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FLYNN, J., dissenting. I concur with part II of the majority opinion. I respectfully dissent from part I. I believe that the principal issue to be decided in this case is whether our traditional common-law rule, embodied in Connecticut Code of Evidence § 7-3, prohibiting opinion evidence about an ultimate issue to be decided by the jury should be abandoned to permit such opinions couched as suspicions as to the identity of the defendant from four police officers, none of whom witnessed the robbery at issue in this appeal. I would hold that the officers' identity testimony constituted opinions on an ultimate issue. First, it went beyond testimony as to factual observations of similarities between the defendant and a person shown on a videotape of the robbery. Second, the effect of the officers' testimony on the issue, if accepted by the jury, was decisive of the defendant's guilt. Third, the fact-finding province of the jury was invaded. I would therefore reverse the conviction and order a new trial.

As is all too common in these times, this prosecution arose because two men robbed a convenience store, one armed and wearing a grotesque Halloween mask and the other wearing a hooded jacket that obscured most of his face. Although the state was not relieved of its burden to prove that a larceny had occurred by force or threat of force, thus constituting a robbery in which one robber was aided by another physically present, there was no contest that the store clerk forcibly had been robbed of the money in his cash register. The only real issue to be determined by the jury was whether the defendant, and not some other person, was one of the two who had committed the robbery.[1] In that sense, it was an ultimate issue. See *State* v. *Coltherst*, 263 Conn. 478, 507, 820 A.2d 1024 (2003) (whether defendant's alibi was fabrication was ultimate issue to be determined by jury).

The testimony of the convenience store clerk who had been robbed was not particularly helpful on the identification issue. The robbery took place in less than one minute. The clerk was not able to make an identification of either robber for the police. Cross-examination established that the clerk had not identified the robbers in the written statement he gave to the police on the day of the robbery. The defendant was a regular customer of the store. It was only after the police had arrested the defendant that the clerk claimed to have recognized him as one of the perpetrators. That recognition occurred about six weeks after the robbery when the defendant entered the store to buy a pack of cigarettes. However, the clerk never contacted the police to let them know that the defendant was the robber. The clerk was permitted to make an in-court identifica-

tion of the defendant. At the time he testified at trial, the clerk had not been shown the video surveillance tape that showed a portion of the robbery.

The defendant objected to the state's calling four members of the police department that had arrested the defendant and who actually had not witnessed the robbery to offer their opinions as to the identity of the hooded person on the videotape. The court was reluctant to permit this testimony given the prejudicial aspect of it and the ultimate issue rule. It was finally persuaded by the state to permit each officer to testify about his or her suspicion as to the identity of the hooded robber on the basis of *State* v. *Fuller*, 56 Conn. App. 592, 744 A.2d 931, cert. denied, 252 Conn. 949, 748 A.2d 298, cert. denied, 531 U.S. 911, 121 S. Ct. 262, 148 L. Ed. 2d 190 (2000). On appeal, the state has abandoned the very *Fuller* claim it urged at trial, namely, that the actual testimony of the officers was admissible as suspicion testimony. Rather, it now claims that each officer's testimony was an admissible lay opinion and is admissible on that ground. I agree with the majority that the holding in *Fuller* cannot be extended to justify admissibility in this case.

Mere suspicion does not even suffice to meet the lesser standard required for establishment of probable cause. *In re Michael B.*, 36 Conn. App. 364, 371, 650 A.2d 1251 (1994). ''The quantum of evidence necessary to establish probable cause exceeds mere suspicion . . . .'' (Internal quotation marks omitted.) *State* v. *Guess*, 44 Conn. App. 790, 794, 692 A.2d 849 (1997), aff'd, 244 Conn. 761, 715 A.2d 643 (1998). When the state's case at best raises suspicion of commission of a crime, this is far from establishing its burden beyond a reasonable doubt. It is the law of this state that a person shall not be convicted on mere suspicion. *State* v. *DeCoster*, 147 Conn. 502, 505, 162 A.2d 704 (1960).

The defendant claims that it was improper for the court to have allowed four police officers to testify as to their suspicions that the person in the surveillance videotape was the defendant. The defendant first raised this claim by way of a motion in limine in which he sought an order prohibiting the testimony of any witness about his or her opinion as to the guilt of the defendant, whether by direct statement or inference. The defendant, in his motion, argued that ''several police officers will attempt to identify the [d]efendant, by way of [videotape], as being one of the perpetrators of the instant offense and by so doing such testimony would constitute opinion testimony as to the guilt of the [d]efendant and such testimony should be precluded based on [*State* v. *Heinz*, 193 Conn. 612, 480 A.2d 452 (1984)].''

Section 7-3 (a) of the Connecticut Code of Evidence provides: ''Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided

by the trier of fact, except that . . . an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue.'' The state, apparently recognizing the potential obstacle created by § 7-3 of the Code of Evidence and common-law prohibitions on opinion testimony on the ultimate issue; see *State* v. *Heinz*, supra, 193 Conn. 627–28; argued that it planned to ask each police officer if he or she had viewed the videotape and ''suspected'' who that person was. Although the court granted the defendant's motion to exclude opinion testimony, it allowed the police officers to testify that they ''suspected'' that the defendant was the man in the hooded sweatshirt. The court reasoned, in reliance on *State* v. *Fuller*, supra, 56 Conn. App. 592, that the police officers' testimony would not amount to opinions on the ultimate issue because such testimony would be couched in the language of suspicion rather than belief.[2]

Four police officers, Michael Thompson, Michael Russotto, Daniel Martin and Kristina Ferrante, testified that they had viewed the videotape at the police station shortly after the robbery and suspected that the man in the hooded sweatshirt was the defendant.[3] Each of these officers testified that he or she knew the defendant personally. There was no mention that they also might have known the defendant from any interactions in their official capacity as law enforcement personnel. For example, Thompson testified that he had known the defendant for approximately ten years, since the defendant was a child. He knew the defendant's family, and the defendant had even been to his house in the past. Ferrante testified that she had known the defendant for seven or eight years and that she had taught him a course when he was in the sixth grade.

The defendant argues that the four officers ''inappropriately gave their opinions that [the] defendant was guilty of robbery, a determination that was solely within the jury's province,'' by testifying that they suspected that he was the man in the hooded sweatshirt. He also contends that the court abused its discretion when it allowed the four police officers to give an opinion on the ultimate issue of the perpetrator's identity because the effect of such testimony, as the state now concedes on appeal, violated the court's order pursuant to the defendant's motion in limine.

The defendant's challenge to the admission of this testimony is evidentiary in nature. ''Evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice.'' (Internal quotation marks omitted.) *State* v. *Alvarez*, 216 Conn. 301, 306, 579 A.2d 515 (1990).

The state was able to persuade the court to admit the officers' testimony only by arguing that the testimony would be phrased in the form of suspicion rather than

opinion. The state now argues on appeal that a witness may offer an opinion on the issue of identity, effectually conceding that the officer's ''suspicions'' in fact amounted to opinion testimony.[4] The change in the state's position in this regard is troubling. At trial, the state persuaded the court that it was excluding opinion testimony on the issue of identity when, in fact, the state was using the officers' testimony for that very purpose. Regardless of the state's strategy in offering the officers' testimony in the form of a suspicion rather than a belief, however, it is clear from the testimony that if it were in fact opinion testimony, as such, it violated the court's order made pursuant to the defendant's motion in limine.

''Whether a statement of a witness is one of fact or of conclusion or opinion within the rule excluding opinion evidence is to be determined by the substance of the statement rather than its form. The use of phraseology appropriate to the expression of an inference, such as 'believe,' 'think,' etc., may in fact signify an opinion which renders the statement inadmissible; but the use of such terms is not conclusive that the witness is stating his opinion, for the language may be used merely to indicate that he is not speaking with entire certainty, in which case the evidence may be received for what it is worth.'' (Internal quotation marks omitted.) *State* v. *Fuller*, supra, 56 Conn. App. 620.

The present case is factually distinguishable from *Fuller*. The portion of the *Fuller* decision on which the state relied in its argument to the court contained a description of the manner in which the ''suspicion'' testimony was admitted. See id., 617–19. *Fuller* involved a defendant who was accused of attempting to murder two of her neighbors by discharging a firearm into the front of the neighbors' house in the middle of the night. Harvey Fuller, father of the defendant, Jancis L. Fuller, testified on the depth and length of the defendant's hostility toward the neighbors. On cross-examination, Harvey Fuller testified that he had overheard his daughter try to enlist two men the night before the shooting to go to the victims' home and ''try to shake them up and get them to leave her alone. . . .'' (Internal quotation marks omitted.) Id., 619. On recross-examination, he testified that the morning after the shooting was one of the worst days of his life. When the state explored this testimony on redirect examination, Fuller testified that he learned of the shooting the morning after it occurred when he awoke to find police cars at his home. It was at this point, in response to the state's question, that he said he suspected that his daughter was responsible for the shooting when he first learned of it. Id. There was then a context and an explanation for this evidence in *Fuller* that explained prior testimony of the witness. In fact, the court noted that it was the defense that had opened the door to this testimony. Id., 621.

In contrast, in the present case, the officers' suspicions were expressed during the state's direct examination and were not offered ''to explain and clarify relevant matters in [their] testimony which [may] have been weakened or obscured by . . . cross-examination.'' (Internal quotation marks omitted.) Id. Furthermore, Harvey Fuller was not one of four police officers who were members of the very police department that had arrested and brought about the prosecution of the defendant. The present case, beyond being factually distinguishable from *Fuller*, does not present a situation in which the jury was exposed to a witness' mere ''suspicions.'' The state asked virtually the same question of all four police officers. That question was whether, after having viewed the videotape, the officer suspected that he or she knew who the unmasked robber was. When the officer responded in the affirmative, the prosecutor would ask who the officer suspected that person was, and the officers each responded with the defendant's name. This testimony went far beyond the speculation of the witness in *Fuller* who was allowed to testify that, when he heard about the crime that had occurred, he could not help but suspect that his daughter had committed the act. Id., 617 n.27. Our description of the effect of the ''suspicion'' testimony in *Fuller* illuminates the distinction between its use in that case and the use of the officers' testimony in the present case. ''It seems fair to say that when a person only *suspects* that a fact exists, here, that the defendant was the shooter, that person is doing nothing more than recognizing a 'possibility' of the existence of that fact, but he has not concluded that it actually exists. It therefore cannot be said to be an opinion on the ultimate issue before the jury, i.e., guilt or innocence.'' (Emphasis in original.) Id., 621.

In the present case, the witnesses' ''suspicions'' went beyond the officers' recognizing a possibility that the defendant could be the person depicted in the videotape. None of the officers was in the store at the time the robbery occurred. Nevertheless, the officers testified that they knew the defendant personally, they saw the videotape, and they ''suspected that they knew'' the person depicted on the videotape was the defendant.[5] Presented in this manner, the officers each gave an opinion on the ultimate issue of the perpetrator's identity. In fact, each officer stated that, in his or her opinion, the hooded person in the videotape was the defendant. They expressed that opinion in statements such as: ''After reviewing the videotape, watching the mannerism[s] and seeing what I saw in the videotape, I recognized that as [the defendant],'' ''I recognized [the defendant] from the video I watched,'' ''I don't state when, I just state that I immediately recognized [the defendant]'' and ''[the defendant's] mannerisms, the way he walked. I could see part of his face and his nose that I recognized as his.'' Significantly, the police witnesses did not testify about what mannerisms, facial

characteristics or way of walking the videotape showed that were similar to those they previously had observed in the defendant. Had that been their testimony, it would not have been objectionable as either ''mere suspicion'' or opinion testimony on the ultimate issue. This is so because the jurors could have observed the defendant in the courtroom and the person on the videotape and determined for themselves if they credited the testimony and if it convinced them beyond a reasonable doubt that the person on the videotape had the same type of nose or other physical feature, or the same type of walk or other mannerism as the officers had observed in the defendant, and that therefore, the defendant was the person on the videotape participating in the robbery of the store. See *State* v. *Vilalastra*, 207 Conn. 35, 45, 540 A.2d 42 (1988) (state may not elicit expert opinion that defendant possessed drugs for sale or consumption but may ask other questions designed to elicit what items drug sellers use or whether it would be usual to find these items in apartment of someone who did not sell drugs).

In the present case, the officers' testimony amounted to opinion testimony given without any sufficient testimony to build an adequate factual foundation. The testimony should have been excluded pursuant to the court's earlier ruling on the defendant's motion in limine. The court, therefore, abused its discretion when it allowed this opinion testimony in direct contradiction of its earlier order without having revisited and changed its ruling in that regard.

Section 7-3 (a) of the Connecticut Code of Evidence provides in pertinent part: ''Testimony in the form of an opinion is inadmissible if it embraces *an ultimate issue* to be decided by the trier of fact . . . .'' (Emphasis added.) In construing what constitutes an ultimate issue, I believe the appropriate definition of ''ultimate,'' and one that may coexist in harmony with the application given § 7-3 by this court and by our Supreme Court, is ''a fundamental fact or principle'' that is decisive of the defendant's guilt.[6] Using this definition, to reach the ultimate issue of guilt or innocence, the trier of fact must first decide several underlying ultimate issues, namely, the elements of the crime, proof that the defendant was a perpetrator and the validity of any defenses that might excuse the defendant's acts, each of which is decisive of the defendant's guilt.

The use of this definition finds support in the following cases in which testimony was inadmissible as to a fact that would serve as a foundation for the finder of fact's final determination of guilt or liability: *Barrett* v. *Danbury Hospital*, 232 Conn. 242, 256 n.6, 654 A.2d 748 (1995) (upholding exclusion of opinion on reasonableness of plaintiff's fear); *Kowalewski* v. *Mutual Loan Co.*, 159 Conn. 76, 80, 266 A.2d 379 (1970) (upholding exclusion of opinion on whether walkway was reason-

ably safe for use); *State* v. *Donahue*, 141 Conn. 656, 667, 109 A.2d 364 (1954) (upholding exclusion of opinion on whether defendant acted in wilful, deliberate and premeditated manner), cert. denied, 349 U.S. 926, 75 S. Ct. 775, 99 L. Ed. 1257 (1955); *Witty* v. *Planning & Zoning Commission*, 66 Conn. App. 387, 392, 784 A.2d 1011 (upholding exclusion of opinion as to intended meaning of term in ordinance), cert. denied, 258 Conn. 950, 788 A.2d 100 (2001); *Daley* v. *Wesleyan Univ.*, 63 Conn. App. 119, 137–38, 772 A.2d 725 (upholding exclusion of opinion that ''tenured faculty's decision not to recommend the plaintiff for tenure was made arbitrarily or capriciously''), cert. denied, 256 Conn. 930, 776 A.2d 1145 (2001); see *State* v. *Vilalastra*, supra, 207 Conn. 39, 43. Each of these cases held that the testimony was inadmissible as an opinion on an ultimate issue in the case. To the extent that one might infer from *State* v. *Fuller*, supra, 56 Conn. App. 621, that there is one ultimate issue in a case, i.e., guilt or innocence, that interpretation would ignore these and a host of other cases from this court and from our Supreme Court.[7]

A close reading of *State* v. *Fuller*, supra, 56 Conn. App. 592, demonstrates that the identity of the perpetrator is an ultimate issue that must be decided by the trier of fact to reach the ultimate issue of guilt or innocence. The challenged testimony in *Fuller* was not deemed a ground for reversal, because, although it concerned the ultimate issue of the defendant's guilt or innocence, the testimony involved mere ''suspicion,'' rather than ''opinion,'' which connotes a lesser degree of certainty. Id., 620–21.

Section 7-3 of the Connecticut Code of Evidence provides an example of an ultimate issue separate from that of the defendant's guilt or innocence. Quoting General Statutes § 54-86i, § 7-3 (b) provides: ''No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto, except that such expert witness may state his diagnosis of the mental state or condition of the defendant. The *ultimate issue* as to whether the defendant was criminally responsible for the crime charged is a matter for the trier of fact alone.'' (Emphasis added; internal quotation marks omitted.)[8] At the very least, § 7-3 (b) explicitly sets forth the proposition that the mental state or condition of the defendant is an ''ultimate issue.'' More than that, however, the language of § 7-3 (b) suggests that certain other elements of the crime charged and defenses thereto are also ''ultimate issues,'' although they would not fall within the exclusion set forth in that particular subsection.

The Federal Rules of Evidence, while not binding on our courts, ''are often influential in shaping our eviden-

tiary rules.'' *State* v. *Vilalastra*, supra, 207 Conn. 39–40.

The state argues on appeal that the officers' testimony ''falls squarely within the well recognized identification exception to the common-law rule prohibiting lay opinion testimony on an ultimate fact in issue.'' This argument should have been presented to the court as a challenge to the court's prohibition on opinion testimony in the present case. No such argument was made to the court at any point, however, and the court's order, therefore, remained in effect.

Inasmuch as the state now concedes that such testimony was opinion testimony on the issue of identity, the state by implication also concedes that the officers' testimony violated the court's order. The state's argument also implies that, despite offering the officers' testimony at trial for a limited purpose that would not have fallen within the category of opinion testimony, the evidence could have been used for a totally different purpose. I disagree.

In the present case, where the state circumvented the defendant's motion in limine by offering the officers' testimony for the limited purpose of showing their ''suspicions,'' it would be inappropriate for this court to decide that the jury could have used the officers' testimony for a totally different purpose. See *Urich* v. *Fish*, 58 Conn. App. 176, 180–81, 753 A.2d 372 (2000) (considering evidence in contradiction of prior ruling violated plaintiff's right to due process).

The majority cites *State* v. *Strong*, 59 Conn. App. 620, 627, 757 A.2d 1186 (2000), and *State* v. *Meike*, 60 Conn. App. 802, 811, 761 A.2d 247 (2000), cert. denied, 255 Conn. 947, 769 A.2d 63 (2001), in which the court found the disputed opinions to be ultimate issues. The majority then goes on to state: ''In each of those instances, the issue we found to be ultimate could not reasonably be separated from the essence of the matter to be decided.'' I see no distinction in the present case. The only disputed factual issue was the perpetrator's identity, and, therefore, it could not be more essential to the matter to be decided.

I also disagree with the majority's opinion that its view of the issue ''is not novel,'' citing *State* v. *Gagnon*, 18 Conn. App. 694, 561 A.2d 129, cert. denied, 213 Conn. 805, 567 A.2d 835 (1989). The disputed testimony in *Gagnon* was from but one police officer, not four. Id., 714. It was not first couched in suspicion. Nor did the officer state, ''I recognized him as [the defendant],'' or ''I immediately recognized him,'' or '' I could see part of his face and nose that I recognized as his.'' Instead, in *Gagnon*, the officer opined about the resemblance between a composite sketch and the defendant. Unlike the present case, the officer in *Gagnon* testified about facts concerning how the defendant's eyes, nose, mustache and the shape of his face fit the composite. Finally,

the court in *Fuller* did not believe that the ultimate issue rule was inapplicable to opinions about identification, or it would not have taken the pains it did to draw a distinction between the harmlessness of mere suspicions as opposed to definite opinions. See *State* v. *Fuller*, supra, 56 Conn. App. 620–23.

I next conclude that the defendant's position was prejudiced by the court's decision to allow four witnesses to testify that the defendant was the person depicted on the videotape. The state called ten witnesses. Four of them did not identify either of the robbers. Of the six witnesses who did identify the defendant as one of the robbers, four of them were the officers who had been prohibited by the ruling on the motion in limine from expressing an opinion on the issue of identity. The fifth was the store clerk who saw the robbers for some number of seconds but less than one minute and who told the police shortly after the robbery that he could not identify the robbers. Robert Teachman, the sixth witness, who claimed that the defendant had admitted having participated in the robbery to him, was impeached by the fact that he had two felony charges pending against him in another jurisdiction. Several witnesses who were called on the defendant's behalf testified that Teachman did not have a good reputation for truthfulness. The defendant has shown that it is more probable than not that the court's ruling affected the result of the trial. See *State* v. *Lomax*, 60 Conn. App. 602, 610, 760 A.2d 957, cert. denied, 255 Conn. 920, 763 A.2d 1042 (2000). I would reverse the conviction and order a new trial.

For all these reasons, I respectfully dissent.

[1] When the identification of the perpetrator of a crime is at issue, it is the state's burden to prove beyond a reasonable doubt "not only that the offense was committed as alleged in the information, but that the defendant was the person who committed it." See D. Borden & L. Orland, 5 Connecticut Practice Series, Criminal Jury Instructions (3d Ed. 2001) § 3.14, p. 238.

[2] The court commented that, prior to having read *State* v. *Fuller*, supra, 56 Conn. App. 592, its inclination was to deny the admissibility of even the testimony as phrased in the form of a suspicion, because the court "felt that anything that's in the nature of suspicion carries little weight."

[3] Beyond merely viewing the videotape, Thompson was the officer in charge of the investigation into the robbery. Russotto assisted the investigation by looking for the gun that was used in the robbery and by taking the statement of the customer who was in the store at the time of the robbery. Martin and Ferrante testified that they had assisted the investigation, but it is not clear from the limited testimony that they gave whether their assistance extended beyond viewing the videotape and corroborating Thompson's and Russotto's suspicions.

[4] The defendant, in his initial brief, describes the distinctions between the present case and *State* v. *Fuller*, supra, 56 Conn. App. 592. The state, in response, argues that the distinctions between this case and *Fuller* are irrelevant and that the holding of *Fuller* is not dispositive of the issue of whether the officers' testimony was admissible. The state does not attempt to argue that the officers' testimony involved mere suspicions rather than opinions. The state also cites to several cases for the proposition that opinion testimony is admissible in certain circumstances. The state's position on appeal is diametrically opposite to that taken before the trial judge.

[5] In *Fuller*, there was nothing comparable to the videotape presented in the present case.

[6] "Fundamental" is defined, in turn, as follows: "serving as, or being an essential part of, a foundation or basis; basic; underlying . . . ." Random

House Compact Unabridged Dictionary 776 (2d Ed. 1996).

[7] Our Supreme Court in *State* v. *Spigarolo*, 210 Conn. 359, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989), listed several examples of ultimate issues of fact that have been held to be exceptions to the rule set forth in § 7-3. Id., 373 (listing testamentary capacity, sanity, authenticity of a signature, intoxication and conditions of safety).

[8] See 1 C. McCormick, Evidence (5th Ed. 1999) § 12, pp. 56–57, for a discussion of the background of the corresponding federal rule of evidence, rule 704 (b).