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RENDERED: MAY 28, 2020
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2019-SC-000030-MR

ANTONIO SALLEE — APPELLANT

V.

ON APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
NO. 17-CR-00166

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**REVERSING AND REMANDING**

Antonio Sallee ("Sallee"), appeals his convictions of fifteen (15) counts of sexual crimes against two of his step-granddaughters. These include: one count of first-degree sexual abuse; six counts of first-degree sodomy; one count of first-degree rape; and seven counts of first-degree incest. Sallee contends that the trial court erred by (1) instructing the jury on ten (10) new and unindicted felony charges; (2) giving the jury flawed instructions which resulted in a violation of his right to a unanimous verdict; (3) subjecting him to a second trial for two counts of sodomy and two corresponding counts of incest regarding Jane, after a directed verdict had been entered in his favor in the prior trial; (4) permitting one child's mother to bolster the child's credibility; (5) instructing the jury on incest charges for acts for which he was also charged with sodomy and rape; (6) finding the children were competent to testify and

without a formal oath; and (7) permitting the jury to hear inaccurate testimony about parole eligibility in the penalty phase.

The Commonwealth concedes that a reversal is required because the trial court (1) added ten (10) unindicted charges, (2) gave jury instructions that led to a unanimous verdict violation, and (3) retried Sallee on four (4) previously adjudicated charges which had been dismissed on a directed verdict motion. While the Commonwealth concedes that it was error to permit the child's mother to bolster her testimony, as the error is unpreserved, the Commonwealth asserts that the error did not result in manifest injustice. The Commonwealth does not concede that the incest charges violated double jeopardy principles, nor does it agree that there was error as to the finding of competency to testify or error as to the probation and parole testimony.

## I. FACTUAL BACKGROUND

Sallee and Rosetta Sallee ("Rosetta") had been married for seven years and resided in Hopkinsville, Kentucky. Between July 2015 and February 2016, Rosetta's daughter Emily (mother of Jane) and Jane[1] lived in the Sallee household for about a month and a half. Rosetta's other daughter, April (Mary's mother), and Mary, also spent time in the Sallee home during the same time period.

In December 2016, April reported to police that Mary had been sexually abused by Sallee. After an investigation, Sallee was indicted on the following six charges stemming from the alleged sexual abuse of his step-grandchildren:

[1] Jane and Mary are used to identify the underage children in the case, all names related to the children have been changed in an effort to protect their identity.

sexual abuse, first-degree (Mary); sodomy, first-degree (Jane); rape, first-degree (Jane); unlawful transaction with a minor, first-degree (Mary); incest (Jane); and indecent exposure, first-degree (Mary). The indictment was amended about a year later to add three additional charges pertaining to Mary: sodomy, first-degree; rape, first-degree; and incest.

The first trial was held April 26, 2018. At the conclusion of the trial, the court granted a directed verdict on the charges of rape, first-degree (Mary); sodomy, first-degree (Jane); indecent exposure, first degree (Mary); and unlawful transaction with a minor. Because the jury was unable to reach a verdict on the remaining charges, a mistrial was declared.

When the case was tried again a couple of months later, both children testified. Mary, who was eight at the time of the trial, testified Sallee touched her on her "front part" with his tongue, licking her. When asked, she testified that this type of encounter happened more than once. Mary testified that it happened in the living room on the couch at her grandma's when she was six. Mary also stated that sometimes when her cousins would come to their grandmother's house Sallee would put her in the laundry room and would do a similar act with her on the dryer.

The prosecutor then asked Mary if Sallee did anything else to her and she stated "no." Then the prosecutor asked her if Sallee touched her with any other parts of his body. Mary testified that Sallee put his "front part" into her "bottom" and moved it back and forth. She stated this occurred when she was six, that it hurt, and that Sallee told her to keep it secret. Mary testified that it was always on the living room couch and that it occurred more than one time.

April, Mary's mother, testified about behavioral changes in Mary that she noticed before she went to police. She testified that Mary began having accidents on herself, refused to bathe on her own, and exhibited a different attitude.

Jane was seven when she testified at the second trial and she carried her doll Annabelle with her to the stand. She initially had trouble verbalizing where she was touched, but finally did say he touched her "front spot." Jane stated that Sallee touched her where he was not supposed to touch her. When the prosecutor asked her to come off the witness stand and identify Sallee, she became very upset. Jane stated she could not answer questions, could not say where he touched her, the court then stated she did not have to look around the courtroom. The prosecutor tried to have her declared unavailable, but the court denied the request. The court then took a break.

When Jane returned she had two dolls, and the prosecutor asked her to show where Sallee touched her. She paused for almost a minute before she would answer. Jane then indicated that Sallee touched her crotch, pointing to the crotch on the doll, and said he touched her crotch with his tongue. She stated that it happened at his house, in the living room on the couch. The prosecutor then asked if Sallee touched her with his tongue more than once, and Jane responded "more." Jane also stated that on another occasion it happened in the laundry room, on top of the dryer.

Jane further testified that Sallee had put his "private part" in her "private part." The prosecutor asked her if this had occurred more than once, to which Jane responded "more." Jane said she was in the laundry room when it happened, and that her grandmother was in her room when it happened. Jane

was five years old at the time and she said that her three-year-old sister walked in, but Sallee did not do anything. Jane testified that she does not remember if Sallee said anything to her when it happened, and that she did not remember anything else from when she was five.

At the close of the second trial Sallee was found guilty of fifteen (15) separate counts: one count of sexual abuse; six counts of sodomy; one count of rape; and seven counts of incest. Sallee was sentenced to ten years for the one count of sexual abuse, thirty years on each count of sodomy, thirty-five years on the count of rape, and thirty years on each count of incest to run for a total of seventy (70) years.

## II. ANALYSIS

### A. THE COMMONWEALTH CONCEDES THAT THE TRIAL COURT ERRED BY ADDING ADDITIONAL UNINDICTED FELONY CHARGES

The Fifth Amendment requires that a defendant only be tried for criminal conduct that is presented in an indictment handed down by a grand jury.[2] Sallee submits that he went to trial facing five charges yet was convicted of fifteen. Further, it is a constitutional requirement of an indictment to "sufficiently apprise a defendant of the conduct for which he is called to answer."[3] Sallee claims that as a result of these additional charges without an amended indictment he was not presented with an opportunity to plan a defense to all of the state's accusations, violating his Fourteenth Amendment rights. Furthermore, pursuant to Kentucky Rules of Criminal Procedure (RCr)

[2] *Stirone v. United States*, 361 U.S. 212, 217-19 (1960).

[3] *Kelly v. Commonwealth*, 554 S.W.3d 854, 861 (Ky. 2018) (quoting *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 325 (Ky. 2006)).

6.16, "[t]he court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

The Commonwealth notes that the jury convicted Sallee on ten felony counts that had not been charged in the indictment. The Commonwealth states that while an indictment can be amended at any time pursuant to RCr 6.16, and while these additional charges were of the same type of crime, they are ten entirely separate criminal acts.

The Commonwealth concedes that Sallee was not provided notice of the ten additional felonies of which he was ultimately convicted. Additionally, the Commonwealth concedes that it was improper to subject Sallee to conviction on these ten unindicted charges. Upon retrial, the jury shall only be instructed on charges as per the indictment.

**B. UNANIMOUS JURY VERDICT ISSUE**

Sallee argues that the jury instructions provided were not unanimous since both Mary and Jane testified that the acts perpetrated by Sallee occurred more than once. "Section 7 of the Kentucky Constitution requires a unanimous verdict."[4] Sallee claims that in the present case, the jury could not differentiate which of the incidents they were being instructed on. The Commonwealth concedes that the instructions were deficient "since they did not have the jury identify which 'more than once' instance on which it was convicting."

[4] *Wells v. Commonwealth,* 561 S.W.2d 85, 87 (Ky. 1978).

Because we are reversing on other grounds, we decline to address this issue on the merits. However, we believe it is important to provide some guidance for this issue on remand as it will almost undoubtedly reoccur. In *Johnson v. Commonwealth*, this Court held that "a general jury verdict based on an instruction including two or more separate instances of a criminal offense, whether explicitly stated in the instruction or based on the proof—violates the requirement to a unanimous verdict."[5] We further acknowledged the particular difficulty child sex abuse cases, such as the one at bar, could present when trying to honor this rule:

> [a]dmittedly, there are a variety of crimes where complying with this mandate will not be easy because of the difficulty in breaking the crimes down into specific but distinct instances based on witness recollections. We frequently see this in child sex-abuse cases, where the child is unable to testify to specific instances of abuse (such as on a certain date) but instead describes patterns of conduct over time (such as that the act occurred every night). Frequently, the defendants in such cases get jury instructions that apply to the time period in which the multiple incidents occurred and for which, if the proof was more specific and multiple counts were charged, multiple convictions could result.[6]

We directed that in such cases "lawyers and trial courts must take steps to assure the unanimity of the jury and the due process rights of the defendant,"[7] and that "the best option may be to require the Commonwealth to elect before trial which instance to prosecute and then be careful to limit the

[5] 405 S.W.3d 439, 449 (Ky. 2013).

[6] *Id.* at 456.

[7] *Id.* at 455.

proof at trial to that single instance of the crime."[8] These safeguarding principles should be carefully adhered to on remand.

In addition, we note that if a child is asked whether the alleged abuse occurred more than once, or if a child states that it happened more than once unprompted, an admonition to the jury can cure a potential unanimity violation. Specifically, the trial court should inform the jury that the victim's acknowledgement of multiple instances of abuse should not be considered additional acts upon which they may base a finding of guilt. This will ensure that the jury's guilty verdict, if found, is based on a single instance of conduct, thereby protecting the defendant's right to a unanimous verdict.

The trial court and the parties must take great care on remand to follow the foregoing principles.

### C. DOUBLE JEOPARDY DOES NOT BAR A SEPARATE CONVICTION FOR INCEST

Sallee argues that double jeopardy bars him from being convicted of incest since it is included in the offenses of rape and sodomy. Sallee asserts that the convictions fail the *Blockburger*[9] test. This issue is unpreserved but is subject to palpable error review under RCr 10.26.

In *Commonwealth v. Burge*, we adopted the *Blockburger* analysis of double jeopardy.

> [W]e now depart from the 'same conduct' test…and the 'single impulse' test…, and declare that double jeopardy issues arising out of multiple prosecutions henceforth will be analyzed in accordance with the

[8] *Id.* at 456.

[9] *Blockburger v. United States*, 284 U.S. 299 (1931).

> principles set forth in *Blockburger v. United States*…and KRS 505.020.[10]

The *Blockburger* analysis requires a determination of "whether the act or transgression complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not."[11]

Sallee argues that the instructions in the present case permitted the jury to find him guilty of two crimes from the exact same act. Specifically, he argues that a double jeopardy violation occurs as to the charge of sodomy and its corresponding charge of incest regarding Mary, and as to the charge of rape and corresponding incest regarding Jane. Sallee contends that the incest instructions contained all the same elements of the corresponding sodomy and rape instructions plus the element of relationship.

Pursuant to Kentucky Revised Statute ("KRS") 530.020(1), a person is guilty of incest when he has "sexual intercourse or deviate sexual intercourse…with a person whom he…knows to be [a]…descendant[.]" KRS 530.020(2)(c)(1) makes incest a class A felony if the victim is less than twelve years old. Rape occurs when a person engages in sexual intercourse with another person incapable of consent because they are less than twelve years old.[12] Sodomy occurs when a person engages in deviate sexual intercourse with a person incapable of consent because they are less than twelve years old.[13] In *Johnson v. Commonwealth*, this Court held that rape and incest

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[10] 947 S.W.2d 805, 811 (Ky. 1996).

[11] *Id.* (citing *Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky. 1994)).

[12] KRS 510.040(1)(b)(2).

[13] KRS 510.070(1)(b)(2).

satisfy *Blockburger*, as rape requires proof of age while incest requires proof of descendant relationship.[14]

> [E]ven if the Commonwealth had only proved that Appellant engaged in sexual intercourse with each of his daughters on one occasion, his Fifth Amendment protection against double jeopardy would still not have been violated. The test for determining whether a defendant can be convicted of more than one crime arising out of a single act is whether each charge requires proof of a fact that the other does not. *Blockburger,* 284 U.S. at 304, 52 S.Ct. 180. The crimes of rape and incest each require proof of a fact that the other does not. Specifically, rape requires proof of age, whereas incest does not; incest requires proof of relationship, whereas rape does not. *See* KRS 530.020; KRS 510.040.[15]

Analogously, sodomy requires proof of age, whereas incest does not. Sallee argues that double jeopardy issues arose because the incest instructions included the victims were under twelve years old. However, age is not an element of the charge of incest, rather the age of a victim changes the classification of the felony for which the defendant can be prosecuted.

Therefore, we do not find error, much less palpable error, because we hold no double jeopardy violation occurred when Sallee was convicted of incest related to the rape conviction as to Jane and incest related to the sodomy conviction as to Mary.

### D. DOUBLE JEOPARDY BARRED SALLEE'S CONVICTIONS FOR TWO COUNTS OF SODOMY AND TWO CORRESPONDING COUNTS OF INCEST REGARDING JANE

Sallee was originally indicted on one count each of sodomy and incest corresponding to the sodomy count as to Jane. Here, Sallee argues that at the

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[14] 292 S.W.3d 889, 897 (Ky. 2009).

[15] *Id.*

close of the Commonwealth's case, during the April 2018 trial, defense counsel made a directed verdict motion on these offenses, as Jane did not testify about all of the charges relating to the indictment. The prosecutor agreed that the evidence as to Jane only supported rape and incest stemming from the rape. The trial court granted the directed verdict motion and ruled the only instructions given would be those consistent with the evidence presented. Ultimately, the trial court declared a mistrial when the jury could not reach a verdict on any charges.

The Commonwealth then tried Sallee again on the same indictment in June 2018. Sallee claims the error is preserved as defense counsel objected in chambers at the beginning of the trial to instructions on any offense which a directed verdict had been granted. This Court has held that a directed verdict is the equivalent of an acquittal under the laws of double jeopardy.[16] Sallee further argues that even if this Court found that defense counsel failed to properly preserve the error to the instructions that "constitutional protection against double jeopardy is not waived by failure to object at the trial level."[17] This Court has held, double jeopardy issues fall within the palpable error rule because this Court "do[es] not want to let stand a conviction possibly tainted by double jeopardy."[18]

Moreover, the Commonwealth concedes that since Sallee was acquitted of the sodomy ***and incest charge*** as to Jane in the first trial, erroneously

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[16] *Walker v. Commonwealth*, 288 S.W.3d 729, 743 (Ky. 2009) (citing *Commonwealth v. Mullins*, 405 S.W.2d 28, 29 (Ky. App. 1966)).

[17] *Montgomery v. Commonwealth*, 505 S.W.3d 274, 279 (Ky. App. 2016).

[18] *Cardine v. Commonwealth*, 283 S.W.3d 641, 651 (Ky. 2009) (citing *Terry v. Commonwealth,* 253 S.W.3d 466, 470 (Ky. 2007)).

instructing the jury on two counts of sodomy in the second trial place Sallee in double jeopardy. As a consequence, this Court must vacate the convictions for first-degree sodomy and the corresponding incest as it relates to Jane.

### E. TESTIMONY BY THE MOTHER REGARDING MARY'S BEHAVIORAL CHANGES IMPROPERLY BOLSTERED MARY'S CREDIBILITY.

During opening statement, the prosecutor told the jury they would hear from Mary's mother about behavioral changes she observed in Mary prior to reporting the abuse to police. After Mary testified, April testified that Mary began to urinate on herself, did not want to take a bath by herself, did not want to use the bathroom alone, and that she was not acting normal.

The issue is unpreserved, but Sallee requests palpable review, claiming that it was the improper use of Child Abuse Accommodation Syndrome (CSAAS) testimony through a non-expert witness and that it improperly bolstered Mary's testimony, depriving him of a fair trial. Our court has held on several occasions that CSAAS testimony, either by way of expert or lay testimony, is inadmissible. We have held that it lacks sufficient scientific standing in the community to be admissible to prove that a child has been sexually abused.[19]

But what is CSAAS? Ronald Summit, M.D. published a paper in 1983 which described what he asserted were five reactions children might exhibit

[19] *Bussey v. Commonwealth,* 697 S.W.2d 139 (Ky. 1985) (expert testimony); *King v. Commonwealth,* 472 S.W.3d 523 (Ky. 2015) (detective's testimony regarding the delay of reporting sexual abuse was error); *Blount v. Commonwealth,* 392 S.W.3d 393 (Ky. 2013) (parents testified that after consulting with a clinical psychologist they believed their child's change in appearance and emotional state were because she had been sexually abused by Blount).

when sexually abused: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, and unconvincing disclosure, and (5) retraction.[20]

In Sallee's case, no expert testimony was solicited regarding CSAAS, and April did not link her observations to a mental health professional as did the parents in *Blount*, nor did she mention CSAAS. Without expert testimony, it is only speculation that the behaviors described by April were probative in any way to the issue of whether she had been sexually abused by Sallee, or anyone. In the context presented, first in opening, then with her testimony, and finally with the closing, it appears that the prosecution believed it was a highly probative link. However, without any expert testimony to support it, April's testimony as to her daughter's behavioral changes was speculative and improperly admitted under our caselaw.

Sallee also alleges that April's testimony was used to improperly bolster Mary's testimony.[21] Our court recently held that testimony by a mother that vouched for the truthfulness of her daughter, a sexual abuse victim, was error because such testimony "remove[s] the jury from its historic function of assessing credibility" and is in error.[22] While the testimony here is not as direct a statement regarding believing another witness, to point to a group of behaviors and infer that it is probative of her having suffered abuse is likewise vouching for another witness. Having reviewed Mary's cross examination

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[20] Summit, R.C. (1983). The child sexual abuse accommodation syndrome. *Child Abuse Neglect,* 7(2), 177-93. https://doi.org/10.1016/0145-2134(83)90070-4 (last visited April 2020).

[21] April testified after her daughter.

[22] *Yates v. Commonwealth,* 539 S.W.3d 654, 666 (Ky. 2018) (quoting, in part, *Newkirk v. Commonwealth,* 937 S.W.2d 690, 696 (Ky. 1996)).

testimony, it can hardly be said that defense counsel attacked her credibility. Therefore, we hold that the changed behavior testimony could not be viewed as proper rehabilitation evidence as her credibility had not been assailed.

Since we are reversing on other grounds, we will not analyze the issue further as to whether palpable error occurred. Upon retrial, if the Commonwealth wishes to present testimony from April regarding Mary's changes in behavior, the trial court must determine prior to trial whether the evidence is CSAAS-related testimony. Or, if the trial court finds the evidence is admissible on other grounds, it must determine whether an expert is necessary to lay a proper foundation and establish its relevance and probativeness.

**THE TRIAL COURT DID NOT ERR IN FINDING MARY AND JANE COMPETENT TO TESTIFY**

Sallee claims that the trial court did not apply the correct standards for competency, and that Jane and Mary were not competent to testify. Sallee alleges the trial court went beyond questioning Jane and Mary about their obligations to tell the truth and determining if they were able to testify about their recollections. Sallee argues that the trial court led the children into rehearsing their testimony regarding the allegations against him.

Kentucky Rule of Evidence ("KRE") 601(b)(1)-(4) sets forth the preliminary areas of inquiry where the competency of a witness to testify is at issue. A witness is competent unless the witness (1) lacks the capacity to accurately perceive the matters about which the witness proposes to testify; (2) lacks the capacity to recall facts; (3) lacks the capacity to express himself or herself so as to be understood, either directly or indirectly or via interpreter; and (4) lacks the capacity to understand the obligation to tell the truth.

A trial court has the sound discretion to determine whether a witness is competent to testify.[23] The trial court is in the unique position to observe witnesses and to determine their competency.[24] Unless there was a clear abuse of discretion, the trial court's ruling on competency will not be disturbed on appeal.[25]

The trial court conducted a competency hearing on April 5, 2018. Prior to speaking with the children, the Court spoke with April and Donna[26], individually, regarding the allegations, including when they each found out about the allegations, and what each girl had said to them. The judge also asked how many people the girls had talked to and who they had talked to. He explained that the purpose of his in-chamber interview was to determine if the children understood being truthful. The Court told the women that they each could sit in with their child during the interview. The judge informed Donna she could be supportive and encourage her to tell the judge the truth, but not to make any other comments.

The trial court then brought Mary and April into chambers and asked Mary a series of questions, including whether she understood that it was important to tell the truth. The trial court asked Mary if she understood the difference between the truth and a story, she told him that she knew she would have to testify in court, and that she was willing to testify in court. The trial court then interviewed Jane, in the presence of Donna, and asked Jane if she

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[23] *Pendleton v. Commonwealth*, 685 S.W.2d 549, 551 (Ky. 1985).

[24] *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978).

[25] *Pendleton*, 685 S.W.2d at 551.

[26] Donna is Jane's stepmother.

remembered telling people what happened and if she had told the truth. Jane confirmed that she had told the truth. Once the court began asking her about the allegations, she became quiet and Donna offered to hold her hand during the interview and Jane accepted. Jane would not answer aloud, but she would nod affirmatively to the questions.

From the bench, at the conclusion to the interviews, the trial court stated, "Based on my interviews of the girls, I find that they are competent to testify, and that they appreciate the seriousness of their allegations and they will testify truthfully at trial and [the Commonwealth] is going to take steps to make sure they are familiar with the courtroom and they will be able to testify truthfully before the jury."

Here, Mary and Jane both testified that they knew the difference between truth and a lie, they recognized that it was a bad thing to tell a lie, and that they had an obligation to tell the truth. Accordingly, we hold that the trial court did not abuse its discretion in finding the children competent to testify.

However, we agree with Sallee that the trial court went outside the parameters of KRE 601 when the children were questioned about matters relating to the trial. In Kentucky v. Stincer, the United States Supreme Court stated,

> [Q]uestions at a competency hearing usually are limited to matters that are unrelated to the basic issues of the trial. Children often are asked their names, where they go to school, how old they are, whether they know who the judge is, whether they know what a lie is, and whether they know what happens when one tells a lie.[27]

[27] 482 U.S. 730, 741 (1987) (emphasis added).

Upon retrial, the questions to the children's competency shall not address the specific allegations but shall be limited to the parameters of KRE 601.

**i. Additionally, Sallee argues that the trial court erred by not formally swearing either child in before testimony.**

As for the lack of an oath prior to testifying, we again review for abuse of discretion. This Court has held that the trial court may determine whether a formal oath is necessary in the case of a young child having been already found competent to testify:

> It is apparent that this has been left to the good judgment of the trial court to decide whether a solemn obligation to tell the truth is to be reinforced with a formal oath in the case of very young children. In any event, **after a child has been found competent to testify, the child becomes a witness the same as any other witness who has taken an oath or affirmed.**[28]

The following exchanges occurred between the court and the children before their testimony.

Judge: Hi Mary

Mary: Hi

Judge: You know, Ms. Gigandet is going to ask you some questions?

Mary: responds in affirmative

Judge: Are you going to tell the truth?

Mary: Yes

Judge: Alright, thank you.

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[28] *Gaines v. Commonwealth*, 728 S.W.2d 525, 526 (Ky. 1987) (emphasis added).

When Jane was in the witness box, the following exchange occurred.

Judge: Hello.

Jane: Hi

Judge: Do you know Ms. Maggie is going to ask you some questions? Are you going to tell us the truth?

Jane: Nods in the affirmative.

The trial court properly both found the children to be competent and appropriately communicated with the children as to their solemn obligation to tell the truth, pursuant to *Gaines.*

**F. THE SENTENCING PHASE WAS NOT TAINTED**

Lastly, Sallee claims that he was substantially prejudiced because the Commonwealth presented incorrect or false testimony during the sentencing phase regarding "custody credit" to be applied to his sentence. Though unpreserved, Sallee now requests palpable error review as he believes that the testimony affected the fairness and integrity of the sentencing phase rendering it "shocking and jurisprudentially intolerable."[29]

During the sentencing phase of the trial, the Commonwealth elicited testimony from Probation and Parole Officer Tim Sending. Officer Sending testified that all but one of Sallee's convictions were Class A felonies. Therefore, Sallee would have to serve 85% of his sentence before being eligible for parole. The prosecutor asked Officer Sending to explain custody credits, to which Officer Sending explained that it was the amount of time an individual spends in custody prior to sentencing. The prosecutor then asked, "What is

[29] *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

the effect of that custody credit time on the sentence?" To which Sending responded, "That time comes off whatever the individual has to serve before parole eligibility." Officer Sending then testified that Sallee had around 620-630 days of custody credit.

Sallee argues that Officer Sending's testimony was inaccurate and confusing to the jury as it could have misled the jury, causing them to believe that custody credit reduced parole eligibility to less than 85%.

We hold that nothing about Officer Sending's statement gives the impression that it reduced Sallee's parole eligibility. The statement correctly stated that custody credit reduces the time remaining to serve. We find no error in this testimony.

## III. CONCLUSION

For the foregoing reasons the judgment is reversed, and the case is remanded to the Christian Circuit Court for a new trial.

All sitting. Minton, C.J.; Hughes, Lambert, Nickell, VanMeter and Wright, JJ. concur. Keller, J., concurs in result only.

COUNSEL FOR APPELLANT:

Kathleen K. Schmidt
Assistant Public Advocate, Department of Public Advocacy

COUNSEL FOR APPELLEE:

Daniel Jay Cameron
Attorney General of Kentucky

Kristin Leigh Conder
Assistant Attorney General of Kentucky