OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

February 15, 2023

To:

Hon. Laura F. Lau
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Craig M. Kuhary
Electronic Notice

Sara Lynn Shaeffer
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP452-CR State of Wisconsin v. Marshall P. Manner (L.C. #2019CF590)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Marshall P. Manner appeals from a judgment of conviction for one count of aggravated battery (domestic abuse, with intent to cause bodily harm) and one count of misdemeanor battery (domestic abuse) and from an order denying his motion for postconviction relief. He argues that the circuit court erred in his sentencing by failing to consider probation as a first alternative, by rejecting the recommendations of his psychotherapist, and by not linking his sentence to the sentencing goals. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1]

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

We conclude that the circuit court properly exercised its discretion in sentencing Manner, and we affirm.

Manner pled guilty to charges of aggravated battery (a felony) and misdemeanor battery stemming from incidents in late 2018 and early 2019 during which he abused his then-girlfriend. Pursuant to his agreement with the State, additional charges of sexual assault and stalking (both involving the same victim) were dismissed and read in, as was an uncharged offense of felony bail jumping.

At sentencing, both the victim and one of Manner's five ex-wives testified about the violent physical and emotional abuse they suffered at Manner's hands and the consequences this abuse had on their lives. The State submitted a presentence investigation report (PSI) which indicated that three of Manner's ex-wives alleged that he had abused them physically and otherwise. A fourth had signed a nondisclosure agreement regarding past incidents of domestic abuse in exchange for Manner's surrender of his parental rights. The State argued that a person with Manner's character "would not do well on probation … and does not deserve that benefit" and that the victim "deserves to be protected from [Manner's] abuse with a prison sentence."

Manner argued that his crimes did not justify a prison sentence and requested probation. His own testimony included statements that he "always had to have just that one more" drink and that on the evening the victim described he "remember[ed] having one more drink at home after [they] had been out" and didn't remember anything further. He also offered an independently prepared PSI and a psychological evaluation prepared by Dr. Sheryl Dolezal, in which she opined that Manner had a "moderate" alcohol use disorder as well as some mental health issues and that "treatment" should be "the goal and focus for him." To the extent the court believed

punishment aside from "a lengthy course of supervision" was warranted, Dolezal recommended consideration of "incarceration with Huber privileges."

The circuit court ultimately sentenced Manner to two years of initial confinement with three years of extended supervision for the aggravated battery and a concurrent sentence of nine months for the misdemeanor battery. The court summarized some of Manner's "dangerous and traumatic" behavior that had left "victims in [his] wake," noting that three of Manner's five ex-wives had sought restraining orders against him. Further noting that while this case was pending, Manner went on an online dating site and began an intimate relationship with yet another woman, the court said that "anyone who enters into an intimate relationship with [Manner] is someone I would be concerned about their safety." The court said that it agreed with much of what was in Dolezal's evaluation, but that it was "absolutely ridiculous" for Dolezal to make a sentencing recommendation because she was in no position to do so. After all of this discussion (spanning about eight pages of transcript), and just before pronouncing Manner's sentence, the court said:

> At this point we are looking at the protection of the public, not depreciating the seriousness of what you have done, and there is not one chance that I would not send you to prison. There is no chance. So this would never be a probation only. That would absolutely depreciate the seriousness of what has taken place here.

Manner filed a motion for postconviction relief, which the circuit court denied.[2] In that motion, he argued that the court did not consider probation as a first alternative as required by Wisconsin law, *see* ***State v. Gallion***, 2004 WI 42, ¶25, 270 Wis. 2d 535, 678 N.W.2d 197, that the court erred by rejecting Dolezal's report and recommendation, and that the court failed to "link" the sentence to the goal of rehabilitating the defendant. He renews all three arguments on appeal.

We review a sentencing decision under the erroneous exercise of discretion standard. ***Gallion***, 270 Wis. 2d 535, ¶17. A circuit court is obligated to consider the three required "***Gallion*** factors"—the need for public protection, the gravity of the offense, and the defendant's rehabilitative needs—before imposing a sentence that reflects the minimum amount of custody or confinement consistent with those factors. ***Id.***, ¶23; ***State v. Bolstad***, 2021 WI App 81, ¶14, 399 Wis. 2d 815, 967 N.W.2d 164; *see also* WIS. STAT. § 973.017(2). The court must explain how the "particular component parts of the sentence imposed advance the specified objectives." ***Gallion***, 270 Wis. 2d 535, ¶42. The amount of explanation necessary to show a "'rational and explainable basis' for the sentence" will vary. ***Id.***, ¶39 (quoting ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971)). To successfully challenge a sentence, a defendant must establish the circuit court's erroneous exercise of discretion by clear and convincing evidence. ***State v. Harris***, 2010 WI 79, ¶¶30, 34, 326 Wis. 2d 685, 786 N.W.2d 409. This court's task is to

[2] The circuit court held that it had:

> addressed the relevant ***Gallion*** factors and went into detail at the sentencing hearing. The Transcript sets forth the court's rationale in detail. The defendant has failed to sustain the burden of proof necessary for his motion, therefore, the motion is denied.

start with the presumption that the circuit court acted reasonably. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). Then we must "closely scrutinize the record to ensure that discretion was in fact exercised"—that the circuit court did actually consider each of the required ***Gallion*** factors—"and [that] the basis of that exercise of discretion [is] [adequately] set forth." ***Bolstad***, 399 Wis. 2d 815, ¶16 (second alteration in original) (quoting ***Gallion***, 270 Wis. 2d 535, ¶4).

Manner's first argument is that the circuit court did not consider probation for him, and that this violates both ***Gallion*** and ***Bolstad***. *See* ***Gallion***, 270 Wis. 2d 535, ¶44 ("Probation should be the disposition unless: confinement is necessary to protect the public, the offender needs correctional treatment available only in confinement, or it would unduly depreciate the seriousness of the offense."). He contends that the court's statements that "[t]here's not one chance that I would not send you to prison" and "this would never be probation only" show "that the court had already made up its mind that he would be sentenced to prison." Manner asserts that these statements were made "from the outset" and that "[t]he remainder of the trial court's sentencing was an attempt to justify its decision to sentence Mr. Manner to prison." That is not so. As described above, the record shows that these statements were made after the court heard testimony from all of the witnesses and attorney argument from both sides and after it had discussed its conclusions drawn from that testimony and argument, as well as from the two PSIs and Dolezal's report.

The record shows that the circuit court did consider all of the ***Gallion*** factors before deciding that probation was not appropriate for Manner.[3] Clearly, protection of the public and the gravity of the offense were the factors of most concern to the court, which stated "we are looking at the protection of the public, not depreciating the seriousness of what you have done, and there is not one chance that I would not send you to prison." This statement followed a discussion on the need for public protection in which the court noted Manner's prior abuse of multiple ex-wives and girlfriends (stretching over decades) and his seeking out of another intimate partner online while this case was pending. The court communicated concern that "anyone who enters into an intimate relationship with [Manner] is someone I would be concerned about their safety."

Regarding the gravity of the offense, the other explicitly stated factor favoring prison rather than probation, the circuit court identified the crimes, mentioned many facts relating to the crimes, and referred multiple times to the trauma that Manner caused his victim. *Cf.* ***Bolstad***, 399 Wis. 2d 815, ¶25 (ordering resentencing because of the circuit court's failure to "identify [the] crime, mention any facts relating to [the] crime, or refer in any way to the … gravity of [the] criminal conduct"). Finally, the record shows that the court considered Manner's rehabilitative needs, stating on the record that it viewed his attempt to blame alcohol for his behavior with skepticism—a view bolstered by Manner's own expert's characterization of his

[3] It is best practice for circuit courts to state on the record that they considered a sentence of probation as the "first alternative" and why they rejected probation based on one or more of the three justifications set forth in ***Gallion***: protection of the public, correctional treatment only available in confinement, and whether probation would unduly depreciate the seriousness of the offense. But, as Manner acknowledges, "magic words" are neither required nor sufficient to justify a sentence, *see* ***State v. Gallion***, 2004 WI 42, ¶¶44, 49, 270 Wis. 2d 535, 678 N.W.2d 197, and our scrutiny of the record shows a "rational and explainable basis" for Manner's sentence vis-à-vis the ***Gallion*** factors, *see* ***id.***, ¶¶37-39 (quoting ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971)).

substance abuse issue as "moderate" rather than severe and her statement that Manner had "an unhealthy relationship with alcohol" rather than that he was an "alcoholic." "***Gallion*** did not change the principle that the [circuit] court has the discretion to emphasize any of the sentencing factors *as long as it considers all the [required] factors*." ***Bolstad***, 399 Wis. 2d 815, ¶34 (quoting ***State v. Odom***, 2006 WI App 145, ¶28, 294 Wis. 2d 844, 720 N.W.2d 695) (alterations in original). We conclude from this record that the court did consider each of the ***Gallion*** factors before properly exercising its discretion in determining that a less severe sentence of "probation only" would be inappropriate.

Next, Manner argues that the circuit court's "rejection of Dr. Dolezal's Report" was an erroneous exercise of discretion. He cites only ***Gallion*** for authority, which "encourage[s] judges to request more complete presentence reports." 270 Wis. 2d 535, ¶34. Manner asserts that the court rejected the "report and recommendations simply because Dr. Dolezal included in her report, a recommendation for sentencing in light of her psychological evaluation of Mr. Manner" and says this is inconsistent with ***Gallion***'s mandate to seek more complete information prior to sentencing a defendant.

We see no merit in Manner's argument. In fact, the record shows that the circuit court discussed Dolezal's report, agreed with much of it (Dolezal's conclusions that Manner had an "unstable sense of self" and view of himself "as vulnerable or a victim," for example), and even relied on some of it in the deliberations placed on the record (Dolezal's characterization of Manner's alcohol abuse issue as "moderate"). The court did reject Dolezal's sentencing recommendation, which it is free to do. *See, e.g.*, ***State v. Johnson***, 158 Wis. 2d 458, 465, 463 N.W.2d 352 (Ct. App. 1990) ("[Circuit courts] do not blindly accept or adopt sentencing recommendations from any particular source."), *abrogated on other grounds by* ***State v. Harbor***,

2011 WI 28, ¶¶47-48 & n.11, 333 Wis. 2d 53, 797 N.W.2d 828. To the extent Manner contends that the "rejection" of Dolezal's recommendation is more evidence that the court failed to consider probation as a first alternative, this court disagrees. We have already discussed the court's explanation on the record that we conclude is sufficient to justify the sentence of prison time rather than "probation only" in this case.

Finally, Manner argues that the circuit court erroneously exercised its discretion by failing to "link" Manner's sentence to the three primary sentencing goals. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶45-46 (requiring circuit courts to explain how component parts of a sentence relate to sentencing objectives). Again, we disagree. From the record, it is easy to discern that the need to protect the public and the need to acknowledge the seriousness of the crimes were the court's primary sentencing goals, which were linked to the sentence of prison time rather than "probation only." Contrary to Manner's assertion, the court never found that he was "in need of significant therapy"—it actually found that Manner was a serial domestic abuser who had "left victims in [his] wake" and that he was "using [alcohol abuse] as an excuse for [his] behavior." Rehabilitation of the defendant, as with the other ***Gallion*** factors, need only be addressed by the circuit court in its deliberations; it is not dispositive. The court explicitly stated that "protection of the public" and "not depreciating the seriousness of what [Manner] ha[s] done" were the reasons that "this would never be a probation only. That would absolutely depreciate the seriousness of what has taken place here." All three ***Gallion*** factors were considered by the circuit court. ***Gallion*** does not require more; it is obvious that prison provides more protection to Manner's victim and the public at large than probation and that prison underscores the gravity of the crimes more than probation.

For the foregoing reasons, we conclude that the circuit court properly exercised its discretion and that Manner is not entitled to resentencing.

IT IS ORDERED that the judgment and order of the circuit court are affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals