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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

ALI MAADARANI et al.,

Defendants and Appellants.

C073747

(Super. Ct. No. 11F02289)

The law surrounding lien sales, as the trial court in the present case noted, is “an obscure little backwater” area of the law. The rules and procedures applicable to liens on vehicles are set forth in chapter 6.5 of title 14, part 4, division 3 of the Civil Code. Under Civil Code section 3071, which governs lien sales of vehicles valued at \$4,000 and above, a lien holder who seeks to exercise the right to sell and apply the proceeds to discharge an underlying obligation must file an application with the Department of Motor

Vehicles (DMV) under penalty of perjury. The application requires the lien holder to disclose specified information concerning the vehicle and the lien, including information regarding the vehicle's value, and following the sale requires the lien holder to account for the proceeds. The purpose of the disclosure is to provide notice of the proposed sale to the registered owners and the opportunity to object, and to ensure the proceeds of the sale in excess of the lien amount are transmitted to the owner.

Defendants, brothers Ali and Amin Maadarani, owned and operated M3 Motors, and submitted lien sale applications for several vehicles owned by various financial institutions. Defendants made representations to the financial institutions that the vehicles were in poor condition and of minimal value. Believing these representations, the financial institutions did not contest the sale of the vehicles, thereby permitting defendants to secure title substantially below value following payment of storage and towing fees defendants claimed were owed defendants on the vehicles.

A subsequent investigation of the representations made by defendants and their activities in connection with the acquisition of the vehicles disclosed gross misrepresentations of value and of the circumstances under which they obtained possession of the vehicles, and led to the filing of a criminal complaint.

Ultimately, both Ali and Amin were charged with the theft or attempted theft of four vehicles: a 2005 BMW 330i, a 2000 Mercedes Benz S-500, a 2004 Hummer H-2, and a 2005 Ford F-150. A jury found Ali guilty of acquiring the BMW by making false representations, grand theft of the BMW, attempting to acquire the Ford by making false representations, attempting to commit grand theft of the Ford, and providing false information to a peace officer regarding the Ford. The jury found Amin guilty of acquiring the BMW by false representation, grand theft of the BMW, acquiring the Hummer by false representations, grand theft of the Hummer, false personation, and attempting to acquire the Mercedes by false representations.

The trial court suspended imposition of Ali's sentence and placed him on probation for five years, conditioned upon his serving 160 days in county jail. The court also placed Amin on five years' probation and ordered him to serve 365 days in county jail.

On appeal, both Ali and Amin argue the trial court erred in denying their separate motions to consolidate all of the theft-related counts into a single count pursuant to *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*), and the court abused its discretion by denying their motion to reduce the convictions to misdemeanors. They also argue instructional error. In light of the Supreme Court decision in *People v. Whitmer* (2014) 59 Cal.4th 733 (*Whitmer*), we reverse and remand.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Following a DMV investigation, an amended information charged both defendants with theft by false pretenses (Pen. Code, § 532, subd. (a)—count one); grand theft (Pen. Code, § 487, subd. (a)—count two); embezzlement (Pen. Code, § 504a—count three); attempted theft by false pretenses (Pen. Code, §§ 664/532, subd. (a)—count twelve); and attempted grand theft (Pen. Code, §§ 664/487, subd. (a)—count thirteen). Ali was charged individually with giving false information to a peace officer. (Veh. Code, § 31—count fourteen.) Amin was charged individually with theft by false pretenses (Pen. Code, § 532, subd. (a)—count four); grand theft (Pen. Code, § 487, subd. (a)—counts five and nine); the unlawful use of another individual's personal identifying information (Pen. Code, § 530.5, subd. (a)—counts six and ten); false personation (Pen. Code, § 529.3—counts seven and eleven); and attempted theft by false pretenses (Pen. Code, §§ 664/532, subd. (a)—count eight).

The charges related to activities undertaken by defendants in connection with the lien sales of the four vehicles previously mentioned, a 2005 BMW 330i, a 2000 Mercedes Benz S-500, a 2004 Hummer H-2, and a 2005 Ford F-150 pickup truck. I-Lien Lien Service (I-Lien), owned and operated by Ronald Teter, assists lien holders in the conduct

of lien sales by submitting the necessary documents from lien holders to the DMV and providing notice to the vehicle owners. I-Lien prepared the lien sale applications on the four vehicles at issue in the present case.

As explained by Teter, the applicant was responsible for listing the vehicle's value on the application. When a vehicle could be potentially valued at over \$4,000 but was not, Teter submitted a statement to the DMV explaining why the vehicle was worth less than \$4,000. Teter testified the DMV has a general rule that vehicles over five years old can be valued at less than \$4,000.

For vehicles over \$4,000, the lien holder must receive approval for the sale from the DMV by supplying the vehicle's make, model, and vehicle identification number (VIN); the state in which the vehicle was registered; the date on which the vehicle came into the applicant's possession; and the amount of the requested lien. The application is submitted to I-Lien under penalty of perjury. The DMV usually authorizes the lien within 30 to 60 days.

The following evidence was presented at the jury trial with respect to each vehicle.

### **The Ford F-150 Pickup Truck**

In 2010 Samuel Jones decided he could no longer afford the monthly payments on his 2005 Ford F-150 pickup truck. Jones went to the Auto Max dealership to purchase a different vehicle. Hamze "Tony" Maadarani, a cousin of Ali and Amin, owned the Auto Max dealership.

Jones drove the Ford to Auto Max, parked it, and purchased another vehicle. Jones left the Ford at the dealership, giving Tony the one key he had and planning to return in a couple of days to pick up the Ford and return it to the bank that had made the loan. Tony told Jones he might have to move the Ford from the back of the parking lot and "park it on the lot or on the street right in front of the car lot."

Tony called Jones the next day and asked him to send proof of his insurance on the new car. Tony also told Jones he might have found a buyer willing to take on the loan on

the Ford. Jones later stopped by Auto Max and dropped off the remaining loan payment slips for the Ford. He left the documents with a young man he assumed was an Auto Max employee. Jones had no further contact with Tony and never saw the Ford again.

Alejandro Banderas, an Auto Max salesman at the time, worked under Tony's supervision. Banderas remembered a customer bringing the Ford to Auto Max to trade in for another car. About two weeks later, Tony allowed Banderas's mother, Carmen Cervantes, to borrow the Ford.

Cervantes drove the Ford for three weeks. At one point a thief broke one of the Ford's windows and stole a purse that had been left in the vehicle. Except for the broken window, the Ford was in perfect working condition.

Tony called Cervantes and requested that she return the Ford to Auto Max. Her son, Banderas, drove the Ford to the dealership and gave Tony the key.

According to Tony, Jones had been a customer in 2010, but Tony had no idea the Ford belonged to Jones. Tony denied speaking to Jones about the Ford or receiving the truck's key. After selling Jones the new car, Tony never saw Jones or the Ford again. He did not give the Ford to either Ali or Amin.

Ali Mohammad Maadarani (Ali Mohammad), defendants' cousin, saw the Ford F-150 parked on the street in front of Tony's Auto Max car dealership. The Ford appeared in good condition and was not stripped. He later saw the Ford parked at M3 Motors.

In October 2010 Teter received an application from M3 Motors for a lien sale of a Ford F-150. Ali owned M3 Motors, and every transaction had to be approved by Amin. The application listed Jones as the registered owner. Teter spoke with Nahed Brakat, an M3 Motors representative, about the Ford's condition. Brakat told Teter the Ford had been stripped and abandoned on Brakat's property. Because a 2005 Ford F-150 could be worth over \$4,000, Teter included a statement with the application noting the vehicle had been stripped.

Sierra Central Credit Union (Sierra Central) handled the lien on Jones's Ford F-150. In 2010 Sierra Central attempted to locate and repossess the Ford. After these efforts failed, a Sierra Central repossession specialist recommended a "charge-off" on the Ford. When the credit union has been unable to locate a vehicle for more than 90 days, it charges off the vehicle for tax purposes but retains legal ownership.

Sierra Central received a notice for a proposed lien sale of the Ford. The notice indicated the Ford had been picked up a few months earlier, and M3 Motors was requesting reimbursement for storage fees for the Ford from Sierra Central. Sierra Central's repossession specialist contacted M3 Motors in an effort to determine why Sierra Central had not been notified immediately when M3 Motors recovered the Ford. A man who identified himself as Alex stated a third party had ordered the Ford be picked up. According to Alex, the Ford was missing its motor, side window, and passenger seat. The exterior was scratched and the upholstery torn.

Sierra Central sent an investigator to inspect and photograph the Ford. The investigator found the Ford was not missing its motor or passenger seat. Sierra Central notified the DMV and the district attorney.

DMV investigator Eric Cook spoke to Ron Teter at the I-Lien office in October 2010. While at the office, Cook and a fellow investigator, Dan Cawley, overheard a telephone conversation between Teter and a customer requesting lien documents for the Ford. Teter gave the investigators the lien documents.

The next day, Cook and Cawley went to M3 Motors to inspect the Ford. They arrived before the business was open and found the parking lot gate open. They found the Ford parked on the lot and identified it through its VIN number. The Ford had not been stripped. However, there was a tear in the driver's seat, a broken side window, and a damaged side mirror. Aside from these damages, the vehicle appeared to be "in great condition." The Ford's motor, transmission, and seats were intact. Cook later spoke with

Brakat, who stated Ali directed him to tell Teter the Ford had been stripped and then abandoned at M3 Motors.

After Cook and Cawley examined the Ford, Ali arrived at M3 Motors and spoke with the investigators. Ali confirmed that the Ford parked on the lot was the same vehicle described in the lien sale documents. He could not produce any documentation supporting the sale. In response to Cawley's questioning about the Ford's provenance, Ali stated the truck had been left at the dealership two months earlier with the key in the ignition and a broken side window. Ali moved the vehicle to the back parking lot and filed the lien documents two months later. Cawley questioned the \$180 towing fee listed on the lien document, and Ali stated he believed his moving the Ford to the back lot constituted a towing.

During a second interview later the same day, Ali stated he believed the broken passenger window, ripped seat, and the missing portion of the grille amounted to a stripping of the Ford. Ali admitted that he failed to inform the police about the stripped Ford and did not attempt to contact the Ford's owner.

An M3 Motors salesperson, Arthur Clark, who worked for the company in 2010 under Ali's direction, remembered seeing Ali drive the Ford onto the lot at M3 Motors. When he asked Ali about selling the Ford, Ali said the truck was not for sale. Instead of selling the Ford, they "were going to keep it to use it to tow parts."

After Clark spoke to the DMV investigators he ended his employment with M3 Motors. He later went to the dealership to pick up a friend who was an employee. Ali, Amin, and their brother Ahmad approached Clark. Ali said he had heard Clark was talking to the DMV and asked Clark if he was wearing a wire. Ahmad patted down Clark, searching for a wire. As Clark left, Ali told him to keep his "mouth shut" and not speak with the DMV investigators.

## **The BMW**

In August 2010 Ronald Teter processed a lien sale application from M3 Motors for a 2005 BMW 330i. Brakat, who was the finance manager of M3 Motors in 2010, filled out the lien sales application for the BMW. Brakat never saw the BMW but circled the words “all-over strip” on the application. Nor did Brakat know the registered owner of the BMW was Amin’s wife. The provenance of the BMW is not entirely clear.

Jason Osiow, a mechanic employed by M3 Motors, saw the BMW parked at the dealership at the beginning of his employment. The BMW was shielded with a protective cover and parked in a service bay, where it remained for a couple of months. A few months after Osiow began working at M3 Motors, Amin started driving the BMW to and from work.

Naji Bsharah, the owner of Fulton Auto Mall, a used-car dealership, had a business relationship with Amin. From 2004 to 2007 Amin operated Amin’s Auto Sales. In 2006 the BMW, which had been stored at Amin’s Auto Sales, was sold wholesale to Fulton Auto Mall. Fulton Auto Mall then sold the BMW to Amin’s sister-in-law, Badera Maadarani, and his sister, Susan Maadarani, as cobuyer. Bsharah denied any involvement in the later lien sale of the BMW.

Ali Mohammad was also in the car business. He worked at Amin’s Auto Sales in 2006. Ali Mohammad saw the BMW for sale at Amin’s Auto Sales in 2006. He described the BMW as “in really good condition, almost like new.” The BMW was still for sale when he stopped working for the dealership in December 2006. In 2008 Ali Mohammad saw the BMW parked in Amin’s driveway. It was still in good condition. Ali Mohammad next saw the BMW for sale at Certified Auto Sales; it was still in good condition.

About 18 months later, Ali Mohammad saw the BMW parked behind M3 Motors in an area separate from the sales lot. Two weeks later, he saw the BMW in the M3 Motors garage, missing its taillights. Ali Mohammad observed Amin driving the BMW

on eight to ten occasions. Amin regularly drove the BMW to other dealerships and to his home.

SAFE Credit Union (SAFE) handled the lien sale on the BMW; Karen Higgins, a senior collection specialist, was in charge. A loan in the amount of \$39,005.75 had been issued in 2008 to purchase the BMW. Only one payment was made on the loan. SAFE could not reach the debtor or repossess the vehicle and ultimately charged off the loan for tax purposes. SAFE retained title to the BMW.

In 2010 SAFE received a lien sale notice for the BMW, and Higgins contacted M3 Motors to ascertain the car's condition and location. The person who answered the phone indicated the BMW had been stripped and had accrued a storage fee of over \$3,000. Based on this information, SAFE decided not to contest the lien sale of the BMW.

The information provided to SAFE was false. Mark Guess, employed by the Bureau of Automotive Repair, investigated vehicles involved in fraud and unfair business practice claims in the auto repair business. At trial, he testified as an expert on automotive collision repair.

In December 2010 Guess received a request from Cawley and Cook to inspect the BMW. The investigators asked Guess to determine whether the BMW had been "stripped of its components."

Guess found no evidence that the BMW had been stripped. The BMW's interior was intact. Guess's inspection revealed no markings indicating the doors, seats, trunk lid, or hood had been removed. There was no evidence that any of the BMW's components had been removed or replaced.

Similarly, another investigator for the Bureau of Automotive Repair, Brian Cole, inspected the BMW to determine whether the vehicle had been stripped. He found no indication that any of the BMW's components had been removed or disassembled and concluded the BMW had not been stripped.

DMV investigator Cawley conducted a business inspection of M3 Motors. During the inspection, Cawley asked Ali about the BMW. Ali stated the BMW's owner was Susan Maadarani. Since she could not afford the monthly payments, Ali brought the BMW to the dealership to "get ownership documents" for the vehicle. Subsequently, Cawley removed the BMW's dealer sales jacket, which contains all of the ownership documents for a vehicle, including documents regarding how the vehicle was obtained and the certificate of title signed by the lender. The outside of the jacket identified the BMW by make, model, and VIN number. The jacket contained no documents. Cawley asked Ali for any receipts or invoices; Ali could not produce any such documentation.

### **The Hummer**

Amin and Ali rented a garage from Consignment Auto Sales, a dealership owned by Mahir Omary. They also used Omary's dealership as a business through which they could consign vehicles. The Hummer and the Mercedes, later to be the subject of lien sales, were stored in Omary's garage. Amin's Auto Sales acquired the Hummer through a customer trade-in. Bsharah last saw the Hummer on the Amin's Auto Sales lot in the middle of 2007.

According to Omary, the Hummer was "running fine" when Ali and Amin brought it to the garage at Consignment Auto Sales. Omary borrowed the Hummer and did not notice any mechanical problems.

Later, Amin asked Omary to conduct a lien sale of the Hummer, but Omary refused. Although a lien sale application filed for the Hummer listed Consignment Auto Sales as the seller, Omary never drafted or filed the application. Omary learned of the application when he received a phone call from an individual desiring to purchase the Hummer. Omary called I-Lien, which had submitted the lien sale application. He also spoke with DMV investigators about the application and filed a police report stating someone had unlawfully used Consignment Auto Sales's name to conduct a lien sale.

Ali supervised Osiow, the mechanic at M3 Motors, and Amin frequently stopped by the dealership. When Osiow began working at M3 Motors in 2010, the Hummer, already dismantled, was stored in the mechanic's shop. The hood and some of the doors were removed, and pieces of the interior were missing. It appeared to have been recently painted. Amin purchased replacement parts for the Hummer, and Osiow worked with him to reassemble it. After the Hummer was repaired, Osiow backed the vehicle out of the garage. Amin never told him where the Hummer had come from or who owned it.

Ali Mohammad first observed the Hummer for sale at Amin's Auto Sales. He saw Amin driving the Hummer, both with and without advertising material on the vehicle. The Hummer remained on the lot until the dealership closed in 2007. Two years later, Ali Mohammad saw Ahmad driving the Hummer. The Hummer was often parked at Ahmad's house, and Ali Mohammad saw it once in Amin's driveway. Ali Mohammad later observed the Hummer parked in the garage of Consignment Auto Sales. It did not appear damaged in any way.

In 2010 Ali Mohammad saw the Hummer parked at M3 Motors. The front end was removed, and according to Ali Mohammad, "the grille, the grille support lights, all the headlights, the sides, pretty much all that was stripped. The lights, everything in the front was gone. Even the hood was off. All you could see was the apron and chassis." Ali Mohammad asked Amin about the registration on the Hummer. Amin told Ali Mohammad he had a company that handled liens.

Ally Financial, a vehicle loan company, handled the account of Gorgen Arutyunyan, who had received a loan to purchase a 2004 Hummer. By April 2010 Arutyunyan had defaulted on the loan. Ally Financial attempted to repossess the Hummer. Ally Financial received a lien sale notice on the Hummer that listed Consignment Auto Sales as being in possession of the vehicle.

An Ally Financial impound coordinator spoke to someone at Consignment Auto Sales who said the Hummer had been stripped down to its chassis. The unidentified

person also stated the towing and storage fees were about \$5,000, an amount which differed from that listed on the lien sale notice. Based on the description given of the Hummer's condition and the storage fees, Ally Financial decided not to contest the lien sale.

Mark Guess from the Bureau of Automotive Repair received a request in December 2010 from Cawley and Cook to inspect the Hummer. The investigators asked Guess to determine whether the Hummer had been burned out and stripped.

Guess found no evidence that the Hummer had been stripped. The paint was intact and the suspension was in place, with no indication that it had been removed. The Hummer's interior was not damaged, nor did it appear that the interior panels had been replaced. The Hummer's doors were intact, although there was evidence the left front and left rear doors had been removed at some point. Guess's inspection revealed the Hummer had never been stripped down to its chassis.

Brian Cole, the automotive expert who testified regarding the BMW, also inspected the Hummer to determine whether it had been stripped. Cole found no evidence the Hummer had been stripped or disassembled. The Hummer's undercarriage, engine, and suspension were intact. Cole did note that several bolts were missing from the Hummer's skid plates, doors, and cross-members and that these parts had been removed and reinstalled.

Arthur Clark, the M3 Motors salesperson who had provided information to the DMV investigators regarding the Ford F-150 truck, also remembered seeing the Hummer on the lot. Although he tried to sell the Hummer, Clark found no buyers. One day Ali told Clark he was expecting delivery of paperwork on the Hummer. When Clark received the documents, which included a notice of lien sale for the Hummer, he brought them to Ali. Ali said, "I've been waiting for those papers." Ali then told Clark that these were "the lienholder papers that he was waiting on so that way [we] can re-get the car."

As detailed earlier, after speaking to the DMV investigators, Clark ended his employment with M3 Motors. Thereafter he went to the dealership to pick up a friend who was an employee. Ali, Amin, and Ahmad approached Clark. Ali said he had heard Clark was talking to the DMV and asked him if he was wearing a wire. Ahmad patted down Clark, searching for a wire. As Clark left, Ali told him to keep his “mouth shut” and not speak with the DMV investigators.

### **The Mercedes**

As noted earlier, Amin and Ali rented a garage from Consignment Auto Sales, a dealership owned by Mahir Omary, where they stored the Hummer and the Mercedes. Omary remembered the Mercedes that Amin stored on the property. The Mercedes had not been stripped or broken up into separate parts. However, the lien sale application for the Mercedes, an application that also included the Hummer, indicated the Mercedes was an “all-over strip.” Because it was more than five years old, DMV presumed a value of under \$4,000, avoiding the need for DMV approval for the sale..

The parties stipulated to the testimony of Susan Scammon that she was the recovery manager for SAFE and SAFE provided the loan for the Mercedes; that the loan became delinquent on March 22, 2007; and that CUNA Mutual Group, the loan insurer, paid an insurance claim in the amount of \$23,150.71 and took title to the Mercedes. The parties also stipulated that a DMV licensing registration examiner would have testified that in doing the registration verification he did not note any major damage to or any large missing components from the Mercedes.

### **DEFENSE CASE**

Neither Ali nor Amin testified. Ali owned M3 Motors, and Amin helped out at the dealership. Amin was not involved in vehicle financing. M3 Motors worked with clients who had trouble getting traditional financing.

Terri Gunn, a private investigator, testified in Amin’s defense. Gunn testified she inspected the BMW and the Hummer in June 2011. Gunn stated a dent on the BMW’s

fender had been sanded off and repaired with “Bondo,” and the paint had been sanded off and never repaired. The BMW’s trunk had been cut out, replaced, and poorly repainted. She found the seals around the doors and the trunk in poor shape and covered with a white, crusty substance. In addition, a plastic strip was missing from the underside of the rear bumper.

In addition, Gunn found the BMW’s body contained scratches, dings, rust spots, and places where the paint had chipped away. The paint chips suggested the BMW had been repaired without the use of a proper primer. The lug nuts on the wheels did not match, and several were missing. The battery had been replaced.

Gunn also inspected the Hummer. She found that a brace and several bolts were missing from the Hummer’s hood. Marks on the bolts securing the front grille suggested it had previously been removed. The Hummer’s battery had been replaced, as had other engine parts. At least one part had been replaced with a used part from a salvage yard. Several bolts were missing from the rear seat brackets, and the trunk’s carpet had what appeared to be a bleach spill. Gunn’s inspection also revealed that the engine had been rewired and some bolts were missing. One door panel was improperly attached, and the rubber sealing around the doors was defective. A windshield wiper was bent at an angle that kept it from resting correctly on the window. The plastic trim on the body had been replaced, and multiple bolts were missing from the Hummer’s undercarriage. The Hummer’s dome light was missing.

John Richards, a salesperson at M3 Motors, also testified in Amin’s defense. Richards had worked at M3 Motors since January 2011. He never saw the Ford, the BMW, or the Hummer on the dealership lot.

Ali presented no evidence at trial.

## **VERDICT AND SENTENCING**

The jury found Amin guilty on counts one, two, four, five, seven, eight, and eleven and acquitted him on counts three, six, nine, ten, twelve, and thirteen. The jury convicted Ali on counts one, two, twelve, thirteen, and fourteen and acquitted him on count three.

The court suspended imposition of Ali's sentence and placed him on formal probation for a term of five years upon the terms and conditions prescribed by the court. The court conditioned Ali's probation on his first serving a term of 160 days in jail. Ali's sentences on counts two, twelve, and thirteen were stayed pursuant to section 654.

On the People's motion, the court dismissed Amin's convictions on counts seven and eleven in the interest of justice. The court denied Amin's motion under *Bailey, supra*, 55 Cal.2d 514 to consolidate his convictions into a single conviction for either theft by false pretenses or grand theft. On counts one and four the court suspended imposition of sentence and placed Amin on formal probation for five years; the court ordered him to serve 365 days in jail on count one. The court imposed a concurrent term of 365 days on count four and a concurrent term of 180 days on count eight. The court stayed Amin's sentences on counts two and five under section 654. Both Ali and Amin filed timely notices of appeal.

## **DISCUSSION**

### **MOTIONS TO CONSOLIDATE ALL THEFT-RELATED COUNTS INTO A SINGLE COUNT**

Amin and Ali contend the trial court erred in denying their motions to consolidate the theft-related charges into a single count. The People agree in part, asking the court to reverse Ali's convictions on counts one and twelve, and Amin's convictions on counts one and four. However, the People argue that defendants' remaining convictions should be affirmed.

## **Background**

Prior to trial, both Ali and Amin filed *Bailey* motions to consolidate their theft-related offenses. Amin argued the offenses should be consolidated into a single grand theft count. Ali contended the theft-related offenses should be consolidated into a single count of embezzlement or theft. The trial court found the motions premature and denied them without prejudice.

Prior to sentencing, Amin filed a *Bailey* motion to consolidate his convictions on counts one through four into a single count. Under *Bailey*, whether a series of acts constitutes a single offense or multiple offenses depends upon whether in a series of takings from the same individual there is a single theft if the takings are pursuant to one continuing plan or scheme, constituting a single theft, or if each taking is the result of a separate independent impulse or intent, resulting in multiple counts. (*Bailey, supra*, Cal.2d at p. 519.) Amin argued the counts involving the Mercedes, count eight, and the Hummer, counts four and five, were based on his submission of a single I-Lien application and therefore were part of a single act that should amount to a single grand theft conviction. The counts involving the BMW, counts one and two, should be consolidated into the single grand theft conviction since they were part of the same common plan.

The prosecution distinguished *Bailey*, noting defendants used similar *modi operandi* but not a systematic scheme; there was no defined sum of money to be taken; the alleged crimes were not committed in a short time span; and while the same method was used to commit the offenses, the factual circumstances were distinct.

During oral argument on the motion, Amin's counsel stated: "It's the same company, I-Lien Service. It's the same similar victims in terms of credit unions or finance companies. Same form. They are more factually identical in this case than we see in similar situations in *Bailey* doctrine cases where they've done different things at different times. So I submit that.

“I believe under Bailey that the constellations of Count One, Two, Four, Five, and Eight collapse into a single grand theft. It could even collapse into a 457 or, I’m sorry, 532. But they collapse into a single common scheme or plan under this rule.”

The trial court noted the Hummer and Mercedes transactions were initiated using a single lien sale application to I-Lien. The court stated: “I think that’s your strongest Bailey argument, but I’m not persuaded by it. Because the folks that processed the lien sale application were not the ultimate victims. They got the application and then they . . . did the paperwork, and at that point the paperwork branched off into separate financial institutions that had separate ownership interest in the two vehicles, and that’s where the real theft took place. It wasn’t by the intermediary who just processed the paperwork.

“There were separate victims, separate vehicles, separate representations as to those vehicles. As I said, I will give you, from a Bailey analysis, the fact that the initial representations were all put in one envelope and mailed at one time. Sure sounds like one act. But I’m not sure under Bailey that if somebody writes five bad checks to five different banks and sends them all out in one envelope that that settles the issue. It makes it closer to one act, but you still have separate victims, separate vehicles, separate representations.

“Then as to the BMW, that’s an entirely separate transaction. When we discussed this issue earlier in the proceedings, I was citing two cases, and I would still rely on them. The only thing that has changed is the most recent case now has a formal cite. That’s the Whitmer case, 2013 case at 213 Cal.App.4th 122. That does an exhaustive review of the whole Bailey line of cases going back to the Bailey decision in the 1960s, and stresses that it’s looking at taking through several transactions with more than one victim.

“I’m also very persuaded by the Third DCA’s case of Mitchell from 2008, 164 Cal.App.4th [412], that says Bailey is not looking at just a single overall intent to steal, but look[s] to the analysis of whether there are multiple victims over a period of time.

“And so here, again, even though the paperwork for the lien sales on the Hummer and the Mercedes was initiated in one transaction, that went to the company that processed the paperwork. And from there they sent it on to the respective financial institutions that held the paper on the Hummer and a different financial institution that held the paper on the Mercedes. So I think it’s a close Bailey argument, at least as to the Mercedes and the Hummer. But I’m not persuaded under the analysis of Whitmer and Mitchell that the Bailey analysis applies here. [¶] . . . [¶] . . . I’ve determined, as a question of law, that Bailey doesn’t apply.”

### **Discussion**

As a general rule, a person may be convicted of, but not punished for, more than one crime arising out of the same act or course of conduct. (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.) The *Bailey* doctrine creates an important exception to this general rule: “in a series of takings from the same individual, there is a single theft if the takings are pursuant to one continuing impulse, intent, plan or scheme, but multiple counts if each taking is the result of a separate independent impulse or intent.” (*People v. Packard* (1982) 131 Cal.App.3d 622, 626; see *People v. Drake* (1996) 42 Cal.App.4th 592, 596.)

#### ***People v. Whitmer***

Subsequent to the trial court’s decision in the present case, the Supreme Court provided an update on the *Bailey* doctrine in *Whitmer, supra*, 59 Cal.4th 733.<sup>1</sup> Our review of the *Whitmer* decision persuades us that it controls the disposition of the present case and compels the application of the legal principles enunciated in *Bailey*. A proper application of those principles compels us to reverse and remand.

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<sup>1</sup> *Whitmer* reversed *People v. Whitmer, supra*, 213 Cal.App.4th 122, relied upon by the trial court in the present case.

In *Whitmer*, the defendant worked as the manager of a motorcycle dealership. In collaboration with a codefendant, the defendant arranged the fraudulent sale of 20 motorcycles, motorized dirt bikes, all-terrain vehicles, and similar recreational vehicles to fictitious purchasers through falsified financing agreements, which resulted in financial loss to the dealership. The 20 transactions occurred on 13 different dates, and involved different fictional buyers and separate paperwork and documentation. (*Whitmer, supra*, 59 Cal.4th at pp. 734-735.) The Supreme Court observed that “[t]he evidence shows that each count of grand theft was based on a separate and distinct act. Each transaction resulting in a stolen vehicle, even those transactions occurring on the same date, involved separate paperwork and documentation.” (*Id.* at p. 736.)

The jury convicted the defendant of 20 counts of grand theft, one for each vehicle, and found damages to the dealership exceeded \$200,000. The defendant argued under *Bailey* that he could be convicted of only one count of grand theft because all the thefts were committed pursuant to the same plan or scheme. The appellate court found the defendant properly convicted of one count for each vehicle stolen. (*Whitmer, supra*, 59 Cal.4th at pp. 736-737.)

To determine whether the defendant could be convicted on each count, the Supreme Court extensively analyzed *Bailey*. In *Bailey*, the defendant had fraudulently claimed to the welfare office that a man who had been living with her had left her home. Due to this misrepresentation she received a series of welfare payments to which she was not entitled. Each separate welfare payment would have been a separate petty theft, but together the payments exceeded the amount necessary to sustain a grand theft charge. The court instructed the jury that if it found several acts of theft were done pursuant to an initial design from the owner of the property having a value exceeding \$200, and if the value of the property taken did exceed \$200, there was one crime of grand theft, but if there was no such plan then the separate takings would be petty thefts. (*Whitmer, supra*, 59 Cal.4th at p. 736, citing *Bailey, supra*, 55 Cal.2d at p. 518.)

The Supreme Court in *Bailey* found the defendant properly convicted of one count of grand theft, reasoning: “Several recent cases involving theft by false pretenses have held that where as part of a single plan a defendant makes false representations and receives various sums from the victim the receipts may be cumulated to constitute but one offense of grand theft. [Citations.] The test applied in these cases in determining if there were separate offenses or one offense is whether the evidence discloses one general intent or separate and distinct intents. . . .

“Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan. [Citation.]” (*Bailey, supra*, 55 Cal.2d at pp. 518-519.) In *Bailey*, the defendant committed “a single misrepresentation and then received a series of welfare payments due to that misrepresentation. Other than *omitting* to correct the misrepresentation and accepting the payments, the defendant committed no separate and distinct fraudulent acts.” (*Whitmer, supra*, 59 Cal.4th at p. 740.)

The defendant in *Whitmer* argued there can be only one grand theft if multiple acts of grand theft are pursuant to a single intention, impulse, and plan. He further argued the thefts he committed came within this rule. The *Whitmer* court found support for the defendant’s claim in appellate opinions that cited *Bailey*. (*Whitmer, supra*, 59 Cal.4th at p. 737.)

*Whitmer* reviewed cases *Bailey* cited but did not overrule, beginning with *People v. Stanford* (1940) 16 Cal.2d 247. In *Stanford* a lawyer entrusted with control of an elderly woman’s property obtained her permission to use funds to buy property for her. The lawyer took title to the property in his own name and made three payments of the entrusted funds for its purchase. (*Id.* at pp. 248-250.) The appellate court affirmed the defendant’s conviction of three counts of grand theft, stating: “There is no merit in

appellant's contention that the entire transaction could not constitute more than one offense, and that the conviction of three separate offenses was error. . . . In the present case the evidence showed that the thefts referred to in the first three counts of the indictment were separate and distinct transactions, which occurred on different dates, and involved the taking of different sums of money. Such separate transactions constituted separate offenses.” (*Id.* at pp. 250-251.)

*Bailey* also cited *People v. Rabe* (1927) 202 Cal. 409 (*Rabe*) and *People v. Ashley* (1954) 42 Cal. 2d 246 (*Ashley*). In *Rabe*, the defendant fraudulently obtained money and property by falsely representing that he intended to use the funds to establish a corporation. He received three separate payments from one individual. (*Rabe, supra*, 202 Cal. at p. 417.) Following his conviction of three counts of grand theft, the Supreme Court rejected the defendant's contention that he had committed only a single offense, reasoning in each count the property was obtained at a different time and was different in character and value. The court also stated that when a defendant obtains property through false representations, the defendant may be separately punished for obtaining additional property from the victim even though the initial representations “were still operating upon the mind” of the victim. (*Id.* at p. 413.)

In *Ashley*, the manager of a corporation falsely represented to two individuals that money obtained would be used for a corporate business project. (*Ashley, supra*, 42 Cal.2d at pp. 252-257.) The defendant received two payments from each individual and was charged with four counts of grand theft. He argued he could be convicted of only one count of grand theft with respect to each victim. Relying on *Rabe*, the Supreme Court rejected this argument. (*Ashley*, at p. 273.) The *Whitmer* court enumerated numerous cases cited in *Bailey* that reached similar conclusions on similar facts. (*Whitmer, supra*, 59 Cal.4th at pp. 738-739.)

However, *Whitmer* also noted that several appellate decisions interpreted *Bailey* differently, holding that *Bailey* bars multiple convictions for grand theft when the

individual thefts arise from a recognizable plan or scheme, even though each theft is separate and distinct. (*Whitmer, supra*, 59 Cal.4th at p. 739.) The principal case so holding is *People v. Kronemyer* (1987) 189 Cal.App.3d 314 (*Kronemyer*), which involved an attorney acting as a conservator for an elderly client. The attorney took all his client's funds in four bank accounts, each of which contained more than \$8,000. (*Id.* at pp. 327-328.) After the attorney was convicted of four counts of grand theft, the appellate court reversed three of the convictions. The court reasoned that "the fact these physically separated funds required four transactions does not avoid the single-plan single-offense rule discussed in [*Bailey*]." (*Kronemyer*, at p. 364.)

*Whitmer* briefly summarized numerous cases with similar reasoning. In *People v. Brooks* (1985) 166 Cal.App.3d 24 (*Brooks*), the appellate court reversed 12 of 13 counts of grand theft and one count of petty theft arising from the defendant's theft of auction proceeds. The court in *People v. Packard* (1982) 131 Cal.App.3d 622 reversed two of three grand theft convictions based on the submission of a series of false invoices. In *People v. Richardson* (1978) 83 Cal.App.3d 853, the court reversed three of four counts of attempted grand theft based on attempting to obtain payments on four fraudulent warrants. Finally, in *People v. Sullivan* (1978) 80 Cal.App.3d 16, the court reversed eight of nine related counts of grand theft based on receipt of a series of cashier's checks pursuant to a single fraudulent scheme. (*Whitmer, supra*, 59 Cal.4th at p. 739.)

After summarizing the two lines of cases, *Whitmer* observed: "We thus have cases distinguished but not overruled in *Bailey* . . . that support multiple convictions of grand theft in this case, post-*Bailey* Court of Appeal cases relying on *Bailey* that would prohibit such multiple convictions, and *Bailey* itself. We must decide what the proper rule should be." (*Whitmer, supra*, 59 Cal.4th at p. 740.) In *Bailey*, the *Whitmer* court noted, the defendant committed a single misrepresentation and then received a series of welfare payments. Other than omitting to correct the misrepresentation and accepting the payments, the defendant committed no separate or distinct fraudulent acts. The evidence

supported a jury finding that the defendant had an initial design to keep receiving the payments and had not committed separate and distinct offenses. (*Ibid.*)

However, *Whitmer* reasoned, “in this case, and, generally, in the earlier cases the *Bailey* court distinguished, the defendant committed separate and distinct fraudulent acts.

“This makes all the difference. When the *Bailey* court said that the earlier cases upholding multiple convictions of grand theft would not have done so ‘had the evidence established that there was only one intention, one general impulse, and one plan’ [citation], it must have had this distinction in mind. *Bailey* concerned a single fraudulent act followed by a series of payments. The cases *Bailey* distinguished generally involved separate and distinct, although often similar, fraudulent acts. Accordingly, those cases involved ‘separate and distinct’ [citation] offenses warranting separate grand theft convictions. This case is not similar to *Bailey* but rather to the cases it distinguished. Defendant committed a series of separate and distinct, although similar, fraudulent acts in preparing separate paperwork and documentation for each fraudulent transaction. Each fraudulent act was accompanied by a new and separate intent to commit that fraud.” (*Whitmer, supra*, 59 Cal.4th at p. 740.) The court concluded that “a serial thief should not receive a ‘ “felony discount” ’ if the thefts are separate and distinct even if they are similar.” (*Id.* at pp. 740-741.)

Accordingly, *Whitmer* held that a defendant “may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme. Without deciding whether any particular post-*Bailey* Court of Appeal opinion was incorrect under its facts, we disapprove of any interpretation of *Bailey* that is inconsistent with this conclusion.” (*Whitmer, supra*, 59 Cal.4th at p. 741.)

However, the court concluded that this rule could not be applied to the defendant. According to the court: “ ‘Courts violate constitutional due process guarantees [citations] when they impose unexpected criminal penalties by construing existing laws in a manner that the accused could not have foreseen at the time of the alleged criminal conduct.’

[Citations.]” (*Whitmer, supra*, 59 Cal.4th at p. 742.) “[G]iven the numerous, and uncontradicted, Court of Appeal decisions over a long period of time that reached a conclusion contrary to ours, we believe today’s holding is . . . an unforeseeable judicial enlargement of criminal liability for multiple grand thefts. Accordingly, that holding may not be applied to defendant.” (*Ibid.*) The court concluded: “The law as it had existed for decades before defendant committed his crimes permitted conviction of only one count of grand theft under those circumstances. Because defendant is entitled to the benefit of that law, he cannot be convicted of more than one count of grand theft.” (*Ibid.*) The court reversed the appellate court’s judgment. (*Ibid.*)

### **Application to the Present Case**

In the present case, the crimes defendants were convicted of took place before the Supreme Court issued its ruling in *Whitmer*, which cannot be applied retroactively. Defendants argue, under *Bailey* and related cases, the trial court erred in failing to consolidate the multiple theft counts prior to trial and to dismiss all but one of the theft counts at sentencing.

Ali contends, and Amin agrees, that the People’s theory of the case was that defendants “had engaged in multiple acts of taking, involving four separate vehicles, but all pursuant to the same single overall plan or scheme.” Ali characterizes the thefts thus: “The acts of taking regarding these vehicles were all done pursuant to the same plan or scheme and the acts were all done within two months of each other.” Amin contends, under *Bailey* and related cases, “neither separate transactions nor separate victims precludes application of the *Bailey* rule . . . .” In support, defendants rely on *Brooks, supra*, 166 Cal.App.3d 24 and *Kronemyer, supra*, 189 Cal.App.3d 314.

In contrast, the People argue the *Bailey* doctrine does not require the total consolidation of defendants’ theft-related convictions. Instead, the People request that we reverse both defendants’ theft by false pretenses convictions, count one, but affirm their convictions for grand theft, count two, convictions related to the BMW. As to

Amin, the People contend his count four conviction for theft by false pretenses should be reversed, but his count five conviction for grand theft related to the Hummer should be affirmed. In addition, Amin's count eight conviction for attempted theft by false pretenses, related to the Mercedes, should be affirmed. Finally, Ali's count twelve conviction for attempted theft by false pretenses should be reversed, but his count thirteen conviction for attempted grand theft should be affirmed, convictions related to the Ford F-150. In effect, the People assert defendant's crimes "should be viewed as three separate and distinct courses of criminal conduct" allowing theft convictions for each vehicle.

The People contend defendants have interpreted the *Bailey* doctrine "much too broadly." We disagree. The facts before us mirror those at issue in *Whitmer*. In *Whitmer*, the defendant arranged the fraudulent sale of 20 motorcycles and other recreational vehicles on 13 different dates. With the exception of two dates, whenever more than one transaction occurred on a single date, the sales involved distinct fictitious buyers. (*Whitmer, supra*, 59 Cal.4th at p. 735.) "Each transaction resulting in a stolen vehicle, even those transactions occurring on the same date, involved separate paperwork and documentation." (*Id.* at p. 736.) Here, defendants' convictions revolve around four vehicles, involving separate transactions and financial institutions. As in *Whitmer*, "Under the law that has existed for decades, defendant could only have been convicted of a single count of grand theft." (*Id.* at p. 735.) In light of *Whitmer*, and the facts surrounding defendants' crimes, their convictions should be reduced to a single conviction for grand theft.

### **INSTRUCTIONAL ERROR**

Amin and Ali contend the court erred in refusing to instruct the jury with a modified version of CALCRIM No. 1802. The error, defendants assert, requires reversal of all but one of their theft convictions. Since we reverse all but one of their theft convictions, we need not address this contention.

## **MOTION TO REDUCE FELONY CONVICTIONS TO MISDEMEANORS**

Ali faults the trial court for denying his section 17, subdivision (b) motion to reduce his felony convictions to misdemeanors. Ali presents a variety of arguments in support of his claim: his crimes were nonviolent, his offenses were less serious than other types of grand theft, he had no prior criminal convictions, he has an exemplary background, and the collateral consequences of a felony conviction subjected him to deportation. In light of our previous discussion, we consider whether Ali's single remaining felony conviction should have been reduced to a misdemeanor.

### **Background**

At the sentencing hearing, the court noted it had read and considered Ali's probation report, which recommended Ali be granted formal probation. The court also considered the sentencing memorandum and letters in support of Ali.

In support of the motion, Ali's counsel pointed out the car dealership provided jobs and tax revenue, and allowed lower-income individuals to secure financing for a car. Most of the dealership's business transactions had been legitimate. Counsel also claimed Amin had been a negative influence on Ali and argued the financial losses of the victims were minimal because they were eventually able to repossess the vehicles. Finally, counsel stated Ali would face "extremely dire immigration consequences" if his felony convictions were not reduced to misdemeanors. The People concede both Ali and Amin were citizens of Lebanon.

In contrast, the prosecution noted the thefts involved vehicles worth thousands of dollars. The thefts also required a great deal of planning, sophistication, and professionalism.

The court denied the motion: "The nature and the circumstances of the offense are as the People characterized it: It is a fairly sophisticated crime. I realize the actual steps of it are just filling out a few pieces of paper. But this area of lien sales is an obscure little backwater of the area of the law that most people do not understand. I've never

heard of it before this case. And as [the prosecutor] summarized it, [it] is an area ripe for abuse.

“The financial institutions are not monitoring what’s happening with their vehicles. They take the representations that are made at face value. If they’re told their car is destroyed or there are liens on the car exceeding the bank’s loan on the car, apparently their practice is to just write off the loan, clear title, and then allow the dealer to sell the car free and clear.”

The court also noted Ali was a licensed dealer in a position of trust, which he used to his advantage. The crimes were crimes of opportunity, conducted over a period of time, with two different vehicles, two different transactions, and numerous statements regarding each transaction. According to the court, this was not misdemeanor conduct.

The court in reaching its sentencing decision acknowledged its duty under California Rules of Court, rule 4.410 to considering the factor of deterrence. The court observed: “I’ve got to say, most times when I’m sentencing, I’m not giving a great deal of thought to deterrence. The average 20-year-old who’s in here selling methamphetamine is not going to be deterred, and neither are his buddies on the streets. But this is an area of a licensed DMV dealer where I believe deterrence is an appropriate consideration for others in the industry who may be tempted to take advantage of their position, and the ability to use the lien sale process, to unlawfully acquire title to vehicles as was [done] here. So deterring others I do believe is an appropriate consideration in the context of this case.

“This is a white-[collar] crime. Fairly sophisticated approach even if the paperwork was just one or two documents that were filed. To know how this process works and to know that nobody is following up on it requires some knowledge of the auto sales industry, and so I think deterrence is an appropriate factor to consider.

“So for these reasons, I do not believe the crimes for which he has been convicted should be reduced to misdemeanors.”

## Discussion

Section 17, subdivision (b) authorizes the reduction of “wobbler” offenses, crimes that in the trial court’s discretion may be sentenced alternatively as either felonies or misdemeanors. (*People v. Douglas* (2000) 79 Cal.App.4th 810, 812-813.) The court may consider a plethora of factors in making this determination, including the nature and circumstances of the offense, defendant’s appreciation of and attitude toward the offense, and defendant’s character as evidenced by his behavior and demeanor at trial. When appropriate, the court may also consider the general objectives of sentencing and the protection of society. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978-979 (*Alvarez*).

On appeal, we consider whether the court’s sentencing decision was irrational or arbitrary. If not, we assume the court acted to achieve a legitimate sentencing objective well within its discretion. (*Alvarez, supra*, 14 Cal.4th at pp. 977-978; *People v. Sy* (2014) 223 Cal.App.4th 44, 66.)

Here, the trial court carefully considered the nature and circumstances of the crimes of which Ali was convicted. Ali argues such consideration weighs in favor of reducing his convictions to misdemeanors. We disagree. As the court observed, Ali, a licensed auto dealer, used his position of trust on more than one occasion to falsify information as to the value of automobiles. The scheme, the court noted, was fairly sophisticated and took advantage of the financial institutions that owned the cars. In addition, the court found Ali’s sentence might well deter others from engaging in such schemes.

Although Ali argues the court should have considered other factors more favorable to reducing his sentence, nothing in the trial court’s exercise of its discretion was irrational or arbitrary. Accordingly, we shall not interfere with the court’s exercise of its discretion.

**DISPOSITION**

We reverse the judgment and remand the matter for further proceedings consistent with this opinion.

\_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

We concur:

\_\_\_\_\_ ROBIE \_\_\_\_\_, J.

\_\_\_\_\_ DUARTE \_\_\_\_\_, J.