

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v. GARY L. HANEY

**Direct Appeal from the Circuit Court for Jefferson County
No. 6260 Ben W. Hooper, II, Judge**

**No. E1999-00552-CCA-R3-CD - Decided
May 8, 2000**

JUDGE WITT, concurring in results only.

I concur in the results reached by the majority. Respectfully, I differ only in the treatment of the variance issue.

The indictment alleged violence as the mode of committing the robbery in the present case. See Tenn. Code Ann. § 39-13-401(a) (1997). The majority holds that the proof that the defendant robbed the victim at gunpoint and then ordered her to walk to a remote area of the store was sufficient to show violence. As the majority notes, this court has previously ruled to the contrary in State v. Walter Lee Allen, No. E1998-00416-CCA-R3-CD (Tenn. Crim. App., Knoxville, Mar. 15, 2000), the appeal in Haney's co-defendant's case.

In Walter Lee Allen, this court held that the very same actions of Haney, by which he robbed the victim by putting her in fear, were not the equivalent of accomplishing the robbery by violence. Id., slip op. at 6-7. As a result, the Walter Lee Allen panel found a variance of the proof from the allegation of the indictment; however, the court held that the variance was not fatal. Id., slip op. at 7.

Walter Lee Allen is persuasive, although not controlling authority. See Tenn. Supp. Ct. R. 4 (amended Nov. 1, 1999). I would follow the reasoning in Walter Lee Allen and hold that, although a variance exists, it is not fatal. The result is the same as the majority's result. The conviction should be affirmed. I am authorized to state that Judge Riley joins in this opinion concurring in the results.