

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIRON BROWN,

Defendant-Appellant.

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UNPUBLISHED

August 1, 1997

No. 158228

Recorder's Court

LC No. 88-001183

AFTER REMAND

Before: Gribbs, P.J., and White and J. F. Foley,\* JJ.

PER CURIAM.

This appeal from defendant's felony-murder conviction, MCL 750.316; MSA 28.548, after retrial<sup>1</sup> is before us after remand to the trial court for an evidentiary hearing regarding a witness (Curtis Winters) whose testimony was sought to be introduced after submission of the case to the jury, but before discharge of the alternate juror. The trial court denied defendant's motion for adjournment to bring the witness in from out of state and the witness' testimony was never placed on the record. We remanded for an evidentiary hearing directed to the circumstances of defense counsel's failure to locate the witness before the conclusion of arguments on retrial, and the content of the witness' testimony. We ordered this hearing to assist in our determination whether the trial court committed reversible error requiring retrial in denying defendant's motion for an adjournment and to reopen proofs. We affirm.

Curtis Winters was one of defendant's sons. He was with defendant at defendant's home when police arrived in response to defendant's call to EMS regarding the victim, defendant's girlfriend. Police found the victim in the bedroom, almost naked, badly beaten and dead. Winters gave a statement to police corroborating defendant's claim that defendant and Winters had been at the home drinking and playing cards, that they had left for a while and had returned, continuing to play cards, that an unknown black male walked by them as they were playing cards, coming from the direction of the bedroom and exiting the house, and that the victim was later discovered in the bedroom.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

The hearing on remand established that defense counsel had sought to determine Winters' whereabouts from his family members, but no one knew where he was. The record adequately established that counsel considered Winters an important and viable witness, notwithstanding the contrary assessment of defense counsel in the first trial,<sup>2</sup> and that counsel acted promptly and reasonably when he was informed of Winters' whereabouts. The hearing raised some doubt, however, whether an adjournment would have resulted in Winters' testimony being timely presented to the jury.<sup>3</sup>

In any event, the hearing also established that Winters died in January, 1995, in a car accident. Under the circumstances, a retrial would serve no purpose.

Affirmed.

/s/ Roman S. Gribbs

/s/ Helene White

/s/ John F. Foley

<sup>1</sup> Defendant was convicted by a jury of felony-murder in 1988. Defendant appealed his conviction and this Court, in an unpublished per curiam opinion, reversed and remanded the matter because of prosecutorial misconduct and admission of prior bad acts. *People v Brown*, #108779, rel'd 3-27-90. Our Supreme Court subsequently remanded this case for our reconsideration in light of *People v Engleman*, 434 Mich 204; 453 NW2d 656 (1990), and this Court issued a second unpublished, per curiam opinion reversing and remanding the case on the basis of improper admission of prior bad acts. *People v Brown (On Remand)*, #134291, rel'd 3-7-91.

<sup>2</sup> Defense counsel in the first trial testified at a *Ginther* hearing that he chose not to call Winters for strategic reasons.

<sup>3</sup> It appears that Winters did not call counsel as directed the following day to find out the results of the hearing.