

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 13, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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**Appeal No. 2024AP579-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2022CF78

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GAVIN J. BALKE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
MITCHELL J. METROPULOS, Judge. *Affirmed.*

Before Stark, P.J., Hruz, and Gill, JJ.

¶1 HRUZ, J. Gavin J. Balke appeals a circuit court order denying his motion for a new dispositional hearing on his commitment to institutional care, which the court ordered after it found him not guilty by reason of mental disease or defect (“NGI”) of battery to a law enforcement officer as a repeater. Balke’s

commitment was ordered following his plea of no contest to punching a law enforcement officer in the face, and a stipulated and accepted finding that Balke was NGI. Balke argues that the court erroneously exercised its discretion when it imposed the maximum term of seven years for his NGI commitment because the court failed to sufficiently explain its decision and, instead, relied only on the notion that selecting the maximum term would best protect the public. Balke asserts that this approach was particularly problematic because his commitment term exceeds the “general rule” that the length of an NGI commitment should be two-thirds of the maximum potential sentence of imprisonment, which rule Balke asserts our supreme court stated in *State v. Fugere*, 2019 WI 33, ¶29 & n.6, 386 Wis. 2d 76, 924 N.W.2d 469.

¶2 We conclude that the record amply supports the circuit court’s discretionary decision to order the commitment period it did, that the court considered proper and relevant factors in doing so, and that any omissions in the court’s ruling that Balke identifies do not constitute reversible error. We also conclude that Balke misstates the law regarding the so-called “two-thirds” rule. Accordingly, we affirm.

BACKGROUND

¶3 According to the criminal complaint, on January 24, 2022, Balke was in “the video court room on the fifth floor of the Outagamie County jail building” for a hearing on a separate criminal matter. An Outagamie County sheriff’s deputy was providing security inside that room. Near the end of the hearing, the circuit court asked Balke if he had any questions, to which Balke replied, “blah blah blah” and stood up. Balke then approached the deputy, clenched his fists while “squar[ing] off” with the deputy, and gave him a

“thousand[-]yard stare.” Shortly thereafter, Balke punched the deputy in the face twice before the deputy was able to gain control of Balke and radio for help.

¶4 The State ultimately charged Balke with one count of battery to a law enforcement officer, one count of battery by a prisoner, and two counts of misdemeanor bail jumping, each as a repeater. Shortly thereafter, and after receiving concerns from Balke’s family members regarding his mental health, the circuit court ordered a clinical evaluation of Balke’s mental health.

¶5 The clinical evaluation concluded that Balke, who was 29 years old at the time, had severe and pervasive mental illnesses that caused “auditory and visual hallucinations, behavioral and thought disorganization, paranoia, bizarre delusional beliefs, and unprovoked aggressive/violent behavior in response to hallucinations.” The evaluation also noted that Balke had a history of schizoaffective disorder diagnoses starting when he was 22 years old. Balke explained to the evaluator that he is often paranoid that people are watching him, that those people can touch him without being seen, and that he hears “voices” that he must obey in order to protect himself. Similarly, Balke claimed that he “hear[s] frequent commands to harm others and instructions that otherwise dictate his behavior to avoid consequences which are not based in reality,” including “that he must assault people to ‘get back into [his] real life.’” (Alteration in original.)

¶6 The evaluator reported on Balke’s mental state at the time of the deputy’s assault, which was consistent with the foregoing account of Balke’s general mental health. In particular, Balke stated that, upon prompting from either a biblical or mythical character, he was experiencing hallucinations and physical anxiety, and he thought the judge and the deputy were not real and were attempting to harm him. Balke said he punched the deputy because doing so

usually “get[s him] back to reality.” The evaluation provided a detailed account of Balke’s mental health struggles in terms of his failing to understand reality and his violent reaction during the incident with the deputy, which was consistent with Balke having serious mental illnesses. The evaluator’s ultimate conclusion was that there was sufficient support for a conclusion that Balke met the standards for an NGI verdict.

¶7 At the time the evaluator interviewed him, Balke was subject to a WIS. STAT. ch. 51 (2023-24)¹ civil commitment—the latest in a number of his commitments—which included an order for involuntary treatment with psychotropic medication. Despite this treatment, Balke reported to the evaluator that the medications did not alleviate his symptoms and actually “possibly worsen[ed] his hallucinations.” Balke also stated he never lived in the community long enough to establish care with an outpatient psychiatrist and that he often failed to take his medications and greatly abused substances.

¶8 A few months after the foregoing evaluation was submitted to the circuit court, Balke and the State reached a plea agreement. Balke agreed to plead no contest to the count of battery to a law enforcement officer as a repeater, and the State, in exchange, agreed to dismiss and read in the remaining counts (along with charges in two other cases) and stipulate to a finding that Balke was NGI. The court later accepted the no-contest plea, found Balke NGI, ordered a predisposition investigation report, set the matter for a dispositional hearing, and ordered Balke committed.

¹ All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

¶9 The predisposition investigation report recommended Balke’s institutional placement at a state mental health institution, due to him “clearly continu[ing] to demonstrate [a] risk of serious harm to himself, others, and property.” In particular, the author stated that “Balke suffers from serious and active symptoms of his illness currently” and that he “verbalizes the continued desire to harm others, connected to his beliefs about” his cousin; that he has a “poor adherence to treatment prescribed”; and that he has “[s]ignificant substance use” issues. The author opined that

[i]nstitutional care would allow more intensive evaluation, on-going treatment needs being addressed for his psychiatric illness and substance abuse, and monitoring of response to treatment on an on-going basis. Treatment to address acute symptoms and stabilize Mr. Balke will undoubtedly support the increased likelihood of longer-term success in the community.

¶10 In reaching these conclusions, the predisposition investigation report extensively chronicled many statements by Balke regarding his mental illness and related symptoms, his life and criminal history, and other facts, which were the same as or similar to statements found in the earlier clinical evaluation. This information included Balke being delusional at the time he battered the deputy; his other delusions and auditory hallucinations—which were tied to a pervasive obsession with his cousin, whom Balke believed had significant influence and power over him and was constantly threatening to harm him—and other mental health issues; Balke’s extensive substance abuse; his frequent refusals to adhere to his medication and other treatment regimens; and the dangers he posed to himself and others. Statements by family members supported the foregoing.

¶11 At the dispositional hearing, the State sought the maximum term of commitment of seven years (less any custody credit due). See WIS. STAT.

§§ 940.62(2)(a), 973.01(2)(b)8., 939.62(1)(b). The State began its argument by noting how Balke’s mental illnesses, as explained at length by both the clinical evaluation and the predisposition investigation report, severely impacted his life. The State argued that Balke had been noncompliant with his medications and required doctor visits, both when in jail and out in the community; that even when he was on his medications, there was “some question about how well they [were] working”; and that Balke continued to experience intrusive hallucinations that caused him fear of being harmed.

¶12 The State noted that Balke’s documented history of substance abuse and homelessness have “contributed to his inability to seek medical advice and to maintain medication compliance.” The State also mentioned that Balke’s hallucinations cause him to verbalize dangerous behavior to himself—such as not eating because of voices telling him not to do so—and to others, particularly his cousin. Regarding harm to others, the State emphasized that Balke had extensive jail reports—spanning many months—about him fighting during his current incarceration, and Balke himself requesting to be put in segregation “because he feels like he wants to hit someone.”

¶13 The State concluded by stating that

institutional treatment [for] seven years will assist [Balke] in being medication compliant. It will get him the therapy he needs. It will, hopefully, get him the resources he needs so he can learn to be independent and live on his own and learn to seek out medical treatment when he needs it and to continue to live in society without harming others.

¶14 Balke’s counsel focused on the fact that much of Balke’s treatment was attempted in a criminal setting, which counsel argued was ineffective if not detrimental. Counsel further argued that Balke’s conduct while recently

incarcerated was not a good measure of what would occur with treatment in a proper, health-oriented setting. And while defense counsel noted that Balke’s hallucinations persisted and that he certainly needed mental health treatment, counsel argued that successful treatment could be accomplished under an NGI commitment that was much shorter than the length recommended by the State. Counsel argued that Balke could then be transitioned to an outpatient setting, including other forms of civil commitment, and noted that plenty of people are “successfully treated for schizoaffective disorder in the community. There’s no reason to think [Balke] can’t be one of them.”

¶15 While Balke’s counsel acknowledged that “all of the reports in this case” have clearly laid out “the extent of [Balke]’s mental illness”—which, he asserted, neither Balke nor anyone “seems to be disputing”—he asked the circuit court to disregard the recommendation in the predisposition investigation report,² “to find that [Balke] is appropriate for conditional release,” and to have him cooperate with the relevant state agency in that setting. The defense also argued that the maximum seven-year period of commitment was unnecessary, and it requested a commitment period of two years.

¶16 The circuit court issued an oral ruling at the conclusion of the hearing. In determining that Balke required institutionalized care, the court noted

² Defense counsel’s full statement was: “We would ask the Court because it is ultimately the Court’s decision to disregard the report that was filed, to find that [Balke] is appropriate for conditional release, to have him cooperate with the State Department of Human Services as well as any designee for his future treatment needs.” It seems, in context, that counsel’s “disregard” comment was not a suggestion that the court should disregard the predisposition investigation report as a whole. Rather, counsel was specifically referring to the report’s recommendation that Balke be treated with institutional placement at a state mental health institution, rather than in the community.

Balke's significant criminal record, his history of severe mental illness, his chemical dependency issues, and his failures to adhere to his mental health medication and treatment regimen, especially when in the community. The court noted that while those issues had been periodically addressed in some circumstances, Balke's condition remained problematic. The court also accepted the evaluator's opinion in the predisposition investigation report that Balke remained a danger to society if he was not treated within a state mental health institution, after which, the court hoped, Balke's dangerousness could be reduced such that a conditional release would be appropriate.

¶17 In summarizing its decision to order institutional care, the circuit court stated its goals as follows:

So obviously [Balke] needs to address those chemical dependency needs as well as his mental health needs, stay on his medications; and, hopefully, we can get the medications and the right amounts and in the right form so that he can be successful.

I certainly agree with both parties that we have an individual here that has severe mental illness and we have to try to determine how best to protect him as well as society by getting him in a position where he can be successful.

¶18 Regarding the length of the commitment, the circuit court stated:

I think to protect society to the fullest we should allow at the outset the maximum time, which would be seven years. With that being said, Mr. Balke can petition the Court for both conditional release from the institution; and if his symptoms are well managed, he can petition for release from the commitment as well. But I would rather set out the parameters at the maximum time to ensure safety for society and to ensure Mr. Balke's best scenario with regards to treatment and, hopefully, keep him from reoffending down the road.

Accordingly, the court ordered a seven-year commitment, with Balke's placement at a state facility, under the care of the Department of Health Services.

¶19 Balke moved for postdisposition relief, requesting a new dispositional hearing.³ He argued that the circuit court erroneously exercised its discretion by failing to sufficiently explain why it imposed the maximum term of commitment, especially in relation to the facts of Balke's case. While acknowledging the law that NGI commitments are not criminal sentences, Balke noted that both types of decisions involve the deprivation of liberty and the exercise of discretion, and he therefore asserted that the factors and law established under criminal sentencing should be considered. Accordingly, Balke argued, "the term [o]f [an NGI] commitment, like a sentence, should be narrowly crafted. It should be the minimum term consistent with the same basic factors [applicable to a sentencing decision]: the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant." Citing *Fugere*, Balke also asserted that, "[a]s a general rule, the length of commitment is about two-thirds of the maximum potential sentence of imprisonment," *Fugere*, 386 Wis. 2d 76, ¶29, and he argued that the court deviated from that rule, without explanation, by ordering the maximum term of commitment.

¶20 The circuit court held a hearing on Balke's motion. The court observed that while its decisions—both regarding institutional placement and the length of commitment—were based on the need to protect the public, the court also considered Balke's prior treatment history (including its lack of success), his

³ Balke also requested additional sentence credit against his commitment for his time spent in jail in connection with his read-in cases, which the circuit court granted after a stipulation by the parties. That credit is not at issue on appeal.

criminal history, and the psychological report generated for the dispositional hearing. To properly address those factors and needs such that Balke “would be safe when he returns to the community” and “maintain[] that safe existence,” the court determined the maximum term of commitment was necessary, at least at the outset. Accordingly, the court concluded that it had properly exercised its discretion, irrespective of the purported two-thirds rule, and it denied Balke’s request for a new dispositional hearing.

¶21 Balke appeals. He asks us to reverse the order denying his postdisposition motion and seeks a new dispositional hearing.

DISCUSSION

¶22 When a criminal defendant is found not guilty by reason of mental disease or defect for a felony committed on or after July 30, 2002, as Balke was in this case, the circuit court

shall commit the person to the department of health services for a specified period not exceeding the maximum term of confinement in prison that could be imposed on an offender convicted of the same felony, plus imprisonment authorized by any applicable penalty enhancement statutes, subject to the credit provisions of [WIS. STAT. §] 973.155.

WIS. STAT. § 971.17(1)(b). This commitment decision essentially has two parts. First, the court must decide whether the commitment will occur in an institutional or a community setting (otherwise known as “conditional release”) and, second, in either setting, the court must decide how long the commitment will be. Sec. 971.17(1)(b), (3)(a). Both determinations are left to the discretion of the circuit court, *State v. Cook*, 66 Wis. 2d 25, 27-28, 224 N.W.2d 194 (1974), albeit with the maximum length of the commitment being capped, pursuant to the statute.

¶23 “[T]he term [discretion] contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.” *State v. Gallion*, 2004 WI 42, ¶19, 270 Wis. 2d 535, 678 N.W.2d 197 (alterations in original; citation omitted). “Although the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court’s discretionary decision.” *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Put another way, “[r]egardless of the extent of the [circuit] court’s reasoning, [a reviewing court] will uphold a discretionary decision if there are facts in the record which would support the [circuit] court’s decision had it fully exercised its discretion.” *State v. Hurley*, 2015 WI 35, ¶29, 361 Wis. 2d 529, 861 N.W.2d 174 (third alteration in original; citation omitted).

¶24 Regarding the first part of the commitment decision—determination of where the defendant will serve his or her commitment—a circuit court must order institutional care if it finds, by clear and convincing evidence, that “conditional release of the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage.” WIS. STAT. § 971.17(3)(a). In making that determination,

the court may consider, without limitation because of enumeration, the nature and circumstances of the crime, the person’s mental history and present mental condition, where the person will live, how the person will support himself or herself, what arrangements are available to ensure that the person has access to and will take necessary medication, and what arrangements are possible for treatment beyond medication.

Id. As stated, these are neither required nor exclusive factors for consideration.

¶25 On appeal, Balke does not challenge the circuit court’s decision to order that treatment begin in an institutional setting. Rather, he asserts that factors considered by a court in determining whether to place an NGI defendant in institutional care are “irrelevant” to whether that court “failed to properly exercise its discretion as to the length of [the defendant’s] commitment.” Balke bases this proposition, at least in part, on the fact that the statute “explain[ing] what [a] court must consider in determining whether to place an individual in institutional care or conditional release at the beginning of his or her commitment”—namely, WIS. STAT. § 971.17(3)(a)—“contains no mention of the length of the commitment.”

¶26 We disagree with Balke’s narrow view of the statutory process. Rather, we agree with the State that it naturally follows that the factors affecting whether to order institutional placement in the first place also apply to determining the length of that placement. After all, a decision to institutionalize for, say, only one day—a highly unlikely result, we realize—is itself a decision regarding the length of time needed for commitment. Any day, month or year added thereafter inherently involves the circuit court’s consideration of if, and why, such additional time is required. Therefore, using the statutory factors under WIS. STAT. § 971.17(3)(a) to also inform the decision regarding the length of the commitment makes sense. Ultimately, all that is required for the court’s proper exercise of discretion in determining the length of the commitment is for the court to rationally analyze relevant and proper factors while applying the correct legal standard.

¶27 What Balke does challenge on appeal is the circuit court’s decision to set his commitment term at its maximum possible length. He seeks reversal of

the court’s order denying his postdisposition motion on that issue and a “remand with directions to hold a new dispositional hearing and conduct a proper exercise of discretion as to the length of his commitment.” Balke does not contend, per se, that the record fails to support the court’s determination as to the length of his commitment. Rather, he insists that the court’s decisional process was inherently deficient and, in the context of setting the length of an NGI commitment, courts must essentially “do more.” In this regard, Balke also asks us to address the necessary considerations for a circuit court when determining the length of an NGI commitment.

¶28 At the outset of our analysis, we reject a premise of Balke’s argument. Citing language in one paragraph in *Fugere*, he insists that the Wisconsin Supreme Court has established a “general rule” whereby the length of an NGI commitment is presumed to be two-thirds of the maximum potential sentence of imprisonment. Balke reads this rule as meaning that the length of his commitment should be, at most, “around four and a half years in this case, taking the repeater enhancer into account,” or two-thirds of seven years. Because the circuit court here exceeded that time period without providing any explanation for doing so, Balke contends the court’s determination is erroneous, presumably because it failed to apply the proper law.

¶29 Balke misapprehends the language in *Fugere* on which he relies, primarily because he fails to acknowledge the law underlying it. The issue in that case was whether a circuit court was required to inform an NGI defendant of the maximum possible term of civil commitment at the guilt phase.⁴ *Fugere*, 386

⁴ When a defendant enters an NGI plea, the case is bifurcated into a “guilt phase” and a “responsibility phase.” *State v. Fugere*, 2019 WI 33, ¶26, 386 Wis. 2d 76, 924 N.W.2d 469.

Wis. 2d 76, ¶¶2, 51. The court declined to exercise its superintending and administrative authority to require that circuit courts do so. *Id.*, ¶¶2, 49, 55. In reaching that conclusion, it relied, in part, on the fact that an NGI commitment is not punishment, but rather a collateral consequence to someone who successfully mounts an NGI defense to criminal charges. *Id.*, ¶¶2, 55.

¶30 As part of its analysis in this regard, the court outlined the general NGI process. *Id.*, ¶¶26-29. This included the following discussion on which Balke relies:

Defendants in criminal cases who are later found NGI are civilly committed rather than criminally sentenced or sanctioned. If commitment occurs, the length of that commitment is not to exceed the maximum sentence for the charged offense plus penalty enhancements subject to statutory credit provisions. WIS. STAT. § 971.17(1)(b) [(2015-16)]. *As a general rule, the length of commitment is about two-thirds of the maximum potential sentence of imprisonment.* In addition, a defendant who succeeds on an NGI defense and is committed may file a petition for conditional release every six months, and if on conditional release, may file a petition to terminate the underlying order of commitment. See §§ 971.17(4), (5) [(2015-16)].

Id., ¶29 (emphasis added; footnote omitted). The court included a footnote anchored to the emphasized sentence above, which stated, in relevant part:

Under ... § 971.17(1) [(2015-16)], an NGI defendant's maximum possible commitment period depends on the nature of the underlying offense. NGI defendants ... who commit a misdemeanor, may receive a maximum commitment period of two-thirds the maximum term of imprisonment that could be imposed. [Sec.] 971.17(1)(a) & (d) [(2015-16)]. NGI defendants who commit a felony on or after July 30, 2002, may receive a commitment term up to but not exceeding *the maximum term of imprisonment* that could be imposed. [Sec.] 971.17(1)(b) [(2015-16)]. Lastly, NGI defendants who commit a felony punishable by life imprisonment may

receive up to a lifetime commitment term.
[Sec.] 971.17(1)(c) [(2015-16)].

Id., ¶29 n.6 (emphasis added).

¶31 It seems plain, from the statutory references in *Fugere*’s above footnote, that the court’s comment was tied to the language in those statutes, which refer to a generalization that a commitment term for a felony will not likely exceed two-thirds the maximum potential sentence of imprisonment, and not some independent declaration by the court. But WIS. STAT. § 971.17(1)(b) clearly states—as it did when *Fugere* was decided⁵—that NGI defendants who commit a felony on or after July 30, 2002, may receive a commitment term “not exceeding the maximum term of *confinement in prison* that could be imposed on an offender convicted of the same felony, plus imprisonment authorized by any applicable penalty enhancement statutes.” (Emphasis added.) Importantly, under the nomenclature of Wisconsin’s sentencing law, “[i]mprisonment’ refers to both parts of a bifurcated sentence: the period of initial confinement in prison *plus the period of extended supervision*.” *State v. Finley*, 2016 WI 63, ¶96 attach. A, 370 Wis. 2d 402, 882 N.W.2d 761. Accordingly, under § 971.17(1)(b), only the time that a defendant could have been confined in prison under the truth-in-sentencing laws (which began on July 30, 2002) is available for the commitment period. And, typically, under the bifurcation and classification of felonies in Wisconsin, that confinement period *is* about two-thirds of the total available imprisonment for the crime, unless the penalty is subject to enhancers. See WIS. STAT. §§ 939.50, 973.01(2)(b), (d).

⁵ The court in *Fugere* applied the 2015-16 version of the Wisconsin Statutes. *Fugere*, 386 Wis. 2d 76, ¶11 n.3. The language in WIS. STAT. § 971.17(1)(b) (2015-16) is identical to the current version of the statute applied here.

¶32 Therefore, the two-thirds “general rule” mentioned in *Fugere* appears to have been referring only to the fact that the two-thirds sentencing calculation applies generally, unless unique case facts render it inapplicable. Alternatively, the court could have been saying “general rule” in the sense that it applies in all cases in which life imprisonment is not a potential sentence if the case were tried to a guilty verdict, meaning in *most* cases—i.e., generally. Regardless, what matters, for our purposes, is that the relevant passages in *Fugere* simply failed to reflect the statutory and real-world distinction in Wisconsin law between “terms of imprisonment” and “terms of confinement in prison.”⁶

⁶ We note, however, that later in the *Fugere* opinion itself, the court correctly referred to WIS. STAT. § 971.17(1)(b) (2015-16) as providing that “[f]or felonies committed on or after July 30, 2002, NGI commitments may at most equal ‘the maximum term of *confinement in prison* that could be imposed’ on a defendant if his NGI defense failed.” *Fugere*, 386 Wis. 2d 76, ¶47 (emphasis added). And, three years after *Fugere*, our supreme court included an analysis which properly recognized the distinction between “imprisonment” and “confinement,” citing the provisions in WIS. STAT. § 971.17(1) (2017-18) and stating, in relevant part:

All four categories of NGI commitment, by the plain text of the statute, are tied to and directly dependent on the lengths of sentences in criminal proceedings. NGI commitment orders are limited by how long an “offender convicted of the same [offense]” *may be “imprison[ed]” or “confin[ed] in prison.”* Instead of setting out an independent basis by which courts may determine the length of NGI commitments, the legislature made NGI commitment lengths dependent upon criminal sentencing lengths. Under [WIS. STAT.] § 971.17(1) [(2017-18)], to determine the length of NGI commitments, courts must look to *criminal terms of imprisonment and confinement*, as well as criminal “penalty enhancement statutes,” and nowhere else.... [U]nder the plain terms of § 971.17 [(2017-18)], the length of NGI commitment is based on *the total length of prison terms* the individual could receive in traditional criminal proceedings.

State v. Yakich, 2022 WI 8, ¶17, 400 Wis. 2d 549, 970 N.W.2d 12 (first, second and third alterations in original; emphases added; citations omitted).

¶33 In Balke’s case, the seven-year number is the maximum “term of confinement in prison” that could have been imposed on Balke if he were found guilty of the underlying offense to which he pled, with the remainder of his “imprisonment” being an additional roughly three years of extended supervision. Given all of the foregoing, we simply do not read anything more into the language from *Fugere* on which Balke relies, and the circuit court here did not err in any way in relation to it.

¶34 What remains then is whether the circuit court otherwise erroneously exercised its discretion by ordering the maximum commitment term of seven years. As outlined extensively above—and without repeating it here—the record is replete with information supporting a decision to impose a lengthy NGI commitment in Balke’s case. In particular, we note that both the clinical evaluation and the predisposition investigation report mentioned Balke’s extensive criminal history—by age 29—from which it was reasonable to infer that most of those charges were tied to Balke’s mental health struggles. Everyone involved in the case—including Balke’s own family and his attorney—recognized that Balke has severe and persistent mental illnesses, and he has had limited success receiving and maintaining his required treatment while living in the community.

¶35 Moreover, we believe the circuit court did sufficiently explain its reasoning. Contrary to Balke’s contention, we see no reason why we cannot rely on the court’s overall statements regarding the need for institutional commitment—not just those comments the court expressly made in relation to the commitment’s length—while assessing its discretionary decision regarding that length. This view is consistent with our earlier determination that the same factors a court may consider in deciding to order institutional commitment apply to its determination of the length of a commitment. *See supra* ¶26. Under this view of

the record, we reject Balke’s assertion that “the circuit court failed to properly link the need for the maximum term to any of the specifics of Mr. Balke’s case.”

¶36 To summarize, the circuit court observed that Balke had a long history of violence and instability stemming from his persistent and pervasive mental illnesses, and this history continued even with the benefit of the medications he was currently prescribed. The court noted that, due to Balke’s mental illnesses, he was very dangerous to both himself and others. Furthermore, the court observed that, over the years, Balke’s treatment regimen had been repeatedly unsuccessful in community and inpatient settings, often due to Balke’s failure to comply. It was under these circumstances in which the court determined that the maximum possible seven-year term of commitment to institutional care was necessary to ensure Balke received the treatment he needed and to protect society. Still, the court expressly noted that Balke would be able to petition for conditional release from the institution or discharge from the commitment entirely if his mental state stabilized.

¶37 We also reject Balke’s contentions that “the circuit court expressed a general policy of allowing for the maximum term of commitment allowed under the law” and that “the court seemingly applied a generic rule or preference for the maximum term of commitment.” While perhaps more explanation could have helped, it is apparent the court simply believed, given all the information before it, that until Balke receives the much-needed treatment identified in the record, Balke will remain at a significant risk of harm to himself or others if placed back in the community. *See* WIS. STAT. § 971.17(3)(a). That conclusion is amply supported by the record.

¶38 Finally, we decline both Balke’s contention that the circuit court erred by failing to consider any mandatory factors and his related request that we articulate “mandatory considerations for the length of an NGI commitment.” In particular, we reject any suggestion that the **Gallion** analysis—i.e., that the sentence imposed by a court must be the minimum amount of confinement consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant, **Gallion**, 270 Wis. 2d 535, ¶44—*necessarily* applies in this setting and that it must strictly be followed.⁷ A particular court may wish to consider those factors, which it may do within the exercise of its discretion. We merely conclude that unlike in the sentencing context, a court committing an NGI defendant is not required to conduct a complete **Gallion** analysis. See *id.*, ¶¶39-46.

¶39 In so concluding, we are mindful that an NGI commitment is not a criminal sentence and that the NGI procedure is neither wholly civil nor wholly criminal. See **Fugere**, 386 Wis. 2d 76, ¶29; **State v. Brenizer**, No. 2015AP2181, unpublished slip op., ¶¶29-30 (WI App June 6, 2017).⁸ To be sure, there is some overlap between the factors considered in both settings when determining both the location and the length of sentences and commitments. Still, they are, and should

⁷ In his reply brief, Balke asserts that the State “concedes ... that courts should consider the **Gallion** factors,” even though the State “bases its concession on the language of WIS. STAT. § 971.17(3)(a).” (Footnote omitted.) While the State conceded that § 971.17(3)(a), by including the phrase “without limitation because of enumeration,” signals the legislature’s intent to “allow[] a court imposing a term of commitment to consider any other factors it found appropriate, including the regular sentencing factors,” that is the extent of the State’s concession. (Emphasis added.) The State did not concede that courts “should” consider, much less “must” consider, the **Gallion** factors.

⁸ An unpublished opinion that is authored by a member of a three-judge panel and issued on or after July 1, 2009, may be cited for its persuasive value. See WIS. STAT. RULE 809.23(3)(b).

be, very different outcomes. The purposes of a criminal sentence include “protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” **Gallion**, 270 Wis.2d 535, ¶40. The purposes of an NGI commitment are “to treat the NGI acquittee’s mental illness and to protect the acquittee and society from the acquittee’s potential dangerousness” due to that mental illness. **State v. Szulczewski**, 216 Wis. 2d 495, 504, 574 N.W.2d 660 (1998). Unlike criminal sentences, NGI commitments are not intended to be punishments. **Fugere**, 386 Wis. 2d 76, ¶39. It is for at least this reason that we are not swayed by Balke’s statement that the circuit court erred because, absent him being an NGI acquittee, the underlying charges would have “rarely warrant[ed]” “a seven[-]year total sentence.” That calculus simply is not the standard for determining the proper length of an NGI commitment.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

