

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

**945.1**

**KA 12-00928**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

MAXWELL CHARLES WYANT, DEFENDANT-RESPONDENT.

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SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR APPELLANT.

JAMES NOBLES, ROCHESTER, FOR DEFENDANT-RESPONDENT.

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Appeal from an amended order of the Monroe County Court (Douglas A. Randall, J.), entered May 14, 2012. The amended order reduced the sole count of the indictment from murder in the second degree to assault in the first degree.

It is hereby ORDERED that the amended order so appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to dismiss or reduce the sole count of the indictment is denied, that count of the indictment is reinstated, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: The People appeal from an amended order that granted that part of defendant's omnibus motion seeking to dismiss or reduce the sole count of the indictment based on the alleged legal insufficiency of the evidence before the grand jury by reducing that count from murder in the second degree (Penal Law § 125.25 [1] [intentional murder]) to assault in the first degree (§ 120.10 [1]). Initially, we note that County Court erred in reducing the count to assault in the first degree inasmuch as assault in the first degree is not a lesser included offense of intentional murder (see CPL 210.20 [1-a]; *People v Alvarez*, 38 AD3d 930, 934, lv denied 8 NY3d 981; see generally *People v Glover*, 57 NY2d 61, 63-65).

In any event, we agree with the People that the evidence is legally sufficient to support the count of intentional murder in the second degree. The grand jury "must have before it evidence legally sufficient to establish a prima facie case, including all the elements of the crime, and reasonable cause to believe that the accused committed the offense to be charged" (*People v Jensen*, 86 NY2d 248, 251-252). Legally sufficient evidence is defined as " 'competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof' " (*People v*

*Swamp*, 84 NY2d 725, 730, quoting CPL 70.10 [1]). The court "must consider whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted . . . would warrant conviction" (*id.*; see *Jensen*, 86 NY2d at 251).

Here, the People called as a grand jury witness a physician employed by the Monroe County Medical Examiner's Office to render an opinion as to the cause of the victim's death. In determining that the evidence was legally insufficient to establish that defendant caused the victim's death, the court concluded that the People did not properly qualify the witness as an expert. That was error. The witness's testimony establishes that she was qualified to provide expert opinion testimony (see *People v Stabell*, 270 AD2d 894, 895, *lv denied* 95 NY2d 804). It certainly may be inferred from her testimony that she was a licensed physician with the requisite training to render her qualified to testify as a forensic pathologist. Even assuming, arguendo, that those inferences could not be drawn from her testimony, we note that the witness further testified that she has conducted "just less than five hundred" autopsies. An "expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" (*Matott v Ward*, 48 NY2d 455, 459 [emphasis added]; see *People v McKinley*, 72 AD2d 470, 476). Indeed, "[p]ractical experience may properly substitute for academic training in determining whether an individual has acquired the training necessary to be qualified as an expert" (*People v Owens*, 70 AD3d 1469, 1470, *lv denied* 14 NY3d 890 [internal quotation marks omitted]; see *People v Hamilton*, 96 AD3d 1518, 1519; see also *People v Burt*, 270 AD2d 516, 518). Thus, the fact that the witness conducted almost 500 autopsies qualified her to give expert medical opinion as to the cause of the victim's death (see *People v Morehouse*, 5 AD3d 925, 928-929, *lv denied* 3 NY3d 644).