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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAVON FEE, Defendant and Appellant.	A171703 (San Francisco County Super. Ct. No. 24007555)

In April 2024, based on information obtained from a confidential informant, defendant Javon Fee was detained and found in possession of a firearm. He was subsequently convicted by a jury of being a felon in possession of a firearm, carrying a loaded firearm in a public place as a prohibited person, and carrying a concealed firearm on his person as a prohibited person, and was sentenced to four years in prison. Fee argues that the trial court erred in denying his motion to disclose the identity of the confidential informant, and that he is entitled to a remand for resentencing because the trial court did not expressly discuss his eligibility for a presumptive lower term based on childhood trauma that he alleges may have contributed to his commission of the offenses. We disagree with both arguments, and we affirm.

BACKGROUND

On the morning of April 25, 2024, San Francisco Police Sergeant Thomas Moran received information from Sergeant Griffin—who in turn received it from a confidential informant—regarding a "black male wearing black clothing" on the 400 block of Eddy Street in San Franciso, associated with a black Jaguar, and possibly in possession of a firearm. Sergeant Moran responded to the 400 block of Eddy Street and saw a black Jaguar "parked off the curb line, in a loading zone." About 30 minutes later, Sergeant Moran saw Fee "enter a store briefly," then exit the store and approach the trunk of the black Jaguar. Fee—who was on post release community supervision—was detained and searched, and a Taurus 9 mm semi-automatic handgun loaded with a magazine and one bullet in the chamber was found in his right front jacket pocket.

The Charges and Trial

On April 29, the San Francisco County District Attorney filed a complaint charging Fee charging with five counts based on his possession of the firearm and the ammunition, and on August 5, the operative first amended information, charging him with possession of a firearm by a felon (Pen. Code,[1] § 29800, subd. (a)(1)) (count I); carrying a loaded firearm in a public place as a prohibited person (§ 25850, subd. (a)) (count II), carrying a concealed firearm on his person as a prohibited person (§ 25400, subds. (a)(2), (c)(4)) (count III); and possession of ammunition by a felon (§ 30305, subd. (a)(1)) (count IV). It was further alleged Fee had a 2014 prior strike conviction for assault with a deadly weapon (§§ 245, subd. (a)(1), 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), and that four circumstances in aggravation

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[1] All undesignated statutory references are to the Penal Code.

were applicable to all four counts under California Rules of Court, rule 4.421(b)(2)–(5).

The preliminary hearing was held on May 13, with the only witness Sergeant Moran, who testified to the circumstances of Fee's arrest and the information he received from Sergeant Griffin.

Jury selection began on July 30. That same day, defense counsel filed a "Motion to Disclose the Identity of the Informant," arguing that the confidential informant was "a material witness to Mr. Fee's innocence in this case." In particular, the motion argued that "[t]he CI informed Sergeant Griffin that the suspect was associated with a black Jaguar parked on the block of Eddy Street and the [*sic*] Fee was wearing all black. It is therefore reasonable that the CI might have testimony favorable to Mr. Fee's defense of transitory possession."

Also on July 30, the trial court discussed the motion with counsel. After observing that the motion was "the type . . . that would need an evidentiary hearing before trial," the trial court asked the prosecutor whether she was "aware whether or not the informant was present at the time of the arrest," and the prosecutor responded that it was her "understanding that they were not." The prosecutor objected to the motion as untimely and argued that Fee had not carried his burden to show that the informant was a material witness. Defense counsel argued that "it's clear that the . . . informant, was, indeed, present because, he's able to provide a description of my client, a description of his car, and a description of where he was located." The trial court then indicated it would "ask the People to confirm this person was not, in fact, present, notwithstanding that I've excluded any of the circumstances leading up to Mr. Fee's detention." The trial court also stated that the motion was "a pre-trial motion that the Court

would have to hear, balance safety concerns, hear from the officers in making a decision whether or not to grant such a motion. These are standard motions that are filed and heard before trial. I'm not hearing it after we've begun the jury selection process."

When the trial court asked, "isn't there a way for you to file a motion well in advance of trial to address whether or not the CRI should be disclosed?," defense counsel replied, "I believe it's still timely, the fact we are filing a motion in limine."

The next day—July 31— defense counsel filed a "Motion in Limine to Disclose the Identity of the Informant." The motion was accompanied by a short declaration of counsel, in which Fee's counsel stated, "The confidential informant will provide information relevant to establishing the defense of transitory possession in this case" and "I believe that the informant is likely to have information that will assist in Fee's defense, given Sergent Griffin's investigation."

After hearing brief argument, the trial court denied the motion, finding first that it was "untimely under California Rule of Court 4.111(a)," and was "something of a discovery motion, where the defense is attempting to determine if, in fact, this informant may have seen something." The trial court went on to conclude it had not "been presented with any proof that there is a reasonable possibility that [the informant] would provide exculpatory information," with citation to *People v. Singletary* (1969) 276 Cal.App.2d 601 (*Singletary*), and given that "the issue of the confidential informant was known as early as the filing of the Complaint, but certainly by the time of preliminary hearing, which was two months ago . . . [¶] . . . the fact that the defense chose not to file a motion in the intervening two months seems to be a defense strategy."

Jury selection continued on July 31, and on August 1, the jury was sworn and opening statements began.

In addition to the testimony of Sergeant Moran, the prosecution entered into evidence a video of an interview Fee gave at the police station after his arrest, in which, after waiving his *Miranda*[2] rights, Fee stated that he "just found the gun . . . [¶] . . . [o]n the streets . . . [¶] . . . [o]ne month ago." When asked by Sergeant Moran whether he had "had that gun for about a month," Fee responded: "No, I put it in the bushes. I refound it." And when asked where the gun came from, Fee reiterated that he "found it . . . [¶] . . . [o]n the street," "in a bag," in the Tenderloin.

Fee testified in his own defense as follows:

On April 25, 2024, Fee had been working for five months as a partitioner at Urban Alchemy, a community organization that hires convicted felons. His duties included keeping the streets clean, preventing overdoses, making sure there was no loitering or selling drugs in front of hotels, and serving as a kind of "community police." His assigned area was between Eddy and Leavenworth.

On April 25, Fee arrived at work at 10:30 am, parked his car, then went around the corner to headquarters to check in and get his supplies. As he "was walking back to my area," he saw "two young men towards the end of the block, towards Leavenworth, arguing and getting in to a confrontation." The men were "yelling and screaming," and because his job at Urban Alchemy was to "de-escalate the situation," Fee "stepped in the middle of the fight" with his arms out. As the men were "both . . . gravitating to each

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

other, a weapon had fell. Once the weapon fell, I picked the gun up and put it in my pocket . . . ." Fee was "trying to do [his] job," and tried to use his walkie-talkie to call his supervisor, but he did not get a response. Fee then "started walking towards . . . the station . . . so I was trying get rid of the stuff and get rid of the gun to give to my supervisor." It was Urban Alchemy "protocol" that "[a]ny time you come across like drugs or a weapon or anything of that nature, you supposed to call your supervisor and notify them and give it to them. [¶] You know, we usually don't get the police involved, because, . . . with me, I don't trust the police. It can go a certain different way. You know, I got out of jail, I'm a convicted felon, and, you know, if I get the police involved, I could get myself killed or hurt."

As Fee was "walking to the hub, I had stopped at my post, and I was going to go inside the Mosser Hotel, you know, get it to my supervisor, so as I was thinking I said—I didn't have my vest on, so I was thinking let me get my vest out of my car so I can put it on and walk to my station." As he was "was walking to my car to get my vest, I was getting arrested by the police."

Fee told the police that he found the firearm in a bush because he "didn't want to get nobody involved" and "didn't want to get labeled a snitch." He "tried to tell them everything about the fight, tried to tell them everything that was going on, and they wasn't listening. They just kept barraging me with questioning . . . so I didn't want to get nobody involved. I was just telling the police what they wanted to hear."

On Monday, August 5, closing statements were given and deliberations began. The next afternoon, August 6, the jury found Fee guilty on counts I through III, and not guilty on count IV (possession of ammunition by a felon).

On August 7, after a second brief trial, the jury found true the prior strike allegation and the aggravating factor allegations that Fee had numerous prior convictions and had previously served a prison term under section 1170, subdivision (h). (Cal. Rules of Court, rule 4.421(b)(2), (3).)

Sentencing

On September 30, in advance of sentencing, Fee filed a sentencing memorandum and requested that the trial court exercise its discretion to dismiss his prior strike for assault with a deadly weapon under section 1385 and *People v. Superior Court* (*Romero*) 13 Cal.4th 497. The motion argued that Fee's father was frequently incarcerated and "hardly present" during his childhood, that Fee "observed his mother decompensate as a result of her drug use," that he had "close family [who] died as a result of gun violence, and another family member [who] died as a result of a car accident," and that he had "not had pleasant experiences with law enforcement" based on the "color of his skin" and the "neighborhood he was unfortunately raised in." The motion then simply asserted that Fee's "past traumas resulted in the current offense."

In support, the motion attached a social history prepared by a reentry social worker at the Office of the Public Defender, based on an interview with Fee and one with his partner. In a section titled, "Trauma History," the report included statements by Fee that he had " 'had whippings before,' " that his parents had a "history of drug and alcohol abuse," including using "crack cocaine . . . for most of my childhood and some of my adulthood," that his father was incarcerated for most of his childhood, and that he had "cousins, friends, [who] were shot and murdered" and another "cousin [who] died in a car accident."

The sentencing memorandum argued that six mitigating factors were applicable under California Rules of Court, rule 4.423, not including the mitigating circumstance under rule 4.423(b)(3) for "psychological, physical, or childhood trauma . . . [that] was a factor in the commission of the crime." The memorandum concluded by asking the trial court to sentence Fee to credit for time served if it dismissed the prior strike allegation, or two years, eight months (double the lower term) if it did not.

The probation report and recommendation indicated that Fee had "relayed [that] his childhood was typical in that he received his necessities though he did encounter juvenile legal troubles. He reported no experience of violence or trauma during his upbringing." The report argued that five circumstances in aggravation were applicable under California Rules of Court, rule 4.21(b)(1)–(5), and that "[t]here appear[ed] to be no Circumstances in Mitigation." It concluded by recommending that the trial court sentence Fee to an aggregate four year term comprised of the middle term of two years on each count, with the sentence on count I doubled by operation of the prior strike, and the sentence on the remaining two counts stayed pursuant to section 654.

At sentencing on October 11, defense counsel argued the court should dismiss the prior strike allegation because Fee had "been a victim of crime as a child, and has faced numerous trauma . . . I want the Court to realize that Mr. Fee has gone through a lot with his upbringing." After the court heard statements from Fee's father and uncle, defense counsel further argued that "[g]iven the trauma that Mr. Fee has experienced, not just with assaults and his lack of trust in law enforcement—a lot of these things is part of the reason why he got caught up in the case that he is currently facing."

As to the *Romero* motion, the trial court indicated it had considered that Fee had "recently completed high school, which he is to be commended for," and that he "was employed and sought employment and those are factors in his favor," but that the jury had found "two factors in aggravation," and ultimately denied the motion after observing that "this case does fall within the spirit of the three-strikes law." With respect to the sentence, the trial court concluded that "there are factors in aggravation as the jury has found," that "I think there are some factors in mitigation including the fact that he has finished high school [and] that he was seeking employment," and that "taking into account the recommendations of probation through the PSR," it would follow the probation department's recommendation. The trial court then sentenced Fee to the middle term of two years on count I, doubled by operation of the strike prior to four years, and the same four year sentence on counts II and III, stayed pursuant to section 654.

Fee filed a notice of appeal.

DISCUSSION

The Trial Court Did Not Err in Denying Fee's Motion to Disclose the Identity of the Confidential Informant

Evidence Code section 1041, subdivision (a), grants a public entity "a privilege to refuse to disclose the identity of a person who has furnished information . . . purporting to disclose a violation of the law." (Evid. Code, § 1041, subd. (a).) The prosecution may claim this privilege after establishing disclosure "is against the public interest because the necessity for preserving the confidentiality of [the informant's] identity outweighs the necessity for disclosure in the interest of justice." (Evid. Code, § 1041, subd. (a)(2); see *People v. Bradley* (2017) 7 Cal.App.5th 607, 620.) "The purpose of the privilege is the furtherance and protection of the public interest in effective

law enforcement. The privilege recognizes the obligations of citizens to communicate their knowledge of the commission of the crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." (*Roviaro v. United States* (1957) 353 U.S. 53, 59.) When a party demands disclosure of an informant's identity, "the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure." (Evid. Code, § 1042, subd. (d).) "During the hearing . . . the prosecuting attorney may request that the court hold an in camera hearing. . . . The court shall not order disclosure . . . unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (*Ibid.*)

In order to afford a defendant the right to a fair trial, "the prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges against the defendant." (*People v. Lawley* (2002) 27 Cal.4th 102, 159.) "An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. [Citations.] The defendant bears the burden of adducing ' " 'some evidence' " ' on this score." (*Ibid.*; see *Williams v. Superior Court* (1974) 38 Cal.App.3d 412, 419; *People v. Oppel* (1990) 222 Cal.App.3d 1146, 1152 ["It is incumbent on the defendant to make a prima facie showing for disclosure before an in camera hearing is appropriate"].)

We review a trial court's decision to deny a motion for disclosure of the identity of a confidential informant for abuse of discretion. (*People v. Hobbs* (1994) 7 Cal.4th 948, 976.) And under the circumstances here, we find none.[3]

To begin with, to carry his burden to show that disclosure was appropriate, Fee relied on the declaration of his counsel that "[t]he confidential informant will provide information relevant" to the defense of transitory possession, as well as defense counsel's conclusion that the informant "was, indeed, present because, he's able to provide a description of my client, a description of his car, and a description of where he was located." With respect to counsel's declaration, "an affidavit made on information and belief" is not evidence, and thus, "cannot constitute the requisite factual foundation for the prima facie showing mandated on the issue of disclosure of a confidential informant's identity under" Evidence Code section 1042, subdivision (d). (*People v. Oppel, supra*, 222 Cal.App.3d at p. 1153.)

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[3] In addition, we agree with the Attorney General that Fee's motion was untimely. "The proper method of obtaining [the identity of an informant] is by use of a motion for pretrial discovery." (*Honore v. Superior Court of Alameda County* (1969) 70 Cal.2d 162, 167, fn. 5; but see *Singletary*, *supra*, 276 Cal.App.2d at pp. 604–605 [error to quash subpoena for testimony of officer with knowledge of informant's identity where officer was subpoenaed for trial and trial court made no mention of defendant's failure to seek pretrial discovery].) Such a motion must be noticed and filed at least 10 court days before trial, and the trial court "may consider the failure without good cause of the moving party to serve and file a memorandum within the time permitted as an admission that the motion is without merit." (Cal. Rules of Court, rule 4.111(b); see *id*., rule 4.111(a).) As the trial court noted, defense counsel was on notice as to the circumstances supporting the motion at least by the time of Sergeant Moran's testimony at the preliminary hearing on May 13. Fee has offered no explanation—before the trial court or on appeal—for his counsel's failure to seek the informant's identity until jury selection was already underway over two months later.

With respect to the confidential informant's presence at or around the time of Fee's arrest, we do not agree that there was any "reasonable possibility that [the informant] could give evidence on the issue of guilt that might exonerate the defendant." (*People v. Lawley, supra*, 27 Cal.4th at p. 159.) In order to prove Fee guilty of possession of a firearm by a felon, the prosecution had to show that he "possessed a firearm," "knew that he possessed the firearm," and that he "had previously been convicted of a felony." (See CALCRIM No. 2511; § 29800, subd. (a)(1).) The other two counts of conviction were similar. (See CALCRIM Nos. 2530, 2591; §§ 25850, subd. (a); 25400, subd. (a)(2)).) The parties stipulated that Fee had previously been convicted of a felony, and according to his own testimony, he both possessed the firearm and knew that he did so. His only hope for exoneration was thus in the defense of "momentary possession," requiring him to establish by a preponderance of the evidence that he "possessed the firearm only for a momentary or transitory period," that he did so "in order to dispose of it," and that "[h]e did not intend to prevent law enforcement officials from seizing the firearm."[4] In short, whether Fee was guilty or not turned largely on his intent in possessing the firearm, and therefore on the jury's evaluation of his credibility. The circumstances immediately surrounding Fee's arrest while in possession of the firearm were largely uncontested and mostly irrelevant.[5]

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[4] On this score, Fee's testimony that he intended to give the firearm to his supervisor because "we usually don't get the police involved, because, . . . with me, I don't trust the police" was problematic, to say the least.

[5] As the trial court aptly observed in denying Fee's motion for a new trial based on the lack of disclosure of the informant's identity:

"In this case, the issue was not whether or not Mr. Fee possessed a gun, that was uncontested. Everybody agreed that that happened. The issue in

Thus, even if—as defense counsel argued—the confidential informant was an eyewitness to the circumstances of Fee's arrest, his or her testimony would have had little or nothing to do with Fee's guilt, and the trial court did not abuse its discretion in concluding that Fee had not carried his burden to demonstrate that the informant "could give evidence on the issue of guilt that might exonerate" him. (*People v. Lawley, supra*, 27 Cal.4th at p. 159.)

Fee's Middle Term Sentence Does Not Warrant Remand for Resentencing

Sentencing decisions are reviewed for abuse of discretion, and such abuse is found where the court "relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "A failure to exercise discretion may also constitute an abuse of discretion." (*Id*. at pp. 847–848.) " 'A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

The burden is on the party challenging the sentencing decision to show that the court abused its discretion, i.e., to "affirmatively demonstrate that the trial court misunderstood" that discretion. (*People v. Lee* (2017) 16

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this case, was under the California Criminal Instruction 2511 whether or not he possessed the firearm for a momentary or transitory period. Whether he possessed the firearm in order to dispose of it and whether or not he intended to prevent law enforcement officials from seizing the firearm.

"Mr. Fee took the stand and testified as to the elements indicating he did not want to provide the firearm to the officers who were on scene and so the issue as to whether or not [the] confidential informant may have been [a] material witness, may have seen how he acquired the firearm is not particularly relevant given that Mr. Fee testified that he had the firearm. So the motion for a new trial is denied."

Cal.App.5th 861, 866.) We may not presume error from a silent record. (*People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527.) "Unless the record affirmatively demonstrates otherwise, the trial court is deemed to have considered all the relevant sentencing factors set forth in the rules." (*People v. Parra Martinez* (2022) 78 Cal.App.5th 317, 322; see also Cal. Rules of Court, rule 4.409 [all relevant sentencing factors "will be deemed to have been considered unless the record affirmatively reflects otherwise"].)

To begin with, Fee's argument is forfeited. As his own brief acknowledges, he never made "reference to the lower term presumption contained in [section 1170,] subdivision (b)(6)(A)" before the trial court.

In general, "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356; see *In re F.M.* (2023) 14 Cal.5th 701, 710 ["a defendant who fails to object before the trial court to a sentence on the ground that it is being 'imposed in a procedurally or factually flawed manner' generally forfeits the right to challenge such an error on appeal"].) There is a "narrow exception" to this rule where the sentence is " 'unauthorized,' " meaning it "could not lawfully be imposed under any circumstances in the particular case," because such error is " 'clear and correctable' independent of any factual issues presented by the record at sentencing" and without remanding for further findings. (*Scott*, *supra*, 9 Cal.4th at p. 356.) But as we explained in *People v. Achane* (2023) 92 Cal.App.5th 1037, a claim that the trial court did not expressly mention application of section 1170, subdivision (b)(6) and therefore did not apply it does not "fit either the definition of an unauthorized sentence or the rationale for this exception to the forfeiture rule" as articulated in *Scott*. (*Achane*, p. 1043; see *id*. at pp. 1042–1044 [defendant

forfeited argument that presumptive lower term applied under section 1170, subdivision (b)(6)(A) based on childhood trauma by failing to so argue before the trial court]; *People v. Tilley* (2023) 92 Cal.App.5th 772, 777–778 [same]; see also *People v. Anderson* (2023) 88 Cal.App.5th 233, 242, review granted and dismissed Oct. 23, 2024, S278786 [claim upper term is improper under section 1170, subdivision (b) is forfeitable].)[6]

In any event, Fee's argument fails on the merits.

Fee argues that "even though [he] made a sufficient initial showing that the lower term presumption applied," "[t]he record does not reveal that the trial court was aware of its obligations under section 1170, subdivision (b)(6)(A)," and thus that he is entitled to "remand for resentencing to permit consideration of section 1170, subdivision (b)(6)(A)." In doing so, he relies heavily on the decision of our colleagues in Division Five in *Fredrickson*, *supra*, 90 Cal.App.5th 984. But his reliance on *Fredrickson* is unavailing—indeed, it counsels in favor of affirmance here. In *Fredrickson*, the trial court sentenced the defendant to the middle term without expressly considering the presumption that the lower term is appropriate where the defendant's "youth was a 'contributing factor' in the commission of the underlying

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[6] We acknowledge the suggestion to the contrary in *People v. Fredrickson* (2023) 90 Cal.App.5th 984, 994, fn. 8 (*Fredrickson*) that "the mandate does not apply if not triggered by an initial showing, but it is not subject to forfeiture," although the parties do not appear to have argued forfeiture in that case. In any event, as the Attorney General acknowledges, there is somewhat of a split of authority on this point, but we find our decision in *Achane* persuasive. (See *People v. Panozo* (2021) 59 Cal.App.5th 825, 839 [declining to find forfeiture where there was "no evidence the trial court was aware of its statutory obligation to consider service-related mitigating factors at sentencing—rather, all indications are to the contrary"]; *Fredrickson*, *supra*, 90 Cal.App.5th at pp. 989–994 [discussing *Panozo*].)

offense." (*Id*. at p. 987.) On appeal, the defendant argued that "because nothing in the record suggests the court made the 'interests of justice' finding required by [s]ection 1170[, subdivision] (b)(6)(B) prior to imposing the middle term," the record was " 'ambiguous' " as to whether the trial court understood its statutory obligation to consider her youth in sentencing. (*Fredrickson*, *supra*, at pp. 988–989.) *Fredrickson* held that "the proper test in reviewing a trial court's failure to expressly apply . . . a sentencing presumption" is to ask whether "the record . . . 'affirmatively' show[s] compliance" with such a presumption after it "has been 'trigger[ed]' by an 'initial showing' of the applicability of the statute." (*Id*. at p. 991, quoting *People v. Bruhn* (1989) 210 Cal.App.3d 1195, 1199–1200.) After suggesting that such an "initial showing" has been made with respect to section 1170, subdivision (b)(6)(B) "when the record and/or arguments are sufficient to put a trial court on notice that a defendant's youth may have been a contributing factor in commission of the underlying offense," the court in *Fredrickson* concluded it had "no occasion to decide the precise nature of the showing required," because the defendant "did not suggest below that Section 1170(b)(6)(B) applied," there was no " 'explicit indication in the record that appellant's youth contributed to the commission of the offense,' " and the Court of Appeal's own review of the record revealed no "clear indication" that the defendant's youth had been such a factor either. (*Id*. at p. 994.)

So too here. As noted, Fee never mentioned section 1170, subdivision (b)(6)(B) before the trial court, and the statements of his counsel that his childhood trauma contributed to the offense were entirely conclusory. Nor has Fee articulated any connection between the childhood trauma he alleges—including his father's incarceration and his parents' substance abuse—and his knowing possession and retention of a firearm while on post

release community supervision over two decades later, at the age of 44. (See *People v. Knowles* (2024) 105 Cal.App.5th 757, 769 [trial court could reasonably reject mitigation based on childhood trauma where doctors who examined defendant failed to "explain[] how the impacts of [that] trauma contributed" to the offense].) Moreover, Fee evidently told the probation department in advance of sentencing that he had "no experience of violence or trauma during his upbringing," which can hardly be said to have put the trial court "on notice" that such trauma "may have been a contributing factor" in his commission of the offense. (*Fredrickson*, *supra*, 90 Cal.App.5th at p. 994.)

Finally, Fee argues in the alternative that if his argument is forfeited, then his trial counsel's failure to expressly argue in favor of a presumptive lower term based on his childhood trauma constituted ineffective assistance of counsel. But to prevail on this argument, Fee must show both that " 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms,' " and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.) The sum total of his argument regarding prejudice is that he "presented undisputed evidence that he experienced trauma as a child and also argued that the trauma was a contributing factor to his criminal conduct. In addition, the trial court acknowledged that there were circumstances in mitigation and did not make a finding that they were outweighed by the circumstances in aggravation." But as just discussed, and as in *Fredrickson,* although the record contains evidence of the alleged trauma, it lacks any indication that such trauma was a "contributing factor" in his offense. "Absent that, we cannot conclude counsel was deficient in failing to present information that may or may not exist, or argue the lower

term presumption applied. And, for the same reason, we cannot conclude it is reasonably probable [Fee] would have received a more favorable result if counsel had made that argument." (*Fredrickson*, *supra*, 90 Cal.App.5th at p. 995). And contrary to Fee's argument, the trial court expressly indicated it had "considered the nature and circumstances of the current case as well as his prior convictions and the particulars of his background, character, and prospects," presumably including the mitigating factors he alleged and the social worker's report detailing his childhood trauma, as well as the two aggravating circumstances found true by the jury, and nevertheless concluded that a middle term sentence was appropriate. Even if his counsel had argued for the lower term sentence based on his childhood trauma, Fee has failed to demonstrate any reasonable probability of a different result.

DISPOSITION

The judgment is affirmed.

RICHMAN, ACTING P. J.

We concur.

MILLER, J.

DESAUTELS, J.

(A171703N)