings. To the contrary, *Rediger* drew the "intentional relinquishment" requirement from *Department of Health v. Donahue*, which involved the failure to request a predisciplinary hearing that the court determined was not constitutionally required.[67] So, parsing the requirements to show a waiver based on whether a constitutional right is involved seems unlikely.

2. Apart from an outright admission, how would defense counsel's knowledge of the issue belatedly raised on appeal—a condition precedent to voluntary relinquishment—be shown? As context for how to prove defense counsel's knowledge, everyone would agree that knowledge may, and often must, be proven circumstantially.[68] Of course, some events, like the courtroom closure in *Stackhouse*, are self-evident. By contrast, the discrepancy between the elemental instruction and the charging document in *Rediger* was not self-evident; defense counsel had to make a specific comparison between the instruction and the charging document. And because defense counsel told the trial court only that he had read the instructions, the record did not show actual knowledge of the discrepancy.

> "But even in a case of self-evident error, a second level of inquiry into defense counsel's knowledge may be required: was counsel consciously aware of the legal principle that potentially made the event an error?"

But even in a case of self-evident error, a second level of inquiry into defense counsel's knowledge may be required: was counsel consciously aware of the legal principle that potentially made the event an error? After all, the *Rediger* Court pointed out that the record contained no evidence that defense counsel had even "considered objecting to the erroneous instruction."[69] So, how could defense counsel consider a course of action without being aware of its underlying legal principle? And given the *Phillips* Court's disavowal of the presumed legal knowledge language in *Hinojos-Mendoza*, circumstantial evidence of defense counsel's knowledge would probably require, at a minimum, that someone had identified the controlling legal principle in the trial court. By contrast, *Rediger* cited *United States v. Perez* with approval, where the record revealed "that neither defendants, the government, nor the court was aware" that a particular element should have been submitted to the jury.[70]

3. Short of an outright admission, in what level of affirmative conduct must defense counsel engage to constitute an intentional relinquishment of a known right? Assuming that defense counsel had actual knowledge of the event that might constitute error and someone had discussed in the trial court the legal principle implicated by this event, the case law remains unclear about how definitive counsel's conduct must be to constitute a waiver. But what if waiver ultimately rests on counsel's affirmative conduct? For example, suppose counsel states, "No objection," "Acceptable," or even, "The defense takes no position," which do not specifically mention the right supposedly waived.

To be sure, the uniform emphasis on "intentional relinquishment" across *Rediger*, *Smith*, *Phillips*, and *Cardman* would support plain error review. Even so, in *Rediger*, the Court also recognized that waiver could be "express or implied."[71] Thus, an inherent tension exists between the "intentional relinquishment" and an "implied" waiver of a right. Without guidance, trial courts might wonder whether defense counsel should be asked to take a specific position on waiving a particular issue.

4. Can the defendant avoid waiver and obtain plain error review where the record shows no plausible strategic purpose for the waiver? Consider a case in which counsel's statement left no reasoned doubt that counsel was waiving an issue, but where that issue is still raised on appeal as plain error. Then suppose the record did not even hint at a strategic purpose for,

much less a possible benefit to, the defendant. Like the "intentional relinquishment" requirement, the Supreme Court's waiver analysis in *Phillips* and *Cardman* considered counsel's "strategic purpose."[72] Whether these concepts work together when applied is unclear. However, because both waiver and invited error derive from defense counsel's affirmative conduct,[73] the latter doctrine is informative on the issue.

Historically, the Supreme Court has chosen to overlook invited error in favor of plain error review where the record did not show a strategic purpose for counsel's conduct.[74] More recently, however, the Court has tempered this position where defense counsel acted affirmatively rather than by omission,[75] citing the importance of a strategic "or other purpose." So, a plain error argument in an otherwise clear waiver case may lead the Supreme Court to clarify its invited error cases.

5. What should a trial judge do to ensure that the record on waiver is sufficiently clear? The answer to this question may depend on whether the trial judge perceives that defense counsel is oblivious to the event that could give rise to a potential appellate issue or recognizes the event but remains unaware of the controlling legal principle. On the one hand, a record that does not show defense counsel's knowledge of both the event and the applicable law probably leaves the verdict vulnerable to plain error review.[76] But on the other hand, would probing counsel's awareness be tantamount to "direct judicial aid in fashioning a defense[,]" which "is inappropriate . . . because the trial court must remain neutral."[77]

Then consider intentional relinquishment, which likely would be an appellate consideration only if the record shows defense counsel's knowledge of both the event giving rise to the potential appellate issue and the applicable law.[78] In such a case, asking defense counsel whether he or she intended to abandon the issue would be consistent with the trial judge's obligation to make the record clear.[79]

And if counsel answers "yes," should the judge go one step further and inquire into counsel's strategic purpose? *People v. Gross* recognized the burden of expecting trial courts to do so.[80] As well, the wisdom of making such an inquiry seems dubious because the answer could risk exposing defense strategy to the prosecution.[81]

Further, the Supreme Court has recognized "the social costs of reversal[.]"[82] But in possible waiver cases, it has not clarified what, if anything, trial courts may or should do to protect the verdict from reversal on plain error review.

Conclusion

In the end, "The line between waiver and forfeiture is often blurry."[83] *Rediger*, *Smith*, *Phillips*, and *Cardman* have sharpened the focus in favor of plain error review. But questions surrounding this issue remain unresolved. CL

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NOTES

1. *People v. Rediger*, 416 P.3d 893 (Colo. 2018).

2. *People v. Smith*, 416 P.3d 886 (Colo. 2018).

3. *Phillips v. People*, 443 P.3d 1016 (Colo. 2019).

4. *Cardman v. People*, 445 P.3d 1071 (Colo. 2019).

5. Crim. P. 52(b) provides: "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

6. Waiver is the "intentional relinquishment or abandonment of a known right," while "forfeiture is the failure to make the timely assertion of a right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (internal quotation omitted).

7. *Hill v. Lockhart*, 791 F.Supp. 1388, 1393 (E.D.Ark. 1992). Crim. P. 52 is modeled on Fed. R. Crim. P. 52. The plain error doctrine codified in Fed. R. Crim. P. 52 traces its origins to *Wiborg v. United States*, 163 U.S. 632, 658 (1896). Fed. R. Crim. P. 52(b) advisory committee's note to 1944 adoption. Neither *Wiborg* nor its progeny tethers the doctrine to constitutional moorings.

8. *Cardman v. People*, 445 P.3d at 1079.

9. "The court did not, however, adopt the fourth prong of the *Olano*-Fed. R. Crim. P. 52(b) plain error test—that the error must be one seriously affecting the fairness, integrity, or public reputation of judicial proceedings." *People v. Greer*, 262 P.3d 920, 933 (Colo.App. 2011) (Jones, J., specially concurring). The certiorari grant in *People v. Butcher*, 2018 COA 54M, encompasses this issue. No. 18SC494, 2019 WL 1768135 (Apr. 22, 2019).

10. *People v. Novotny*, 320 P.3d 1194, 1207 (Colo. 2014) (noting "the specter of invited error . . . precludes appellate review"). The nuances of the invited error doctrine are beyond the scope of this article.

11. *Phillips*, 443 P.3d at 1022 ("The question is whether [the defendant] waived both claims, thereby foreclosing review on appeal . . . .").

12. *People v. Gross*, 287 P.3d 105, 110 (Colo. 2012) (stating that trial counsel's incompetence in inviting an error "should be challenged on grounds of ineffective assistance of counsel under Crim. P. 35(c)."); *Cardman*, 445 P.3d at 1083 (invoking waiver "would then force Cardman to take his chances with a Crim. P. 35(c) ineffective-assistance-of-counsel claim."). *See People v. Owen*, 122 P.3d 1006, 1008 (Colo.App. 2005) (discussing the effect of a defendant's waiver of statutory and constitutional rights).

13. *People v. Rediger*, 2015 COA 26, ¶ 53, *aff'd in part, rev'd in part*, 411 P.3d 907.

14. *Rediger*, 416 P.3d at 897.

15. *Id.* at 902 (internal quotations and citations omitted).

16. *Id.* at 903 (internal quotation omitted).

17. *Id.*

18. *Id.*

19. *Smith*, 416 P.3d at 889.

20. *Id.*

21. *People v. Smith*, No. 14CA2164, 2016 WL 908929 (Colo.App. Mar. 10, 2016) (not published pursuant to C.A.R. 35(f)).

22. *Smith*, 416 P.3d at 891 (internal citation omitted).

23. *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007), *abrogated by Phillips*, 443 P.3d 1016.

24. *Stackhouse v. People*, 386 P.3d 440, 442 (Colo. 2015).

25. The statute excuses the prosecution from calling the technician unless trial defense counsel demands the technician's presence.

26. *Hinojos-Mendoza*, 169 P.3d at 670.

27. *Id.* (internal citation omitted).

28. *Stackhouse*, 386 P.3d at 442.

29. *Id.* at 445.

30. *Id.*

31. *People v. Tee*, 446 P.3d 875 (Colo.App. 2018).

32. *Id.* at 881.

33. *Id.* at 882.

34. *Id.*

35. *Id.* at 883.

36. *People v. Allgier*, 428 P.3d 713, 717 (Colo.App. 2018).

37. *Id.*

38. *Id.*

39. *Id.* at 720.

40. *People v. Ramirez*, 2019 COA 16, ¶ 14 (emphasis in original).

41. *People v. Bott*, 2019 COA 100.

42. *People v. LaRosa*, 293 P.3d 567 (Colo. 2013).

43. *Bott* at ¶ 20 (internal citations and quotations omitted).

44. *People v. Murray*, 2018 COA 102.

45. *People v. Kessler*, 436 P.3d 550 (Colo.App. 2018).

46. *Bott* at ¶ 21.

47. *See People v. McKnight*, 446 P.3d 397, 413–14 (Colo. 2019) ("Because the prosecution did not raise any arguments about the exclusionary rule or its exceptions at the suppression hearing, we consider those arguments waived and decline to address them on appeal."); *People v. Staton*, 924 P.2d 127, 133 (Colo. 1996) (To preserve a suppression issue for appeal, where other grounds for suppression are stated in the motion to suppress, defendant "must have stated [the issue] initially as a ground for his motion to suppress.").

48. *Phillips*, 443 P.3d at 1019.

49. *People v. Phillips*, No. 14CA2482, 2017 WL 223210 (Colo.App. Jan. 19, 2017) (not published pursuant to C.A.R. 35(e)).

50. *Phillips*, 443 P.3d at 1022.

51. *Id.* at 1023.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Anderson v. People*, 490 P.2d 47 (1971) (finding defendant waived objection to courtroom closure when defense counsel should have been aware of closure).

56. *Phillips*, 443 P.3d at 1025.

57. *Id.* (quoting *Stackhouse*, 386 P.3d at 445).

58. *Id.*

59. *Id.* at 1026.

60. *Id.*

61. *Cardman*, 445 P.3d at 1076.

62. *Id.* at 1077 (emphasis in original).

63. *Id.* at 1078.

64. *Rediger*, 416 P.3d 893 (jury charge error); *Smith*, 416 P.3d 886 (same); *Phillips*, 443 P.3d 1016 (Fourth Amendment violation); *Cardman*, 445 P.3d 1071 (same).

65. *See Stackhouse*, 386 P.3d at 445 ("[O]nly a select few rights are so important as to require knowing, voluntary, and intelligent waiver to be personally executed by the defendant.").

66. *See Allgier*, 428 P.3d at 727 (arguing that "the effect of waiver [in a non-constitutional evidentiary ruling] was of more modest consequence.") (Nieto, J., specially concurring).

67. *Rediger*, 416 P.3d at 902–03.

68. *See Whaley v. People*, 466 P.2d 927, 929 (Colo. 1970) ("[G]uilty knowledge may also be established by circumstantial evidence, as indeed it generally is.").

69. *Rediger*, 416 P.3d at 903. *See Phillips*, 443 P.3d at 1023 ("[T]he record before us is barren of any indication that defense counsel considered raising the unpreserved contentions before the trial court . . . .").

70. *Rediger*, 416 P.3d at 903 (citing *United States v. Perez*, 116 F.3d 840, 845–46 (9th Cir. 1997)).

71. *Id.* at 902. *See Phillips*, 443 P.3d at 1023 ("[A] waiver need not be express; it can be implied.").

72. *Cardman*, 445 P.3d at 1077; *Phillips*, 443 P.3d at 1023; *Smith*, 416 P.3d 886. *See also Rediger*, 416 P.3d at 903 (referring to a "tactical . . . reason").

73. *See People v. Foster*, 364 P.3d 1149, 1155–56.

74. *See, e.g.*, *People v. Stewart*, 55 P.3d 107, 119 (Colo. 2002) (stating that a nontactical instructional omission is reviewable for plain error).

75. *Gross*, 287 P.3d at 110 ("In this case, however, defense counsel argued affirmatively for the initial aggressor instruction despite opposition by the prosecution.").

76. *Rediger*, 416 P.3d at 905; *Phillips*, 443 P.3d at 1023.

77. *People v. Romero*, 694 P.2d 1256, 1274 (Colo. 1985).

78. *Rediger*, 416 P.3d at 904–05; *Phillips*, 443 P.3d at 1022.

79. *See In re Marriage of Thornhill*, 200 P.3d 1083, 1087 (Colo.App. 2008), *rev'd in part on other grounds by In re Marriage of Thornhill*, 232 P.3d 782 (Colo. 2010).

80. *Gross*, 287 P.3d at 110–12.

81. *People v. Foster*, 364 P.3d 1149, 1158 (Colo. App. 2013) (questioning "could that limited colloquy favor the prosecution, which now has a reason to reconsider the strategic implications and, perhaps as a result, act differently?").

82. *People v. Sepulveda*, 65 P.3d 1002, 1008 (Colo. 2003).

83. *United States v. Garcia*, 580 F.3d 528, 541 (7th Cir. 2009).