No. COA 22-1024 THIRTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

|  |  |  |
| --- | --- | --- |
| STATE OF NORTH CAROLINA v.Laketta malourica Hussain, Defendant. | ))))))) | From Brunswick County   |

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**DEFENDANT-APPELLANT’S**

**OPENING BRIEF**

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**INDEX**

TABLE OF CASES AND AUTHORITIES iii

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW 3

STATEMENT OF FACTS 3

1. Ms. Hussain Obtains a Mortgage from SECU and Disputes the Bank’s Allegations Against Her. 3
2. During Sentencing, the Trial Court Summarily Orders Restitution and Imposes an Extended Term of Probation 8

ARGUMENT 10

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION TO DISMISS THE CHARGE OF ALTERING COURT DOCUMENTS 10

A. Standard of Review. 10

B. There Was No Evidence That Ms. Hussain Altered the Official Order in the Florida Court’s File 11

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION TO DISMISS THE CHARGE OF OBTAINING PROPERTY BY FALSE PRETENSE 13

A. Standard of Review 13

B. There Was No Evidence That SECU Was in Fact Deceived by the Altered Documents 14

III. THE TRIAL COURT ERRED IN ORDERING $25,061.46 IN RESTITUTION …. 16

A. Standard of Review 16

B. The Record Did Not Show that Ms. Hussain’s Alleged Misconduct Caused SECU’s Monetary Loss 16

C. The Trial Court Failed to Consider Ms. Hussain’s Ability to Pay the Restitution Award 19

IV. THE TRIAL COURT ERRED IN IMPOSING AN EXTENEDED TERM OF PROBATION …. 21

A. Standard of Review 21

B. The Extended Term of Probation Was Improperly Based on the Erroneous Restitution Award 22

V. IF MS. HUSSAIN’S TRIAL COUNSEL DID NOT PRESERVE THE SUFFICIENCY ISSUES WITH HIS MOTIONS TO DISMISS, HE PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL OR THE ISSUES SHOLD BE REVIEWED UNDER RULE 2.…. 23

CONCLUSION 26

CERTIFICATE OF COMPLIANCE 27

CERTIFICATE OF SERVICE 28

# TABLE OF CASES AND AUTHORITIES

Cases

*Adam v. Mills*, 312 N.C. 181, 322 S.E.2d 164 (1984) 17

*Hampton v. Scales*, 248 N.C. App. 144, 789 S.E.2d 478 (2016) 17

*Monroe v. Rex Hosp., Inc.*, 272 N.C. App. 75, 844 S.E.2d 43 (2020) 17

*State v. Allen*, 360 N.C. 297, 626 S.E.2d 271 (2006) 24

*State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984) 11

*State v. Buchanan*, 260 N.C. App. 616, 818 S.E.2d 703 (2018) 19

*State v. Burke*, 185 N.C. App. 115, 648 S.E.2d 256 (2007). 12

*State v. Campbell*, 369 N.C. 599, 799 S.E.2d 600 (2017) 26

*State v. Carter*, 184 N.C. App. 706, 646 S.E.2d 846 (2007)
 11

*State v. Gamble*, 274 N.C. App. 425, 852 S.E.2d 655 (2020) 22

*State v. Gayton-Barbosa*, 197 N.C. App. 129, 676 S.E.2d 586 (2009) 25

*State v. Gerald*, 227 N.C. App. 127, 742 S.E.2d 280 (2013). 25

*State v. Golder*, 374 N.C. 238, 839 S.E.2d 782 (2020) 23

*State v. Hillard*, 258 N.C. App. 94, 811 S.E.2d 702 (2018). 16

*State v. Hunt*, 250 N.C. App. 238, 792 S.E.2d 552 (2016).. 16

*State v. Johnson*, 251 N.C. App. 260, 795 S.E.2d 126 (2016) 11

*State v. Marion*, 233 N.C. App. 195, 756 S.E.2d 61 (2014). 25

*State v. Martinez*, 230 N.C. App. 361, 749 S.E.2d 512 (2013) 12, 13

*State v. Meadows*, 371 N.C. 742, 821 S.E.2d 402 (2018) 22

*State v. Mucci*, 163 N.C. App. 615, 594 S.E.2d 411 (2004)
 20, 21

*State v. Pierce*, 279 N.C. App. 494, 865 S.E.2d 335 (2021). 14

*State v. Porter*, 282 N.C. App. 351, 870 S.E.2d 148 (2022)
 22

*State v. Smith*, 210 N.C. App. 439, 707 S.E.2d 779 (2011)
 16, 23

*State v. Smith*, 90 N.C. App. 161, 368 S.E.2d 33 (1988)
 20, 21

*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) 24

*Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003) 24

Statutes

N.C. Gen. Stat. § 14-100 14

N.C. Gen. Stat. § 15A-1340.36(a) 20, 21

N.C. Gen. Stat. § 15A-1343.2 22

N.C. Gen. Stat. § 15A-1444(a) 3

N.C. Gen. Stat. § 7A-27(b) 3

Rules

Rule 2 of the Rules of Appellate Procedure 11, 14, 24, 25

No. COA 22-1024 THIRTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

|  |  |  |
| --- | --- | --- |
| STATE OF NORTH CAROLINA v.Laketta malourica Hussain, Defendant. | ))))))) | From Brunswick County   |

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**DEFENDANT-APPELLANT’S**

**OPENING BRIEF**

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

# ISSUES PRESENTED

I. DID THE TRIAL COURT ERR iN failing to dismiss the altering court documents charge where theRE WAS NO evidence that any official court record was changed?

II. DID THE TRIAL COURT ERR iN failing to dismiss the obtaining property by false pretense charge where theRE WAS NO evidence the bank was in fact deceived?

III. DID THE TRIAL COURT ERR iN imposing restitution where the record did not show defendant’s conduct proximately caused the claimed damages and the court failed to consider the defendant’s ability to pay?

IV. DID THE TRIAL COURT ERR iN imposing an extended term of probation when that term was based on the improper restitution order?

# STATEMENT OF THE CASE

 The indictments in this case charged Defendant Laketta Hussain with three counts of common law forgery, four counts of common law uttering forged paper, altering court documents, residential mortgage fraud, and obtaining property by false pretense. (R pp 7-11) Her case came on for trial at the 28 February 2022 Criminal Session of Brunswick County Superior Court, before the Honorable Jason C. Disbrow, Superior Court Judge presiding. (T p 1)[[1]](#footnote-1) On 2 March 2022, a jury found Ms. Hussain guilty of all charges. (R pp 29-38; T pp 230-33)

 On 2 March 2022, the trial court entered judgment, partially consolidated the charges, and sentenced Ms. Hussain to three sentences of 6 to 17 months imprisonment, with each sentence suspended for 60 months of supervised probation. (R pp 43-50; T pp 237-39) The trial court also ordered restitution in the amount of $25,061.46. (R pp 41-42; T p 238) Ms. Hussain timely gave notice of appeal in open court that same day. (T p 241; R p 51)

# STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

 Defendant appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) from a final judgment entered in Brunswick County Superior Court.

#

# STATEMENT OF FACTS

### A. Ms. Hussain Obtains a Mortgage from SECU and Disputes the Bank’s Allegations Against Her.

 In 2016, Defendant Laketta Hussain applied to obtain a mortgage from the State Employees’ Credit Union (“SECU”) to purchase a home. (T pp 59, 64) On 19 August 2016, SECU approved Ms. Hussain’s mortgage request, with a loan amount of $167,000 being used to purchase a home located in Shallotte, North Carolina. (T p 64; State Ex. 1d, Supp pp 4-5)

 In the letter notifying Ms. Hussain of the loan approval, SECU requested certain documents from her. (Supp p 4) For “Income Verification,” SECU only asked Ms. Hussain to provide a copy of her most recent paystub. (Supp p 4) At that time, Mr. Hussain was employed as a human services caseworker by New Hanover County. (T p 117; State Ex. 5, Supp p 23)

 The loan was finalized on 4 October 2016 and the loan funds were paid on 1 November 2016. (T p 62; State Ex. 1a, Supp p 1) Ms. Hussain’s first mortgage payment was then due on 1 December 2016. (T p 62; Supp p 1)

 SECU has a Mortgage Assistance Program (“MAP”), which assists homeowners when they have trouble making their mortgage payments. (T p 44) Based on the homeowner’s situation, SECU may grant forbearance so that payments are not due, or modify the mortgage to lower the payment amount. (T p 45)

 Ms. Hussain applied for assistance under SECU’s MAP program, requesting forbearance for her loan on 9 December 2016. (T pp 68, 150; State Ex. 1g, Supp p 8) With her application, Ms. Hussain submitted contemporaneous paystubs from New Hanover County, which were genuine. (T pp 69-71; State Exs. 1h, 1i, Supp pp 9-10) Ms. Hussain reported a loss of child support income from her husband, Usama Hussain, which was documented by a notice of dismissal from a Brunswick County District Court case involving Ms. Hussain and her husband. (T pp 71, 75, 150; State Ex. 1j, Supp p 11) SECU approved Ms. Hussain’s request and granted her four months of forbearance for her loan. (T pp 50, 75)

 Ms. Hussain applied for MAP assistance for a second time in April 2017, and SECU approved the second request for forbearance, again for a period of four months. (T pp 45, 51, 77, 152, 154)

 Ms. Hussain applied for MAP assistance for a third time in August 2017. (T pp 45, 77, 155) According to Ms. Hussain, she informed SECU that she no longer worked for New Hanover County at this point. (T p 158) Ms. Hussain’s employment with New Hanover County had ended in May 2017. (T p 117; Supp p 23) SECU denied Ms. Hussain’s third request for assistance. (T p 46) SECU later foreclosed on her home. (T pp 161-62)

 SECU witnesses testified contrary to Ms. Hussain. Graham White testified that, during the process for Ms. Hussain’s third MAP application, he noticed “issues with a pay stub” and referred the matter to the bank’s fraud department. (T pp 45-46) According to SECU investigator Allison Bailey, Ms. Hussain submitted two New Hanover County paystubs with her third MAP application, which were for paychecks in July 2017. (T pp 78-79; State Exs. 1m, 1n, Supp pp 14-15) Bailey believed that the pay period dates on the two paystubs had been altered. (T pp 80-82) Ms. Hussain testified that she did not alter the paystubs and did not submit the July paystubs. (T p 159)

 According to Bailey, Ms. Hussain also submitted a paystub for her husband from Sands Beach Wear with her third MAP application. (T pp 82-83; State Ex. 1o, Supp p 16) Bailey believed that the pay period dates on this paystub had been altered. (T pp 83-84) Ms. Hussain testified that she did not alter this paystub. (T pp 159-60)

 After reviewing documents from the third MAP application, Bailey reviewed SECU’s file for Ms. Hussain’s mortgage. (T p 85) Bailey focused on a Florida child support document, which she claimed was “submitted with Ms. Hussain’s original mortgage paperwork.” (T p 86) The document is a copy of a child support order issued by the Florida Department of Revenue, requiring the garnishment of wages for Brandon A. McCurry, so that child support can be provided for a particular child. (State Ex. 1p, Supp p 17; T p 86) In the caption of the document, the handwritten name “Laketta Hussain” is listed as the second petitioner in the action. (Supp p 17) Bailey believed that the document had been altered to add Ms. Hussain’s name. (T pp 86-87)

 The State did not present any evidence of whether or how the Florida document was considered during SECU’s mortgage origination process. There was no evidence that SECU reviewed the Florida document, believed the Florida document was genuine, or that it relied on the Florida document in deciding to issue a mortgage to Ms. Hussain.

 Ms. Hussain testified that she did not alter the Florida document, she did not write her name on the document, the handwriting on the document is different than hers, she did not know child listed on the document, and she did not submit the document to SECU. (T pp 159, 164-65)

 Brunswick Count Sheriff’s Office investigator Edward Carter investigated the Florida document by (1) contacting the Brunswick County Department of Social Services regarding the child listed on the document; and (2) obtaining the North Carolina birth certificate for the child, which did not list Ms. Hussain. (T pp 120-23) There is no evidence that Carter or anyone else contacted the Florida Department of Revenue concerning the order, or obtained the original version of the order from the Florida court file.

 Bailey also focused on a paystub for Ms. Hussain from “Fundays,” which Bailey claimed was submitted “with her original mortgage.” (T p 89; State Ex. 1r, Supp p 19) Bailey believed that the address and phone number for Fundays had been altered on the paystub, and that the recipient’s name had been altered to “Laketta M. Hussain.” (T pp 90-91) Ms. Hussain testified that this paystub was for her husband, but she did not change the name on it. (T pp 159-60, 167)

 Bailey also testified about an employment confirmation form that had been completed by a SECU employee regarding Fundays. (T pp 88-89; State Ex 1q, Supp p 18) The form showed that SECU contacted Fundays on 2 September 2016 and confirmed that Ms. Hussain was employed there. (T pp 89, 96; Supp p 18)

 Other than the employment confirmation form, the State did not present any evidence of how the Fundays paystub was considered during SECU’s mortgage origination process. There was no evidence that SECU relied on the paystub in deciding to issue a mortgage to Ms. Hussain.

 Finally, Bailey testified that the amount SECU “lost in that mortgage with Ms. Hussain” was $25,061.46. (T p 95; St. Ex. 2, Supp p 20) Bailey testified that after SECU foreclosed on Ms. Hussain’s home and sold it, $25,061.46 was the remaining balance due. (T p 95)

### B. During Sentencing, the Trial Court Summarily Orders Restitution and Imposes an Extended Term of Probation.

 Ms. Hussain was charged with the following offenses: (1) three counts of forgery, for the two July 2017 New Hanover County paystubs and the Fundays paystub; (2) four counts of uttering forgery, for the two July 2017 New Hanover County paystubs, the Florida child support order, and the Fundays paystub; (3) altering court documents, for the Florida child support order; (4) residential mortgage fraud, for altering documents “within the mortgage lending process;” and (5) obtaining property by false pretense, for submitting altered documents “during the mortgage lending process and mortgage modification process.” (R pp 7-11)

 At trial, Graham White, Allison Bailey, Edward Carter, and a human resources employee for New Hanover County were the witnesses for the State. (T pp 43-134) Ms. Hussain testified for the defense. (T pp 141-84) The defense moved to dismiss all charges at the close of the State’s evidence and close of all evidence, which was denied. (T pp 135-37, 188) The jury found Ms. Hussain guilty on all charges. (R pp 29-38; T pp 230-33)

 During sentencing, the State proffered a restitution worksheet, seeking $25,061.46 in restitution to SECU. (R p 41; T p 236) This is the same amount that Bailey described in her testimony and is listed on State’s Exhibit 2. The State did not proffer any additional evidence in support of this amount being an accurate measure of SECU’s loss. Defense counsel objected to the restitution amount sought by the State. (T p 237)

 The State did not proffer any evidence concerning Ms. Hussain’s ability to pay $25,061.46 in restitution. The trial court did not make any inquiries concerning Ms. Hussain’s ability to pay.

 In imposing its sentence, the trial court ordered Ms. Hussain to pay $25,061.46 in restitution to SECU. (T p 238; R 41-42) The trial court did not make any findings in support of its restitution award, and made no statements regarding Ms. Hussain’s ability to pay.

 The trial court imposed a suspended sentence of 60 months supervised probation. (T pp 238-39; R pp 43-50) The court made a finding that the extended term of probation—60 months instead of 36 months—was based on the amount of restitution, which was made a condition of Ms. Hussain’s probation. (T p 238; R p 42)

# ARGUMENT

The trial court made several errors below. First, the trial court erred in failing to dismiss the charge of altering court documents because there is no evidence that the official order in the Florida court’s file had been altered. Instead, only a copy of the order was apparently altered. Second, the trial court erred in failing to dismiss the charge of obtaining property by false pretense because there is no evidence that SECU was in fact deceived by any of the purportedly forged documents. Third, the trial court erred in ordering Ms. Hussain to pay $25,061.46 in restitution to SECU because (1) there is no evidence that Ms. Hussain’s alleged misconduct was the but-for cause of SECU’s monetary loss; and (2) the trial court failed to consider any factor related to Ms. Hussain’s ability to pay the full amount of restitution. Finally, because the restitution award was improper, the trial court erred in imposing an extended 60-month term of probation.

##

## I. THE TRIAL COURT ERRED IN denying defendant’s motion to dismiss the charge of altering court documents.

### A. Standard of Review.

 “In ruling on a defendant’s motion to dismiss, the trial court must determine whether the State presented substantial evidence (1) of each essential element of the offense and (2) of the defendant’s being the perpetrator.” *State v. Carter*, 184 N.C. App. 706, 708, 646 S.E.2d 846, 848 (2007). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 708-09, 646 S.E.2d at 848 (quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). “[E]vidence which raises no more than a surmise, suspicion, or conjecture of guilt is insufficient to withstand the motion to dismiss even though the suspicion so aroused by the evidence is strong.” *State v. Johnson*, 251 N.C. App. 260, 270, 795 S.E.2d 126, 134 (2016). This Court reviews the trial court’s denial of a motion to dismiss *de novo*. *Id.*[[2]](#footnote-2)

**B. There Was No Evidence That Ms. Hussain Altered the Official Order in the Florida Court’s File.**

 Ms. Hussain was charged with altering court documents under N.C. Gen. Stat. § 14-221.2, specifically regarding the Florida child support order. (R p 8) That statute provides: “Any person who without lawful authority intentionally enters a judgment upon or materially alters or changes any criminal or civil process, criminal or civil pleading, or other official case record is guilty of a Class H felony.” § 14-221.2 (emphasis added). The State, however, did not present any evidence that Ms. Hussain—or anyone else—altered the official case record of the Florida court that originally issued the child support order.

 For § 14-221.2 to apply, a defendant must have altered the official case record of a court that is kept in the court’s possession, rather than altering a document before it reaches a court or altering a copy of a document issued by a court. For example, in *State v. Martinez*, 230 N.C. App. 361, 749 S.E.2d 512 (2013), the evidence showed that the defendant forged signatures on a document before it was filed in the clerk of court’s office. *Id.* at 365, 749 S.E.2d at 515. There was no evidence, however, that the defendant went into the court’s file and altered a document that was already an official case record of the court. This Court concluded that “the evidence does not show that Defendant materially altered or changed any process, pleading, or other official case record.” *Id.* It thus vacated the defendant’s conviction. *Id.*

 In contrast, in *State v. Burke*, 185 N.C. App. 115, 648 S.E.2d 256 (2007), the evidence showed that the defendant had altered a court’s order and it was “the order in the file [that] had been changed[.]” *Id.* at 117, 648 S.E.2d at 258. This evidence was sufficient to sustain a conviction for altering court documents. *Id.* at 119, 648 S.E.2d at 259.

 In this case, there is no evidence that anyone altered the official case record of the Florida court that originally issued the child support order in question. The State did not present any documents from the official file of the Florida court or any witness that had ever seen the Florida court’s file. There was no evidence of what the Florida court file contained or that any documents in the file had been altered.

 Instead, the State simply presented a copy of an order that had been submitted to SECU and which had apparently been altered. Altering a copy of an order issued by a court is plainly not the same as altering the official version of the order in a court’s file. Because the State failed to present any evidence that Ms. Hussain altered the official version of the order in the Florida’s court’s file, her conviction for altering court documents must be vacated. *See* *Martinez*, 230 N.C. App. at 365, 749 S.E.2d at 515.

## II. THE TRIAL COURT ERRED IN denying defendant’s motion to dismiss the charge of obtaining property by false pretense.

### A. Standard of Review.

 This Court reviews the trial court’s denial of a motion to dismiss *de novo*. *See* Section I.A, *supra*.[[3]](#footnote-3)

**B. There Was No Evidence That SECU Was in Fact Deceived by the Altered Documents.**

 Ms. Hussain was charged with obtaining property by false pretense under N.C. Gen. Stat. § 14-100. The elements of this offense are “(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.” *State v. Pierce*, 279 N.C. App. 494, 499, 865 S.E.2d 335, 339 (2021) (emphasis added). The State, however, did not present any evidence that SECU was in fact deceived by the documents Ms. Hussain allegedly submitted.

 First, much of Ms. Hussain’s alleged misconduct was recognized as problematic by SECU at the time. Allison Bailey became involved when Graham White flagged the paystubs from New Hanover County and Sands Beach Wear, and she believed the paystubs were not genuine. SECU then ended up denying Ms. Hussain’s third mortgage modification request, despite the documents submitted, and foreclosed on her home. The State’s evidence thus affirmatively shows that SECU was not deceived by these paystubs. There was no evidence to the contrary.

 Second, regarding the Florida child support order, the State did not present any evidence of whether or how the order was considered during SECU’s mortgage origination process. There was no evidence that SECU reviewed the document, believed the document was genuine, or that it relied on the document in deciding to issue a mortgage to Ms. Hussain. The only evidence is that Bailey found the Florida order in the mortgage file. Standing alone, the mere presence of the order in the file cannot prove that SECU was in fact deceived by the order.

 Third, regarding the Fundays paystub, the only evidence reflecting SECU’s consideration of the paystub was a form showing that SECU contacted Fundays to check whether Ms. Hussain was employed there. This form shows that SECU apparently believed the Fundays paystub may or may not have been genuine, and so decided to confirm employment by other means. There was no other evidence of how SECU considered the paystub during its mortgage origination process, and no evidence that SECU relied on the paystub in deciding to issue a mortgage to Ms. Hussain. The State therefore failed to provide any evidence that SECU was in fact deceived by the Fundays paystub, or by any of the other purportedly forged documents.

 Accordingly, Ms. Hussain’s conviction for obtaining property by false pretense should be vacated.

## III. THE TRIAL COURT ERRED IN ordering $25,061.46 in restitution.

### A. Standard of Review.

 “[A]wards of restitution are reviewed *de novo*.” *State v. Hunt*, 250 N.C. App. 238, 253, 792 S.E.2d 552, 563 (2016). Defense counsel objected to the amount of restitution, but even if he had not, “no objection is required to preserve for appellate review issues concerning the imposition of restitution.” *State v. Smith*, 210 N.C. App. 439, 443, 707 S.E.2d 779, 782 (2011).

### B. The Record Did Not Show that Ms. Hussain’s Alleged Misconduct Caused SECU’s Monetary Loss.

 The trial court is authorized to order restitution “for any injuries or damages arising directly and proximately out of the offense committed by the defendant.” N.C. Gen. Stat. § 15A-1340.34(c) (emphasis added). “A trial court’s award of restitution must be supported by competent evidence in the record.” *State v. Hillard*, 258 N.C. App. 94, 96, 811 S.E.2d 702, 704 (2018).

 “In North Carolina, the legal definition of proximate cause is ‘a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries, would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen[.]” *Monroe v. Rex Hosp., Inc.*, 272 N.C. App. 75, 77–78, 844 S.E.2d 43, 46 (2020) (emphasis added; quoting *Adam v. Mills*, 312 N.C. 181, 192-93, 322 S.E.2d 164, 172 (1984)). But-for causation is a necessary requirement of proximate cause. To establish “proximate cause of the loss suffered,” it must be shown that “the loss would not have occurred but for the [alleged] conduct.” *Hampton v. Scales*, 248 N.C. App. 144, 150, 789 S.E.2d 478, 484 (2016).

 In this case, the record did not contain any evidence that Ms. Hussain’s alleged misconduct caused the monetary loss claimed by SECU. Allison Bailey testified that after SECU foreclosed on and sold Ms. Hussain’s home, there was a remaining balance of $25,061.46. This balance is attributable to Ms. Hussain only if her misconduct caused SECU to issue the mortgage for her home in the first place. There is no evidence in the record, however, that her alleged misconduct was a but-for cause of SECU issuing the mortgage.

 First, much of Ms. Hussain’s alleged misconduct occurred after SECU originated and issued the mortgage. The submission of altered paystubs from New Hanover County and Sands Beach Wear was only alleged to have happened during the process for Ms. Hussain’s third mortgage modification request. And SECU ended up denying that request, despite the documents submitted. The submission of these paystubs thus could not have caused the loss claimed by SECU.

 The only alleged misconduct occurring before SECU issued the mortgage was the submission of the Florida child support document and the paystub from Fundays. However, there is no evidence that the submission of these particular documents was a but-for cause of SECU issuing the mortgage, i.e., that SECU would not have issued the mortgage had these documents not been submitted.

 It is undisputed that throughout 2016—during the entirety of the mortgage application process—Ms. Hussain was employed full-time by New Hanover County. The State’s witness from the County confirmed that Ms. Hussain was a County employee from May 2014 to May 2017. (T p 117; Supp p 23) And the 2016 paystubs from the County, which Bailey admitted were genuine, showed Ms. Hussain’s full-time employment with and substantial income from the County. (T pp 69-71; Supp pp 9-10) It is thus entirely possible, if not likely, that Ms. Hussain’s employment with the County was sufficient in and of itself for SECU to issue a mortgage to her.

 While the child support document and Fundays paystub showed supplemental income for Ms. Hussain, there is no evidence in the record that SECU would not have issued the mortgage absent this supplemental income. If true, it would have been easy for one of the SECU witnesses to explain how SECU relied on the Florida document and Fundays paystub in deciding to issue a mortgage to Ms. Hussain. Surely SECU had some sort of financial analysis showing the amount of income needed to support the size of the mortgage they issued. But the State proffered no such evidence. There was no evidence as to how the child support and Fundays income factored into SECU’s decision to issue the mortgage. And there was certainly no evidence that SECU would not have issued the mortgage had those documents not been submitted. In the absence of such evidence, nothing in the record shows that Ms. Hussain’s alleged misconduct was a but-for or proximate cause of SECU issuing the mortgage. Therefore, the record in no way supports a finding that Ms. Hussain’s conduct was a but-for or proximate cause of SECU’s claimed financial loss.

 The trial court’s restitution award thus must be vacated. *See State v. Buchanan*, 260 N.C. App. 616, 624, 818 S.E.2d 703, 709 (2018) (“When no evidence supports the award, the award of restitution will be vacated, and the typical remedy is to remand the restitution portion of the sentence for a new sentencing hearing.”).

### C. The Trial Court Failed to Consider Ms. Hussain’s Ability to Pay the Restitution Award.

 “In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant’s obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution[.]” N.C. Gen. Stat. § 15A-1340.36(a) (emphasis added). If the record “reveals that the trial court did not consider any of the factors related to defendant’s ability to pay the full amount of restitution[, then the] case must be remanded for a new sentencing hearing.” *State v. Mucci*, 163 N.C. App. 615, 626, 594 S.E.2d 411, 419 (2004); *see State v. Smith*, 90 N.C. App. 161, 168, 368 S.E.2d 33, 38 (1988), *aff’d per curiam*, 323 N.C. 703, 374 S.E.2d 866 (1989) (remanding for new determination of restitution where the trial court failed to consider defendant’s financial situation).

 In this case, the record shows that the trial court entirely failed to consider Ms. Hussain’s ability to make restitution before imposing its restitution award. During sentencing, the trial court did not make any inquiries about Ms. Hussain’s income, expenses, or ability to pay thousands of dollars to SECU. Nor did either of the parties address these questions. Instead, the State simply proffered a restitution worksheet and exhibit, defense counsel objected to the amount of restitution, and the trial court ordered Mr. Hussain’s to pay $25,061.46 in restitution to SECU without any discussion as to whether she was realistically able to make that payment. The trial court thus violated the mandatory requirements of § 15A-1340.36(a). *See* *Mucci*, 163 N.C. App. at 626, 594 S.E.2d at 419.

 The trial court’s error was particularly glaring given what the record did disclose about Ms. Hussain’s financial condition. Ms. Hussain had lost her job with New Hanover County. (T p 117; Supp p 23) She was unable to make her mortgage payments and SECU foreclosed on her home. (T pp 161-62) Ms. Hussain has three children. (T p 145) And she was indigent and represented by appointed counsel. (T p 239) Given these facts, the trial court’s failure to consider Ms. Hussain’s ability to pay is obviously erroneous. *See* *Smith*, 90 N.C. App. at 168, 368 S.E.2d at 38 (vacating restitution award where trial court “did not consider any evidence of defendant’s financial condition,” even though defendant had small children and her counsel was court-appointed).

 Accordingly, the trial court’s restitution award must be vacated and the case remanded for resentencing. *See* *Mucci*, 163 N.C. App. at 626-27, 594 S.E.2d at 419-20.

**IV. THE TRIAL COURT ERRED IN IMPOSING AN EXTENEDED TERM OF PROBATION.**

**A. Standard of Review.**

 “Alleged statutory sentencing errors are questions of law which [the Court] review[s] de novo.” *State v. Gamble*, 274 N.C. App. 425, 427, 852 S.E.2d 655, 656 (2020). Regardless of whether defense counsel objected, “nonconstitutional sentencing arguments are preserved by statute.” *State v. Meadows*, 371 N.C. 742, 748, 821 S.E.2d 402, 406 (2018).

### B. The Extended Term of Probation Was Improperly Based on the Erroneous Restitution Award.

 The trial court is authorized to impose a term of probation longer than 36 months only if the court makes “specific findings” that a longer term is “necessary.” N.C. Gen. Stat. § 15A-1343.2; *see State v. Porter*, 282 N.C. App. 351, 352, 870 S.E.2d 148, 150 (2022).

 Here, the trial court imposed an extended 60-month term of probation. The court justified the sentence by making a “special finding that based on the restitution amount that the Court intends to enter as a condition of the defendant's probation that a longer period of probation is required than the 36 months.” (T p 238)

 However, as discussed above, the trial court’s restitution award was erroneous and must be vacated. *See* Section III, *infra*. When this Court determines that a restitution award is erroneous, it also vacates any extended probation sentence based on the restitution award. *State v. Smith*, 210 N.C. App. 439, 445, 707 S.E.2d 779, 783 (2011) (“Having determined that the State failed to present sufficient evidence in support of the amounts of restitution ordered . . . , we must remand on this issue as well.”). Accordingly, the Court must vacate Ms. Hussain’s sentence and remand so that the “trial court [can] reconsider the length of Defendant’s probationary period in light of new evidence concerning the amount of restitution, if any, presented on rehearing.” *Id.*

## V. IF MS. HUSSAIN’S TRIAL COUNSEL DID NOT PRESERVE THE SUFFICIENCY ISSUES WITH HIS MOTIONS TO DISMISS, HE PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL OR THE ISSUES SHOLD BE REVIEWED UNDER RULE 2.

 Ms. Hussain’s trial counsel moved to dismiss all charges at the close of the State’s evidence, and then renewed the motion at the close of all the evidence. (T pp 135-37, 188) “[D]efendant’s simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review.” *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020). Nonetheless, if the Court determines that trial counsel’s motions did not properly preserve the arguments made in Sections I and II, *supra*, it should find that Ms. Hussain’s counsel provided ineffective assistance of counsel or review the sufficiency issues above under Rule 2 of the North Carolina Rules of Appellate Procedure.

 “To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense.” *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)). “Deficient performance may be established by showing that ‘counsel’s representation fell below an objective standard of reasonableness.’” *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003)). To demonstrate prejudice, “a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* (quoting *Wiggins*, 539 U.S. at 534).

 If Ms. Hussain’s trial counsel did not properly preserve the arguments made in Sections I and II, *supra*, that failure would plainly constitute deficient performance. There could not be any tactical reason for such a failure. Trial counsel’s error would be prejudicial because proper preservation would result in this Court vacating the altering-court-document and false-pretense convictions for the reasons stated in Sections I and II. The proper remedy for trial counsel’s ineffectiveness would be to vacate those convictions. *See State v. Gerald*, 227 N.C. App. 127, 133, 742 S.E.2d 280, 284 (2013) (finding ineffective assistance on direct appeal).

 In addition, if the arguments in Sections I and II have not been properly preserved, this Court should review the issue under Rule 2 of the Rules of Appellate Procedure. *See State v. Marion*, 233 N.C. App. 195, 202, 756 S.E.2d 61, 67 (2014) (“However, because Defendant also brings forward an ineffective assistance of counsel claim based on her counsel’s failure to make the motion to dismiss, we elect to review Defendant’s sufficiency of the evidence argument pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure.”). “The Supreme Court and this Court have regularly invoked N.C. R. App. P. 2 in order to address challenges to the sufficiency of the evidence to support a conviction.” *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 590 (2009).

 Because Ms. Hussain’s altering-court-document and false-pretense convictions lack a proper evidentiary basis, and any preservation failure was due to ineffective assistance of counsel, Rule 2 review is particularly appropriate. *See id.* (“[I]t is difficult to contemplate a more ‘manifest injustice’ to a convicted defendant than that which would result from sustaining a conviction that lacked adequate evidentiary support[.]”); *see also* *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (requiring assessment of specific circumstances of case and parties in order to determine whether to exercise Rule 2 jurisdiction).

 Therefore, because trial counsel properly preserved the arguments made in Sections I and II, *supra*, because any failure to do so would constitute ineffective assistance of counsel, or because review under Rule 2 is appropriate, the Court should reverse Ms. Hussain’s altering-court-document and false-pretense convictions.

**CONCLUSION**

 For the foregoing reasons, Laketta Hussain respectfully requests that the Court vacate the altering-court-document and false-pretense convictions, vacate the sentence and restitution award, and remand for resentencing.

 Respectfully submitted, this 15th day of March, 2023.

Electronically submitted

Narendra K. Ghosh

NC Bar No. 37649

Patterson Harkavy LLP

100 Europa Dr., Suite 420

Chapel Hill, NC 27517

Tel: 919-942-5200

Email: nghosh@pathlaw.com

*Counsel for Defendant*

# CERTIFICATE OF COMPLIANCE

 Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Defendant certifies that the foregoing brief, which is prepared using proportional font, is less than 8,750 words (excluding cover, index, table of authorities, certificate of service, this certificate of compliance, and appendices) as reported by the word-processing software.

 This the 15th day of March, 2023.

 Electronically submitted

 Narendra K. Ghosh

# CERTIFICATE OF SERVICE

 The undersigned counsel for the Defendant hereby certifies that a copy of Defendant’s Brief was e-filed with the Court and served via email to counsel for the State, addressed as follows: Hilary R. Ventura, hventura@ncdoj.gov.

 This the 15th day of March, 2023.

 Electronically submitted

 Narendra K. Ghosh

1. The trial transcript, covering 28 February to 1 March 2022, is cited as “T.” The trial exhibits are contained in the Rule 9 Supplement to the Record on Appeal, which is cited as “Supp.” [↑](#footnote-ref-1)
2. If the Court finds that Ms. Hussain’s trial counsel did not properly preserve the sufficiency issue presented in this section, the Court should find that trial counsel provided ineffective assistance of counsel or review the issue under Rule 2 of the Rules of Appellate Procedure. *See* Section V, *infra*. [↑](#footnote-ref-2)
3. If the Court finds that Ms. Hussain’s trial counsel did not properly preserve the sufficiency issue presented in this section, the Court should find that trial counsel provided ineffective assistance of counsel or review the issue under Rule 2 of the Rules of Appellate Procedure. *See* Section V, *infra*. [↑](#footnote-ref-3)