MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Walter B. White, Jr.,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

March 30, 2023

Court of Appeals Case No. 22A-PC-1729

Appeal from the Marion Superior Court

The Honorable Peggy Ryan Hart, Magistrate

Trial Court Case No. 49D31-1804-PC-11453

Memorandum Decision by Senior Judge Najam
Judges Bailey and Foley concur.

Najam, Senior Judge.

Statement of the Case

[1] Walter B. White, Jr. appeals the post-conviction court's denial of his petition for post-conviction relief, in which he alleged ineffective assistance of trial counsel. He also argues that he did not receive a fair post-conviction proceeding. We affirm.

Facts and Procedural History

[2] The factual background for White's convictions was recited by this Court in our opinion on his direct appeal as follows:

> On November 5, 2015, Alan Becker was leaving a CVS store in Lawrence and walking toward his vehicle. He was approached by an African American male wearing dark pants, a dark hoodie, and a bandanna over his mouth. The man said, "I'm going to put a cap in your head if you don't take me to the ATM over there and withdraw $2,000." Tr. p. 109. The man was extending his arm toward Becker and "holding his hand out sideways with his hand on top and in his hand was something that was cylindrical, sort of looked like the shape of a gun but it was covered" by a sock or other similar material. *Id.* at 110. Becker tried to quickly get in his vehicle to get away, but the man jumped into the backseat behind Becker. Becker put the vehicle into gear, "tromped on the accelerator," and did a "360 degree turn," which threw the man against the door. *Id.* at 114. Becker was then able to stop in front of the adjacent Marsh store, put the vehicle in park, and jump out. Becker yelled for help, and an off-duty officer assisted him. The suspect then ran away.
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> Officer Matthew Brandenburg with the Lawrence Police Department received a dispatch regarding an armed robbery by a

> "[b]lack male with scarf or hoodie, dark clothing" and then received additional information that the suspect was seen running east across Oaklandon Road. *Id.* at 85. Officer Brandenburg headed that direction, stopped at the St. Simon school, and scanned the area with his spotlight. He saw White "laying face down near the goal line" on the football field. *Id.* Officer Brandenburg apprehended White, and Officer Dustin VanTreese brought Becker to the scene. Officer VanTreese shined his spotlight on White, and Becker said White was the same height, same build, and had the same clothes as the suspect, but he could not identify White as the suspect because the suspect had been wearing a mask or bandanna. At that point an officer pulled out a bandanna from White's collar and "pulled it up over" White's face, and Becker identified White as the man that he encountered in the CVS parking lot. *Id.* at 22. Officers were unable to locate a gun on White or in the area. Detective Bruce Wright interviewed White at the police station. After being read his *Miranda* rights, White told Detective Wright that he had been at the CVS and that he had an interaction with Becker. He denied that he had threatened Becker.
>
> The State charged White with Count I, Level 2 felony kidnapping; Count II, Level 3 felony kidnapping; Count III, Level 3 felony attempted armed robbery; and Count IV, Class A misdemeanor resisting law enforcement. White filed a motion to suppress the show-up identification, which the trial court denied. At the jury trial, White objected to the admission of the show-up identification. The jury found White guilty of Count I and Count II and not guilty of Count III and Count IV. Due to double jeopardy concerns, the verdict for Count II was merged with Count I, and White was only sentenced on Count I. The trial court sentenced him to twenty-four years in the Department of Correction.

White v. State, No. 49A05-1701-CR-85, 2017 WL 3471017, at *1 (Ind. Ct. App. August 14, 2017), *trans. denied.*

[3] In his direct appeal, White challenged: (1) the trial court's decision to admit evidence of the show-up identification; and, (2) the sufficiency of the evidence supporting his Level 3 felony kidnapping conviction. *Id.* at *2-*3. We affirmed the trial court's judgment in all respects. *Id.*

[4] In 2018, White filed a Petition for Post-Conviction Relief, which he later amended and requested that the court decide the matter on the parties' submissions. In his amended petition, White alleged that his trial counsel was ineffective in the following ways: he did not (1) raise a defense to the hijacking element of Level 2 felony kidnapping; (2) object to Jury Instruction 21A, which did not define the term "hijacking;" (3) object to the State's closing argument about the hijacking element; and (4) tender a proper jury instruction on hijacking.[1] Appellant's Supp. App Vol. 2, pp. 22, 24-25 (filed August 26, 2022).[2] The post-conviction court concluded that White had not met his burden of demonstrating either deficient performance or prejudice. *Id.* at 161-69. Accordingly, the court denied White's petition for post-conviction relief. White now appeals.

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[1] On appeal, White does not challenge the post-conviction court's findings and conclusion that appellate counsel rendered effective assistance.

[2] White has filed several sets of volumes of appendices. We cite to them by their name and with a parenthetical indicating the filing date.

Discussion and Decision

I. Freestanding Claims

[5] We first address White's claims in Issues 1 and 2 that: (1) the trial court "committed reversible error, fundamental error, and abuse of discretion" by failing to instruct the jury on the definition of hijacking; and, (2) the prosecutor committed prosecutorial misconduct[3] during closing argument. Appellant's Amended Br. pp. 5, 17-21.

[6] Neither of these arguments was raised in White's petition for post-conviction relief. Consequently, both claims are waived. *See Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001); Ind. Post-Conviction Rule 1(8).

[7] Waiver notwithstanding, both claims fail because they were only available to White in his direct appeal. *Lambert v. State*, 743 N.E.2d 719, 726 (Ind. 2001) ("The post-conviction procedures do not provide a petitioner with a 'super-appeal' or opportunity to consider freestanding claims that the original trial court committed error. Such claims are available only on direct appeal."); *Hinesley v. State*, 999 N.E.2d 975, 988 (Ind. Ct. App. 2013) (concluding that because the claim of prosecutorial misconduct was known and available on

[3] As set out above, White argued in his petition that trial counsel's performance was deficient because he failed to object to portions of the State's closing argument. Here, on appeal, however, White presents for the first time the argument that the State engaged in prosecutorial misconduct in its closing arguments. *See* Appellant's Amended Br. pp. 22-27.

direct appeal, but not raised, it was not available as a freestanding claim of fundamental error on a petition for post-conviction relief), *trans. denied.*

[8] In his Issue 6, White also asserts, in part, that he was denied equal protection of the law because the jury was not given an instruction defining hijacking. This freestanding constitutional claim was not included in White's petition for post-conviction relief, nor did he include it in his initial proposed findings of fact and conclusions of law. *See* Appellant's Supp. App. Vol. 2, at pp. 19-27 (petition for post-conviction relief); 70-92 (proposed findings and conclusions of law). White's argument is waived because (1) it is a freestanding claim of error, and (2) he did not raise it earlier. *See Lambert*, 743 N.E.2d at 726 (cannot bring freestanding claims in petition for post-conviction relief). Additionally, White did not present evidence in support of his assertion, including in his affidavit. *See* Appellant's Supp. App. Vol. II at 93-107 (White's affidavit).

II. Ineffective Assistance of Trial Counsel

[9] White alleges that he received ineffective assistance of trial counsel and that the post-conviction court erred by finding otherwise.

> We evaluate claims of ineffective assistance under the two-part test originally set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A petitioner must demonstrate that his or her counsel performed deficiently, resulting in prejudice. Counsel renders deficient performance when his or her representation fails to meet an objective standard of reasonableness. Prejudice exists when a petitioner demonstrates that, if not for counsel's deficient performance, there is a reasonable probability that the result would have been

> different. A petitioner must prove both parts of the test, and failure to do so will cause the claim to fail.
>
> We strongly presume counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. Counsel's conduct is assessed based on facts known at the time and not through hindsight.

Cole v. State, 61 N.E.3d 384, 387 (Ind. Ct. App. 2016) (citations omitted), *trans. denied.*

[10] Because White bore the burden of proof of establishing grounds for relief and appeals from a negative judgment, he must show this Court that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Pierce v. State*, 135 N.E.3d 993, 1002 (Ind. Ct. App. 2019), *trans denied*. We do not defer to the post-conviction court's legal conclusions, but we will reverse its findings and judgment only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. *Id.* A post-conviction court's judgment may be affirmed on any theory supported by the evidence. *Id.*

A. Reasonable Strategy

[11] The post-conviction court found that White's trial counsel presented a reasonable trial strategy. White disagrees and argues that his counsel's performance was deficient because he failed "to defend WHITE against the most essential element of the kidnapping statute." Appellant's Amended Br. p. 5.

[12] In addition to the strong presumption that counsel has rendered adequate assistance, we observe that "'[c]ounsel is afforded considerable discretion in choosing strategy and tactics and these decisions are entitled to deferential review.'" *Pierce v. State*, 135 N.E.3d at 1002. "Further, 'poor strategy' and 'instances of bad judgment do not necessarily render representation ineffective.'" *Id.* (quoting *Weisheit*, 109 N.E.3d at 984).

[13] "Effectiveness is measured using 'an objective standard of reasonableness under prevailing professional norms.'" *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1198) (quoting *Smith v. State*, 689 N.E.2d 1238, 1243 (Ind. 1997)). "[T]rial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness." *Id.* "This is so even when 'such choices may be subject to criticism or the choice ultimately prove detrimental to the defendant.'" *Id.* (quoting *Garrett v. State*, 602 N.E.2d 139, 142 (Ind. 1992)).

[14] Trial counsel's strategy centered on: (1) the suppression of Becker's show-up identification of White; (2) thorough cross-examination of law enforcement officers to drive home the point that a handgun was never found; and (3) the challenge of Becker's credibility about what he saw in White's hand. This strategy was not detrimental but, in fact, beneficial because trial counsel successfully obtained an acquittal on the attempted robbery and resisting law enforcement charges. Additionally, counsel secured a reduced felony conviction for the second charge of kidnapping (charged as a Level 3 felony but convicted on a Level 6 felony charge). Trial Tr. Vol. II, p. 230. The post-

conviction court did not err when it found trial counsel's strategy to be effective. *See Davidson v. State*, 763 N.E.2d 441, 447 (Ind. 2002) (ineffective strategy claim rejected where counsel gained an acquittal for one of the robbery charges); *Curtis v. State*, 905 N.E.2d 410, 415 (Ind. Ct. App. 2009) (post-conviction court properly refused to second-guess trial strategy that may have been a factor in acquittals on two charges). White has not met his burden of proving deficient performance or prejudice.

[15] As for White's specific challenge to his trial counsel's strategy on the Level 2 felony kidnapping charge, he has failed to meet his burden of proving deficient performance. Indiana Code section 35-42-3-2(a) (2013) provides that "[a] person who knowingly or intentionally removes another person, by fraud, enticement, force, or threat of force, from one place to another commits kidnapping." The offense is a Level 2 felony if it is committed while "hijacking a vehicle." Ind. Code §35-42-3-2(b)(3)(B) (2013). Counsel attacked Becker's show-up identification of White and challenged Becker's credibility about what White said to him in the first place and while they were in Becker's vehicle. The failure to obtain an acquittal on this charge does not establish that counsel's strategy was ineffective where the same strategy resulted in acquittals on his other charges. *Hinesley*, 999 N.E.2d at 983 ("That the defense strategy was ultimately unsuccessful does not mean that counsel was constitutionally ineffective.").

[16] We also find White's argument on the element of hijacking to be unpersuasive. He states that his trial counsel "failed to even say the term 'hijacking'

throughout [White's] trial," and that "counsel failed to show the jury that 'unauthorized access' is not [a part] of the definition provided by the Indiana Supreme Court." Appellant's Amended Br. pp. 28, 29. The State argued during closing argument, "It's that unauthorized *access*, or that unauthorized control over something. Mr. Becker didn't give him permission to get in his vehicle." Trial Tr. Vol. II, p. 206 (emphasis added).

[17] Our Supreme Court, in *Wilson v. State*, 468 N.E.2d 1375 (Ind. 1984), an appeal from a kidnapping charge, was called upon to define the term "hijacking" for the purpose of reviewing the sufficiency of the evidence of kidnapping by "hijacking a vehicle." The Court held that hijacking "has a central core meaning which is commonly understood by the public at large, that is, the exercising of unlawful or unauthorized control of a vehicle by force or threat of force upon the vehicle's inhabitants." *Id.* at 1378. The Court discerned the legislative intent in that part of the kidnapping statute to be "to prevent persons from being exposed to that special danger, that increased probability of injury or death, which results when one is seized and confined or transported in a commandeered vehicle." *Id.* The Court noted that "[t]he message intended for the would-be wrong doer, is that if you are going to steal or commandeer a vehicle, let the people in it go and don't force people into it against their will." *Id.*

[18] In subsequent cases reversing convictions for kidnapping by hijacking a vehicle, the reversals rested on the absence of evidence of any threats made to the victim or the display of weapons, or the use of force or threats to keep the victim in the

vehicle against their will or prevent the victim from leaving. *See e.g., J.D.Z. v. State*, 785 N.E.2d 1158, 1161 (Ind. Ct. App. 2003) (no threats made to victim if she refused to continue driving perpetrator and no display of weapons), *trans. denied*; *Clayton v. State*, 658 N.E.2d 82, 87 (Ind. Ct. App. 1995) (no evidence of use of force to keep victim in vehicle or to prevent victim from leaving).

[19] The present case is much different from *J.D.Z.* and *Clayton* in that White threatened Becker and displayed what appeared to the victim was a handgun covered by something while the two were inside Becker's vehicle. Though the recitation of the facts in White's direct appeal do not mention it, Becker testified at trial that White "jumped into the backseat of my car and repeated that he was going to put a cap in my head if I don't go over—drive him over to the ATM to get the $2,000." Trial Tr. Vol. II, pp. 111-12. Becker also testified that White "still has the, what I took to be a gun pointed at me." *Id.* at 112. Thus, White repeated the threat and the display of what seemed to be a handgun that he had made outside the vehicle once the two were inside Becker's vehicle. Clearly, as we found in White's direct appeal, the evidence was sufficient to support his conviction for kidnapping by hijacking a vehicle. White's arguments that his counsel's performance was deficient by failing to challenge language used by the State—unauthorized control of a vehicle—are unavailing

because our caselaw supports the use of that very language.[4] *See Wilson*, 468 N.E.2d at 1378.

[20] White further claims that he never controlled Becker or his vehicle and that counsel performed deficiently by failing to present this argument to the jury. *See* Appellant's Amended Br. pp. 29-31. In *Wilson*, our supreme court spoke of stolen or commandeered vehicles when interpreting the "hijacking by vehicle" section of the kidnapping statute. Commandeered is a transitive verb defined in the Merriam-Webster dictionary as "to take arbitrary or forcible possession of." https://www.merriam-webster.com/dictionary/commandeered [https://perma.cc/JK77-TPT5] (last visited March 2, 2023). White has not established that trial counsel performed deficiently by failing to present this argument about control of the vehicle. Counsel challenged Becker's recollection of what he saw in the perpetrator's hand. A jury and we have already made the sufficiency of the evidence determination, and we have further found counsel's strategy of challenging the victim's testimony to be sound. We find no deficient performance in this way.

[21] Moreover, White's argument that trial counsel's performance was deficient because counsel did not comprehend the hijacking element of the kidnapping statute is also without merit. *See* Appellant's Amended Br. pp. 33-35. At sentencing, trial counsel made the observation on the record about the fact the

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[4] We address in section II. C. of this opinion the allegations surrounding the State's use of the words "unauthorized access" in its closing argument.

legislature had deemed kidnapping by hijacking a vehicle to be a more serious offense than kidnapping while armed with a deadly weapon, a fact which counsel found surprising given the number of firearm crimes in the community. *See* Trial Tr. Vol. III, pp. 6-7. This statement does not support White's argument that counsel did not understand the statute. His commentary was directed at the legislature's choice in the degree of sanctions under the statute.

[22] White also asserts deficiencies in counsel's performance related to the amendment of the kidnapping charge. *See* Appellant's Amended Br. pp. 35-36. As to the amendment of the Level 2 felony charge, the amendment removed the allegation about the use of the handgun, but retained the hijacking allegation. Direct Appeal Appendix Vol. II Conf., pp. 36, 94. The amendment to the charge was not such that it would have altered counsel's understanding of White's defense against that charge. The amendment was made "to delete superfluous language in the information, as it is confusing as written and contains allegations not required to establish a valid charge." *Id.* at 58. And White's claim that "all essential elements have to have a defense in order to protect the defendant against an unfair trial" is unsupported by authority. Appellant's Amended Br. p. 36. White has not established a basis for relief here.

B. Instructional Issue[5]

[23] White claims that trial counsel was ineffective by failing to tender a jury instruction to include a definition of the term hijacking. Appellant's Amended Br. pp. 18-21. The post-conviction court concluded that its Jury Instruction Number 21A was consistent with the Indiana Pattern Criminal Jury Instruction for kidnapping. Appellant's Supp. App. Vol. 2, p. 166 (filed on September 9, 2022). The post-conviction court further observed that White provided no authority for his assertion that a definition of hijacking should have been included. *Id.*

[24] "The preferred practice is to use pattern jury instructions." *Ivory v. State*, 141 N.E.3d 1273, 1283 (citing *Gravens v. State*, 836 N.E.2d 490, 493 (Ind. Ct. App. 2005), *trans. denied*), *trans. denied*. And though "pattern jury instructions are not always upheld as correct statements of the law," White does not argue that the instruction misstated the law. *See id.* (quoting *Boney v. State*, 880 N.E.2d 279, 294 (Ind. Ct. App. 2008), *trans. denied*). White contends that the jury "had a right to know" a definition for hijacking. Appellant's Amended Br. p. 20. The post-conviction court correctly determined that White is mistaken.

[25] "[G]enerally, the use of a term of art in a jury instruction requires a further instruction explaining the legal definition of the word." *Blanchard v. State,* 802

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[5] As an initial matter, we acknowledge that on appeal White has abandoned his claim raised in his petition, that counsel should have objected to Instruction Number 21A. *See* Appellant's Supp. App. Vol. 2, pp. 22, 24 (filed on August 26, 2022). Instead, he maintains that counsel should have tendered an instruction defining the term hijacking.

N.E.2d 14, 33 (Ind. Ct. App. 2004). However, in *Wilson*, our Supreme Court concluded that hijacking "has a central core meaning which is commonly understood by the public at large. . . ." 468 N.E.2d at 1378. And White has not demonstrated that the jury was confused when considering the evidence at trial. Furthermore, White has not provided us with authority to support his contention that a definition of hijacking must be given when kidnapping by hijacking is charged.

[26] We further conclude, as did the post-conviction court, that White's reliance on *Sears v. State*, 668 N.E.2d 662 (Ind. 1996), *overruled on other grounds*, is misplaced. *Sears* involved the question whether the instruction defining hijacking was proper, not whether an instruction defining hijacking should be given. *Id.* at 670 (defendant challenged that the jury had been improperly instructed on the element of hijacking). The instruction as given in *Sears* was correct because it tracked the language used in *Wilson*. *Id.*

[27] We also observe that White has not demonstrated prejudice related to the lack of an instructional definition of hijacking. If given, a proper instruction would have tracked the *Wilson* language. The evidence shows that White threatened to shoot Becker in the head if he did not drive him to an ATM and withdraw $2,000. White reiterated the threat after Becker retreated to his car and an unwelcome White joined him. White has not shown us a reasonable probability that the jury would have acquitted him of Level 2 felony kidnapping, had the instructional definition of hijacking been given.

C. Failure to Object to the State's Closing Argument

[28] Next, White suggests that the State committed prosecutorial misconduct during its closing argument and that his trial counsel's performance was deficient because he failed to object. To establish ineffective assistance of counsel due to the failure to object, White must prove that an objection would have been sustained if it had been made and that he was prejudiced by the failure to object. *Kubsch v. State*, 934 N.E.2d 1138, 1150 (Ind. 2010). White has not met his burden here.

[29] Upon review of a claim of prosecutorial misconduct, appellate courts first determine whether prosecutorial misconduct occurred, and then whether that misconduct placed the defendant in a position of grave peril. *Collins v. State*, 966 N.E.2d 96, 106 (Ind. 2012). "'Whether a prosecutor's argument constitutes misconduct is measured by reference to case law and the Rules of Professional Conduct.'" *Id.* (quoting *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006)). "'The gravity of the peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct.'" *Id.*

[30] The following statements were made during the State's closing argument in the discussion of the evidence supporting the kidnapping by hijacking a vehicle count.

> Mr. Becker tells us he felt that to mean he was going to get shot through the head. That makes sense, we all understand. That's the threat of force. And when we're talking about Count One,

> how far he had to go. It doesn't have to be a great distance for kidnapping. It's essentially did you take him from one place to another. In Count One we're talking about from that parked spot through the Marsh parking lot. I'm sure (indecipherable) an argument well, I wasn't hijacking the vehicle. That wasn't what it was. It was hijacking. It's that unauthorized *access*, or that unauthorized control, over something. Mr. Becker didn't give him permission to get in his vehicle. Mr. Becker didn't give the defendant permission to make him go somewhere. Now, Mr. Becker made a maneuver to get the heck out of Dodge. That's because he wasn't going to be a victim of something (indecipherable) for that robbery. He wasn't getting hurt. Yeah, (indecipherable). That doesn't mean the defendant didn't hijack that vehicle. No, he did that.

Trial Tr. Vol. II, pp. 205-06 (emphasis added).

[31] White takes umbrage with the State's brief use of the word "access," which it immediately corrected, and characterizes that slip of the tongue as prosecutorial misconduct. Had trial counsel objected to that instance of poor word choice, it is uncertain that the trial court would have sustained the objection. We agree with the post-conviction court's conclusion that White "has not shown that the trial court would have been required to sustain an objection to the isolated sentence about unauthorized control." Appellant's Supp. App. Vol. 2, p. 168 (filed on 9-9-22).

[32] Here, the State misspoke and immediately corrected itself. Later, on rebuttal, the State argued as follows:

> And it was a hijacking. If I'm – we'll use a plane—if I take over a plane and hijack it and go from New York to London, that's a

> hijack. If I get in a plane and hijack it and drive it down the runway a few feet, that's still a hijack because it's being forced under threat of violence, threat of death to drive in the parking lot. The length of the drive doesn't make it a hijack. I hope that makes sense.

Trial Tr. Vol. II, p. 225. This argument re-emphasized the use of *unauthorized control*. White has not shown "that had an objection been made, the trial court would have had no choice but to sustain it." *See Oglesby v. State*, 515 N.E.2d 1082, 1084 (Ind. 1987). Furthermore, White has not demonstrated that a different result would have obtained had his counsel objected because he has not shown that the misuse of a word had a probable persuasive effect on the jury's decision. Counsel was not ineffective by failing to object and, thus, the post-conviction court did not err in rejecting White's claim of ineffective assistance of counsel.

III. Unfair Proceedings

[33] In pages thirty-eight through forty-seven of White's amended brief, he contends that his post-conviction proceedings were unfairly conducted. "Although the process due to a petitioner in a post-conviction proceeding does not rise to the level of process due to a citizen prior to being convicted, fairness and justice require that the opportunity to obtain post-conviction relief be more than illusory." *Hubbell v. State*, 58 N.E.3d 268, 277 (Ind. Ct. App. 2016). We address these arguments in turn.

[34] White claims that the State's findings of facts and conclusions of law omitted and changed facts that he argued, and he repeats his claim that the State erroneously referred to unauthorized access instead of unauthorized control. *See* Appellant's Br. pp. 38-41. However, White filed his own proposed findings of fact and conclusions of law, providing the court with his arguments in his own words. And White has not included the State's proposed findings of fact and conclusions of law in his appendix for our review. This argument on appeal, in which he alleges that the State misled the court, is unsupported by the record. Nonetheless, White has provided the trial court's "Amended Findings of Fact and Conclusions of Law Denying Post-Conviction Relief" which correctly analyze the parties' claims. Appellant's Supp. App. Vol. 2, pp. 157-172 (filed on 8-26-22). Further, White's "Rebuttal to [State's] Amended Findings of Fact and Conclusions of Law," filed after the court's order denying him relief, reiterates the arguments he raised in his petition, which the court addressed in its order. *Id.* at 173-87. We have already decided that White suffered no prejudice from the State's brief use of the word "access" instead of "control," which the State immediately corrected. Thus, we conclude that White has not demonstrated how his proceedings were unfair in this way because the court's decision relies on a correct application of the law to the facts as argued by the parties.

[35] Next, White relied on the *Sears* decision as authority for the proposition that the jury must be instructed on the definition of hijacking. We have already concluded that *Sears* does not stand for that proposition. Also unpersuasive is

White's argument that because both "Sears and White were convicted in the same court, Marion County Superior Court Room five (5) (recently changed to court room 31)[,]" the hijacking instruction was required to be given during his trial because the instruction was given in the *Sears* trial. The fact that the two defendants were tried in the same courtroom twenty-two years apart does not mean that they were tried by the same trial judge. Moreover, White has not provided us with support for his argument that it would make a difference regarding whether the hijacking instruction was given if the trial judge was the same person. The facts in each case are unique to each defendant as are the jury instructions. The post-conviction court in White's case did not err by concluding that White had offered no authority in support of his assertion that the jury had to receive an instruction on the definition of hijacking based on the *Sears* decision.

[36] Additionally, White claims the post-conviction court "ignored" the issues and merits in his proposed findings of fact and conclusions of law because it denied the petition in seven business days. Appellant's Amended Br. p. 44. However, this claim finds no support in the record. White submitted his proposed findings of fact and conclusions of law on March 19, 2021. Appellant's Supp. App. Vol. 2, pp. 70-92 (filed on August 26, 2022). After White's first appeal and remand, the State submitted revised proposed findings of fact and conclusions of law on June 23, 2022. Appellant's App. Vol. 2, p. 18 (filed on August 18, 2022). The post-conviction court issued its findings of fact and conclusions of law on July 5, 2022. Appellant's Supp. App. Vol. 2, pp. 157-72

(filed on August 26, 2022). White has not identified what issues the post-conviction court ignored that were properly before the court.

[37] White also asserts that he was denied equal protection of the law because the jury was not given an instruction defining hijacking. This freestanding constitutional claim was not included in White's petition for post-conviction relief, nor did he include it in his initial proposed findings of fact and conclusions of law. *See id.* at pp. 19-27 (petition for post-conviction relief); 70-92 (proposed findings and conclusions of law). White's argument is waived because (1) it is a freestanding claim of error, and (2) he did not raise it earlier. *See Lambert*, 743 N.E.2d at 726 (cannot bring freestanding claims in petition for post-conviction relief). Additionally, White did not present evidence in support of his assertion, including in his affidavit. *See* Appellant's Supp. App. Vol. 2, pp. 93-107 (White's affidavit).

[38] As a final matter, White asserts that the *Sears* jury received a hijacking definition in the jury instructions because he was Caucasian, whereas White's jury was not so informed because he is African American. *See* Appellant's Amended Br. pp. 46-47. However, White has not supported his claim with any evidence of discrimination aside from his bald assertion. White has not demonstrated grounds for relief here.

Conclusion

[39] Based on the foregoing, we affirm the post-conviction court's denial of relief in all respects.

[40] Affirmed.

Bailey, J., and Foley, J., concur.