RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3791-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

S.B.,

Defendant-Appellant.

Argued October 18, 2016 – Decided February 28, 2017

Before Judges Koblitz, Rothstadt and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 12-02-0314.

Michael Confusione argued the cause for appellant (Hegge & Confusione, attorneys; Mr. Confusione, of counsel and on the brief).

Joie Piderit, Assistant Prosecutor, argued the cause for respondent (Andrew C. Carey, Middlesex County Prosecutor, attorney; Ms. Piderit, of counsel and on the brief).

PER CURIAM

Defendant S.B.[1] appeals from his March 17, 2015 convictions after a jury trial for charges relating to the sexual abuse of his stepdaughter, B.P., over a period of more than ten years. He was sentenced to seventeen years in prison with an eighty-five percent period of parole ineligibility. Because of the State's treatment of a potential defense witness and the court's grant of the State's motion to relieve defendant's retained counsel over defendant's objection without sufficient cause, we reverse.

Defendant was convicted of all counts in the indictment: two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a) (Counts 1 & 2); one count of second-degree attempted aggravated sexual assault, N.J.S.A. 2C:5-1, 2C:14-2(a) (Count 3); two counts of second-degree sexual assault, N.J.S.A. 2C:14-2(b), -2(c) (Counts 4 & 5); one count of second-degree attempted sexual assault, N.J.S.A. 2C:5-1, 2C:14-2(c) (Count 6); one count of third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a) (Count 7); one count of fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b) (Count 8); and one count of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (Count 9).

[1] We use initials and pseudonyms to refer to defendant, the victim and other related individuals to preserve the confidentiality of the victim. R. 1:38-3(c)(9).

I

On November 9, 2012, defendant retained Joseph J. Benedict as his attorney. The State moved to disqualify Benedict more than nine months later, arguing that he had interviewed defendant's son "Arthur," who was one year younger than B.P., outside of the presence of a third person and, thus, was a necessary witness.

On August 12, 2013, when interviewed by the prosecutor's investigators, Arthur stated in a sworn statement that he never had a sexual relationship with B.P., and that he had never transferred any saliva to B.P.'s underwear. Two days later, Arthur went with defendant to see Benedict, who interviewed Arthur alone. Arthur told Benedict that he had previous sexual contact with B.P., describing several incidents that had occurred in 2010 and 2011. Benedict gave his interview notes to the State the next day, and later submitted a certification detailing the meeting with Arthur.

On August 28, 2013, the same date that the State filed its motion to disqualify Benedict, Arthur gave a recorded statement to a defense investigator, recounting several sexual incidents that occurred between B.P. and himself.

On September 17, 2013, the motion judge granted the State's motion to disqualify Benedict, stating:

> In the present case, defense counsel will likely be called as a necessary witness.

> Defense counsel interviewed a witness without an investigator present. Although defense counsel did exactly what he should have done, which was memorialize [Arthur]'s statement, though without an investigator present, I don't find that testimony to be cumulative. There's no other witness other than [Arthur] himself who can testify to the discrepancies between his statement made to defense counsel and to the State.
>
> Defense counsel maybe would not be a necessary witness i[f Arthur] takes the witness stand and gives a complete account of all interviews that he had both with the State and defense counsel on that occasion. We do know that [Arthur] has given three different statements. Two are similar in nature, but they're three different statements regarding his sexual relationship with the victim. But his inconsistencies can't be ignored by me.

The motion judge stated that defendant would likely want Benedict on the stand if the State claimed that Arthur's statements were recent fabrications.

On October 2, 2013, defendant's new defense counsel made a motion for reconsideration, requesting a Rule 104 hearing in light of Arthur's willingness to testify. On January 23, 2014, the motion judge conducted a Rule 104 hearing, where Arthur testified. Relevant to this appeal, Arthur's retained counsel asked Arthur if he was aware that if he gave testimony which conflicted with his sworn statement there could be criminal repercussions, and Arthur responded affirmatively. Defense counsel, on cross-examination, asked further questions regarding whether Arthur

understood that he had given conflicting statements and that he could be charged with certain crimes and that he did not have to testify, and Arthur answered that he understood. Arthur testified that Benedict's notes were an accurate recollection of what Arthur told him at the interview and were the truth.

The State asked Arthur, who was then eighteen years old:

> Q: [Arthur], you've been asked questions about that you could be charged with a crime. Correct?
>
> A: Yeah.
>
> Q: If you testify for your father, do you understand that?
>
> A: Yeah, I understand that.
>
> Q: Did anybody tell you what crime it is you could be charged with?
>
> A: Yeah, perjury; right?
>
> Q: What else?
>
> A: Giving a false statement.
>
> . . . .
>
> Q: Did anybody tell you about a potential charge for hindering the apprehension of a person?
>
> A: I don’t know what that means.
>
> Q: Okay. Did anybody tell you what the punishment for the crimes that you could be charged with is?
>
> A: No. What do you mean by "punishment," like --

Q: What you face.

A: No one gave me an exact information of what I could be facing. I don't know.

Q: So you don't know what punishment you face if you're convicted -- if you're eventually convicted of the crimes that you might be charged with?

A: No.

Q: Okay. What do you think will happen to you if you are charged with a crime and convicted of a crime?

A: I don't know. Go to jail, prison, I don't know.

Q: Did anyone explain to you how long?

A: No.

. . . .

Q: Okay. So did anybody tell you what a second-degree crime charges, potential punishment for that?

A: No.

Q: Third-degree crime, potential punishment?

A: No.

Q: Fourth-degree crime, potential punishment?

A: No.

Arthur testified that he voluntarily attended the interview with Benedict, "to get stuff off [his] chest."

II

On September 11, 2014, almost a year after defendant's first attorney was relieved, defendant's trial commenced. The trial testimony revealed that defendant, his three children and his wife, "Barbara," and her two children, including B.P., all lived together for eleven years. B.P. and her mother initially reported the incident on July 11, 2011.

A forensic nurse with the Middlesex County Prosecutor's Office testified that she performed a forensic examination on B.P. at the Rape Crisis Center. B.P. told her that defendant used his saliva on his fingers prior to inserting them in her vagina. Several clothing items of B.P. were taken for testing, including her underpants, as well as specimens of secretions located on her upper and lower back.

B.P. testified that she believed defendant began abusing her when she was seven when they lived in their first home, recalling that she was in elementary school at the time. The first incident occurred when her mother was taking a shower:

> I was sitting on the bed waiting for her, and he approaches me and tells me to close my eyes and open my mouth. And at first, he stuck his fingers in there and then after that, he stuck his penis in my mouth and he asked me do you know what it is, and I opened my eyes and I freaked out and I backed away and I left the room.

The incident ended because her mother turned off the shower. B.P. acknowledged that she first reported to police that the incident occurred when she was ten, and she noted that she could only remember that it was in elementary school.

A second incident occurred in her bedroom. Defendant climbed into the top bunk of her bunkbed while she was sleeping and began rubbing her vagina. B.P. testified that this occurred while one brother was sleeping in the bottom bunk, and the other was sleeping on a single bed in the room. B.P. stated that she was younger than thirteen at the time.

A third incident occurred when she was sleeping on the single bed. B.P. explained that defendant came in and touched her vagina. B.P. stated that she never told anyone about these incidents while they were living at their first house.

According to B.P., the abuse continued after they moved to a new residence. She recalled defendant coming into her bedroom at night and touching her vagina, specifically recalling that he would wet his fingers in his mouth first. Defendant would also rub his penis on her vagina and try to put his penis in her mouth. This would also sometimes occur in defendant and her mother's bedroom. Defendant would not ejaculate; instead, "he would like, stop and he would cover his penis and he would go to the bathroom." However, on one occasion he ejaculated "on [her] butt."

Another incident occurred in the living room:

> Um, my brothers were outside playing with their friends and I was home, um, watching TV and [defendant] grabbed me and got me over to the side of the couch and bent me over. Pulled my pants down, pulled his pants down, and put, uh, his penis between my legs and started to rub me.

B.P. also described an incident that occurred at a garage when defendant exposed himself to her, and she ran and locked herself in the car. Another incident occurred in a house that defendant was constructing, when defendant exposed himself to her and she again ran away.

B.P. testified that the last time defendant abused her was July 11, 2011, the date she gave the police a statement. Defendant came into her room that day, pulled her pants down, wet his fingers with his saliva, and rubbed her vagina, before eventually getting on top of her and rubbing his penis on her vagina. B.P. pushed him off and went to the living room.

B.P. explained that defendant confronted her in the kitchen after the incident. Defendant showed B.P. on his laptop a picture of herself masturbating for her boyfriend online, and told her that doing so was wrong.

Later that day, B.P. told her mother what had been occurring and her mother took her to the police station. At the police station, B.P. called defendant with the police monitoring the

call. In the lengthy recorded conversation, defendant denied abusing B.P. and expressed suspicion that someone was putting her up to making the phone call. B.P. denied that she was making the accusations because she was mad at defendant.

On cross-examination, B.P. conceded that the she was video-chatting with her boyfriend and masturbating for him the night before she was abused by defendant, although she did not tell the police about it. She also testified to the following. She wore the same underpants from the night before through the examination at the police station. After defendant had stopped touching her, she eventually wiped her genitals with towels that were in her room. She said she had misremembered defendant ejaculating on her buttocks, instead recalling that he ejaculated on the sheets of her bed.

When B.P. initially reported the abuse she did not report the first incident on the bunkbed, and another that occurred in that room, because she did not remember it until the second interview with the State six days after her initial report. She also did not tell police that defendant had bent her over the couch the first time she reported the incident.

Barbara, B.P.'s mother, testified that defendant treated B.P. and her son very well, and was like a father figure to them. She said defendant was "was better than a father. He always made sure

they had everything they needed. He bought them presents. He worry about the school. He spent time with them. He didn't -- anything that you wish a good father did to your kids." Barbara also confirmed that in 2010, there were six people living in the home during the period of the alleged abuse: Arthur, B.P., Barbara's son "Amos," Barbara's friend and the nanny "Ann," Barbara and defendant.

"Kerri," defendant's younger daughter, testified for the defense. She described the bunkbeds in the home in the first home, stating that there was little room on the top bunk between the bed and the ceiling. Many people lived at the home while she lived there, including defendant and Barbara, defendant's two other children and Barbara's two children, and at times friends and other family. According to Kerri, Barbara was the disciplinarian for B.P. B.P. never told Kerri about anything defendant did that made B.P. uncomfortable, and Kerri never observed anything unusual. She testified that, in her opinion, B.P. was not a truthful person and "most of the stuff she kind of just made up or wasn't true."

"Kyle," B.P.'s boyfriend, testified that B.P. had masturbated for him over an internet video site. Kyle testified that he met B.P. through Facebook in 2009. Kyle had only met B.P. in person four or five times. Prior to July 11, defendant contacted him at

some point and told him to cease communication with B.P., threatening to call the police.

The nanny, Ann, Barbara's friend who stayed in defendant and Barbara's home, also testified for the defense. The interactions between defendant and B.P. that she observed were "normal" and she did not see anything inappropriate. Ann testified that others would not believe B.P. on occasion because "she could really say stories."

Defendant's older daughter, "Donna," testified to the following. B.P. did not have a close relationship with her mother, although she had a good relationship with Donna. B.P.'s mother would often yell at B.P. because she was having inappropriate conversations with boys in school. Donna did not recall defendant taking B.P. anywhere alone or spending time with B.P. alone in the house. B.P. did not have a reputation for being truthful, and "[n]obody believed anything that she said." Defendant's brother's wife also testified that B.P. had a reputation for being untruthful.

Susan Cohen Esquelin, a licensed psychologist, testified for the State regarding Child Sexual Abuse Accommodation Syndrome (CSAAS). See State v. J.R., ___ N.J. ___ (2017) (slip op. at 1-2).

Lab analysis revealed that there was male, Y-STR DNA on a sample taken from the crotch area of B.P.'s underwear. Christopher Szymkowiak, a forensic scientist with the New Jersey State Police DNA laboratory, explained that the Y-STR profile is the same for a father, son, brothers or uncles. The Y-STR profile of defendant matched the profile found from B.P.'s underwear, "therefore [defendant] cannot be excluded as a possible contributor to the Y-STR DNA profile obtained. Due to the paternal inheritance of Y-STR DNA, it is expected that all of his paternal male relatives cannot be excluded as possible contributors to the Y-STR DNA profile obtained."

On cross-examination, Szymkowiak conceded that DNA could be transferred through a variety of benign activities, such as sitting on a toilet seat or picking up someone's clothing. Notably, B.P. earlier testified that Arthur's laundry would sometimes be washed at the same time as hers.

Defendant raises the following issues on appeal:

> POINT I: THE TRIAL COURT MISAPPLIED RULE OF PROFESSIONAL CONDUCT 3.7 AND VIOLATED DEFENDANT'S RIGHT TO COUNSEL UNDER THE UNITED STATES AND NEW JERSEY CONSTITUTIONS BY DISQUALIFYING DEFENDANT'S CHOSEN TRIAL COUNSEL FROM REPRESENTATION ONLY ONE MONTH BEFORE TRIAL WAS SET TO BEGIN -- A STRUCTURAL CONSTITUTIONAL ERROR MANDATING REVERSAL AND REMAND FOR A NEW TRIAL HERE.
>
> POINT II: IF THE TRIAL COURT CORRECTLY RULED THAT DEFENDANT'S COUNSEL HAD TO BE

DISQUALIFIED ON THE GROUND THAT HE WAS "LIKELY TO BE A NECESSARY WITNESS" AT DEFENDANT'S TRIAL, THEN DEFENDANT RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL, ALSO WARRANTING REVERSAL AND REMAND FOR A NEW TRIAL HERE.

POINT III: THE PROSECUTOR INFRINGED DEFENDANT'S RIGHT TO COMPULSORY PROCESS BY INTIMIDATING THE PRIMARY WITNESS FOR THE DEFENSE, [ARTHUR], OFF THE WITNESS STAND.

POINT IV: THE PROSECUTOR EXCEEDED FAIR COMMENT ON THE TRIAL EVIDENCE AND VIOLATED DEFENDANT'S RIGHT TO A FAIR TRIAL BY TELLING THE JURY THAT THE ALLEGED VICTIM, B.P., HAD A "BRAIN INJURY" THAT MADE HER ACT "LESS MATURE" THAN OTHERS HER AGE -- DESPITE DEFENDANT'S OBJECTIONS AND THE TRIAL JUDGE'S ADMONITION THAT THE PROSECUTOR NOT DO SO.

POINT V: THE TRIAL JUDGE ERRED BY DENYING DEFENDANT'S MOTION FOR A NEW TRIAL FOLLOWING VERDICT.

POINT VI: THE TRIAL COURT ERRED IN ADMITTING INFLAMMATORY PHOTOS BEFORE THE JURY.

POINT VII: THE CUMULATIVE ERRORS WARRANT REVERSAL.

POINT VIII: DEFENDANT'S SENTENCE IS IMPROPER AND EXCESSIVE.

III

Defendant argues in Point I of his brief that the trial court misapplied Rule of Professional Conduct (RPC) 3.7 and improperly disqualified Benedict as defendant's counsel. "[A] determination of whether counsel should be disqualified is, as an issue of law, subject to de novo plenary appellate review." City of Atl. City v. Trupos, 201 N.J. 447, 463 (2010). A defendant

is constitutionally entitled to choose which lawyer will represent him or her, so long as that counsel is not court-appointed. State v. Kates, 426 N.J. Super. 32, 43 (App. Div. 2012), aff'd, 216 N.J. 393 (2014). "In other words, the Sixth Amendment 'commands . . . that the accused be defended by the counsel he believes to be best.'" Ibid. (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 146, 126 S. Ct. 2557, 2562, 165 L. Ed. 2d 409, 418 (2006)). The United States Supreme Court has classified the erroneous deprivation of that right as a "structural error," regardless of the quality of representation of substitute counsel, requiring reversal because it affects "the framework within which the trial proceeds." Gonzalez-Lopez, supra, 548 U.S. at 150, 126 S. Ct. at 2564-65, 165 L. Ed. 2d at 420 (quoting Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d 302, 331 (1991)); see Kates, supra, 216 N.J. at 395-96.

The right to select counsel is not absolute, and can be curtailed by certain restrictions, including the court's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Gonzalez-Lopez, supra, 548 U.S. at 152, 126 S. Ct. at 2566, 165 L. Ed. 2d at 421-22 (quoting Wheat v. United States, 486 U.S. 153, 160, 108 S. Ct. 1692, 1698, 100 L. Ed. 2d 140, 149 (1988)).

In a motion to disqualify counsel, the moving party bears the burden of proving that disqualification is appropriate. Maldonado v. New Jersey, 225 F.R.D. 120, 137 (D.N.J. 2004). Disqualification is considered a "drastic measure which courts should hesitate to impose except when absolutely necessary." Alexander v. Primerica Holdings, Inc., 822 F. Supp. 1099, 1114 (D.N.J. 1993) (citations omitted). Importantly, "a defendant's 'choice of counsel is not to be dealt with lightly or arbitrarily. That choice should not be interfered with in cases where potential conflicts of interest are highly speculative.'" United States v. Lacerda, 929 F. Supp. 2d 349, 360 (D.N.J. 2013) (quoting United States v. Flanagan, 679 F.2d 1072, 1076 (3d Cir. 1982)).

RPC 3.7 states in pertinent part:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> . . .
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

"The ethical prohibition is not against being a witness, but against acting as trial attorney in a case where it is likely that the attorney's testimony will be necessary." State v. Tanksley, 245 N.J. Super. 390, 393 (App. Div. 1991). Importantly, the rule does not require certainty that the lawyer will testify only "a likelihood the lawyer will be a necessary witness." J.G. Ries &

Sons, Inc. v. Spectraserv, Inc., 384 N.J. Super. 216, 230 (App. Div. 2006).

The State carried the burden of demonstrating a likelihood that Benedict would testify at trial. See Maldonado, supra, 225 F.R.D. at 137. The State's main contention at trial was that it would likely need to call Benedict because he alone interviewed Arthur initially when he admitted having sexual relations with B.P. This is not a case where the only avenue to challenge the credibility of Arthur was through Benedict. Rather, the original statement to the State, Benedict's notes from his interview, the defense investigator who conducted Arthur's subsequent interview, and Arthur's testimony at the Rule 104 hearing could have been used on cross-examination. RPC 3.7 is meant to protect the client's interests and reduce the possibility of unfairness to the opposing party. See J.G. Ries, supra, 384 N.J. Super. at 230; Kevin H. Michels, New Jersey Attorney Ethics § 31:4-1(a) at 747 (2015). Balancing the overwhelming interests at stake for defendant in choosing his counsel against the State's professed interest in calling Benedict as a cumulative witness was not a close call, nor the reason the judge disqualified Benedict.

Rather, the trial judge reasoned that defendant would likely want to call Benedict himself if a charge of recent fabrication was made regarding Arthur's testimony. The trial judge relied on

State v. Dayton, 292 N.J. Super. 76 (App. Div. 1996), stating that Benedict's testimony would be necessary if Arthur refused to testify and defendant sought to introduce his statement. In Dayton, defendant sought to admit evidence that only his counsel could provide. Id. at 86-87. We stated: "Here defendant wanted his counsel to withdraw so he could testify, and the issue is not what the court should have done if [defendant] sought [counsel's] continued representation over prosecutorial objection." Id. at 85. That exact situation, where the State sought disqualification of defense counsel over defendant's objection, arose here. Arthur's statement at the initial interview with the State, the subsequent interview with the defense investigator, and his sworn testimony at the Rule 104 hearing could be all have been used by the parties without the necessity of calling defense counsel.

Unlike in Dayton, defendant did not seek to have his counsel relieved. Defendant could reasonably choose, as he did, to keep his counsel and forgo the additional, cumulative testimony that his lawyer might have furnished. Depriving defendant of the right to choose his attorney is a structural error mandating reversal. We nonetheless will discuss a related error in the proceedings to ensure it is remedied at defendant's retrial.

IV

Defendant argues in his third point that the State infringed on defendant's rights by intimidating his son Arthur, who was a year younger than B.P., and an important defense witness. Defendant argues that the prosecutor improperly threatened Arthur with criminal charges if he testified based on his prior contradictory sworn statement.

"The basic premise of our judicial system is 'that the fullest disclosure of the facts will best lead to the truth and ultimately to the triumph of justice.'" State v. Feaster, 184 N.J. 235, 251 (2005) (quoting State v. Jamison, 64 N.J. 363, 375 (1974)). Pursuant to the Federal and New Jersey Constitutions, a criminal defendant is afforded the right to due process and the right to compulsory process so that he or she is able to present defenses and compel the testimony of witnesses. U.S Const. amends. V, VI, XIV § 1; N.J. Const. art I, ¶¶ 1, 10. When the State substantially interferes with a defense witness's "free and unhampered choice to testify," it violates those rights. Feaster, supra, 184 N.J. at 251 (quoting United States v. Hammond, 598 F.2d 1008, 1012, modified on reh'g on other grounds, 605 F.2d 862 (5th Cir. 1979)).

A prosecutor cannot threaten a prospective defense witness with prosecution for perjury before the witness actually testifies at trial in contradiction to a previous sworn statement. See id.

at 260-61. Whether or not the warnings are conveyed in good faith does not nullify this significant restriction. Ibid. Pre-trial interference by a prosecutor with a defense witness's recantation "does not advance the truth-seeking function of a trial." Id. at 261. The prosecutor may expose the falsity of such testimony through the adversarial process; specifically, on cross-examination. Ibid.

The actions of the prosecutor prior to the Rule 104 hearing, and not just her actions at that hearing, warrant reversal in this case. "Whether the threat of a perjury prosecution is delivered conversationally, in transparently coded language, or loudly, in pointedly brash language, the effect is likely to be the same on the witness, even if the conduit is his attorney." Id. at 259. The message that Arthur had given false testimony and would be prosecuted for perjury was conveyed through defense counsel prior to any hearings, and then later conveyed after Arthur retained counsel. Specifically, the State made representations that Arthur would be subject to prosecution for perjury:

> Your Honor, my - - what he's calling a threat against [Arthur], he gave a sworn taped statement, Judge. When you go against a sworn taped statement, you're either giving a false swearing, some type of perjury, and the circumstances surrounding it, I'm not threating him, but does the kid know that, Judge?

The State's later actions at the Rule 104 hearing only enhanced the threats.

Indeed, "the wise judicial course would have been, and ordinarily will be, to leave the matter of suspicion of criminality attendant upon the actions of the prospective witness to the prosecutor, for such attention at the conclusion of the case as he [or she] might deem warranted." Feaster, 184 N.J. at 258 (quoting Jamison, supra, 64 N.J. at 377).

Importantly, "[t]he State has no affirmative duty to tell a witness, subpoenaed by the defense, that he could be prosecuted if his testimony is different from his previously sworn testimony and inconsistent with the State's theory of the case." Ibid. Such actions by the State only served to prevent defendant from presenting his most viable defense to the Y-STR evidence. Even if the State was acting in good faith by informing Arthur of a possible perjury prosecution, that "is not a valid basis for choking off the 'free flow of evidence for the enlightenment' of the court." Id. at 261 (quoting Jamison, supra, 64 N.J. at 376). It is difficult to construct a remedy for this situation upon remand, nor is the record clear as to why Arthur did not testify for his father at trial.[2]

[2] At sentencing Arthur said defendant did not want him to testify because "he did not want anyone to have the opportunity to charge me with perjury."

Upon remand, should defendant choose to call his son as a witness, the court should fashion a remedy to extinguish any remaining effect of the State's intimidation on the witness. See e.g. United States v. Morrison, 535 F.2d 223, 228-29 (3d Cir. 1976) (ordering that if the witness invoked her Fifth Amendment privilege, acquittal was necessary unless the Government provided use immunity for her testimony). We need not discuss defendant's other claim of trial or sentencing errors because he will receive a new trial.

Reversed and remanded for further proceedings. We do not retain jurisdiction.