

was to be admitted to the hospital where she believed she would die. As a result, Cloia gave appellant her jewelry, bank books, certificates of deposits, and a disputed amount of cash.

{¶ 3} Cloia was admitted to the hospital, but survived the illness. Upon her return home, Cloia requested that appellant return her personal property and money that she had given him prior to her hospital stay. Appellant returned the jewelry and other items of personal property, but refused to return the money. The present dispute ensued.

{¶ 4} Cloia claimed that she was entitled to \$80,000 that she gave appellant prior to the hospital stay, as she only wanted him to hold onto the money for safekeeping while she was in the hospital. On the other hand, appellant claimed that Cloia wanted him to have that disputed sum of money and further alleged that she had given him only \$6,800 in cash.

{¶ 5} On October 1, 2012, Cloia sent a demand letter to appellant requesting that he return the disputed sum of money and also alleged additional damages. On October 9, 2012, appellant filed a lawsuit against Cloia asserting various claims, including allegations of unjust enrichment for money spent on renovations to Cloia's home. Cloia answered and filed a counterclaim. Prior to trial, Cloia passed away and her executor was substituted as a party defendant.

{¶ 6} The case was subsequently tried to the bench. At trial, appellant was the first and only witness to testify during his case-in-chief. Appellant acknowledged that Cloia had given him a large stack of envelopes containing \$6,800 in cash prior to her admission to the hospital. However, appellant alleged that the money was given to him as a gift. Furthermore, appellant claimed that all of the money that Cloia had given him was used on home renovations approved by her or used on expenses incurred by her during her lifetime.

{¶ 7} Thereafter, appellant rested and the estate presented the testimony of Cloia's daughters: Annette Morris, Elaine Symonds, and Geraldine Jones.

{¶ 8} Morris testified that she was involved in Cloia's financial affairs during her

mother's advanced years. Over appellant's objection, Morris also testified that Cloia told her that she had given appellant \$80,000 prior to her admission to the hospital and appellant refused to return that money when she was discharged.

{¶ 9} Symonds stated that she had financial power of attorney over Cloia's affairs from January 2013 until her mother's death. Symonds testified about some details regarding Cloia's personal finances, including past inheritances, CD accounts, and interest income that she received from individuals. Symonds further explained that Cloia asked her to help draft a letter addressed to appellant regarding the disputed sum of money, as well as a request for other damages. The letter, which was entered into the record stated, in pertinent part:

You were to have paid the amount of \$75,000.00 USD to me on May 31, 2011 and this Debt remains outstanding despite my requests for payment. The Debt relates to: During the month of May 2011, I (your Mother) had in trusted [sic] you with my cash and my jewelry while I was admitted into the hospital. Upon my return from the hospital, the jewelry was returned, but the money was not. When asked about returning the money, your response was that you put it into a college fund for your children * * *. This was not acceptable, and you were asked again several times to return the money, however, I was given excuse after excuse as to why you would not.

{¶ 10} Jones testified that she is the executor of Cloia's estate and also served as a caregiver to Cloia during her lifetime. During her testimony, Jones authenticated a handwritten note, authored by Cloia, which stated that appellant had taken \$80,000 and refused to pay her back after she had returned home from the hospital.

{¶ 11} After concluding, the trial court denied appellant's request for damages related to his complaint. With respect to the estate's counterclaim, the trial court found appellant liable for failing to return the disputed sum of money to Cloia and ordered damages in the amount of \$80,000. Appellant now appeals the decision of the trial court, raising three assignments of error for review. For ease of discussion, we will address appellant's assignments of error out of order.

{¶ 12} Assignment of Error No. 1:

{¶ 13} THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF BY PERMITTING HEARSAY TESTIMONY AND EVIDENCE DESPITE OHIO RULE OF EVIDENCE 804(B)(5).

{¶ 14} In his first assignment of error, appellant contends the trial court should have excluded certain out-of-court statements made by Cloia. In particular, appellant claims the trial court erred by admitting Cloia's handwritten note, which stated that appellant had taken \$80,000 from her. Appellant also argues the trial court erred by permitting testimony offered by Cloia's daughter, Morris, who testified that Cloia said she gave appellant \$80,000 to hold for safekeeping while she was in the hospital. In pertinent part:

COUNSEL: * * * At the hospital or after [Cloia] was in the hospital in February of 2011, did you have an occasion to have a conversation with your mother about the money that was at the house, and what happened to the money in the house?

MORRIS: Yes, we had a conversation.

* * *

MORRIS: [Cloia] told me that prior to going to the hospital she gave [appellant] the money that she had in her purse, because she didn't want to take it to the hospital. And then when she got back she asked for the money back, and [appellant] would not give it to her.

* * *

MORRIS: Well, she had called me up on her phone and * * * she told me she had something to tell me. And I said, "What?" And she said, "Well, you're going to be mad at me." I said, "What's going on?" And she then proceeded to tell me that prior to going to the hospital she gave [appellant] this cash money for him to hold while she was at the hospital. Then when she got back from the hospital she asked him for the money, and he wouldn't give it back to her.

* * *

COUNSEL: Okay. Did you have later conversations with [Cloia]

as to the amount of the money?

MORRIS: [Cloia] had told me it was 80 grand is what she told me.

{¶ 15} The admission or exclusion of relevant evidence rests within the discretion of the trial court. *Ohmer v. Renn-Ohmer*, 12th Dist. Butler No. CA2012-02-020, 2013-Ohio-330, ¶ 17. An appellate court will not disturb a decision of the trial court to admit or exclude evidence absent a clear and prejudicial abuse of discretion. *League v. Collins*, 12th Dist. Butler No. CA2013-03-041, 2013-Ohio-3857, ¶ 8. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Hornsby v. Gosser*, 12th Dist. Warren No. CA2013-12-134, 2015-Ohio-162, ¶ 8.

{¶ 16} Generally, out-of-court statements offered to prove the truth of the matter asserted are inadmissible hearsay. Evid.R. 801(C). However, Evid.R. 804(B)(5) is an exception to the hearsay rule which exists for the benefit of the executor or other personal representative of a decedent's estate whereby the decedent is permitted to "speak from the grave" in order to rebut the testimony of a living party who may testify under Evid.R. 601. *Monk v. Monk*, 12th Dist. Clermont No. CA97-04-039, 1997 WL 700061, *4 (Nov. 10, 1997); *Knowlton v. Schultz*, 1st Dist. Hamilton No. C-080016, 2008-Ohio-5984, ¶ 40. To qualify for admission under Evid.R. 804(B)(5):

(5) *Statement by a deceased or incompetent person.* The statement was made by a decedent or a mentally incompetent person, where (a) the estate or personal representative of the decedent's estate, or the guardian or trustee of the incompetent person is a party, and (b) the statement was made before the death or the development of the incompetency, and (c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

{¶ 17} Appellant claims that both the handwritten note and Morris' testimony do not meet the hearsay exception contained under Evid.R. 804(B)(5) because the testimony did not

rebut any prior testimony as required by the rule. In so doing, appellant admits that he testified that Cloia gave him money prior to admission to the hospital, as a gift, and in the much lesser amount of \$6,800. However, appellant attempts to distinguish that testimony based on the procedural posture of the case. Appellant argues that his prior testimony as to the amount of money involved related only to the claim contained in his complaint and not in regard to the estate's counterclaim. Therefore, appellant continues, the handwritten note and Morris' testimony offered during the trial of the estate's counterclaim could not be rebuttal of the testimony offered in his case-in-chief as required by Evid.R. 804(B)(5).

{¶ 18} After review, we find the trial court did not err in admitting Morris' testimony or Cloia's handwritten note prior to her death, as both meet requirements under Evid.R. 804(B)(5) as a hearsay exception. Cloia's statement to Morris and the handwritten note were both made before her death and offered to rebut appellant's prior testimony regarding the purpose and amount of money that Cloia had given him before her admission to the hospital. Consequently, the estate could introduce the statement and the handwritten note into evidence to rebut appellant's testimony as to the amount of money involved.

{¶ 19} Appellant's argument, which focused on the trial procedure of claims and counterclaims, is without merit, as the trial court has discretion over the mode and order of the presentation of evidence. See Evid.R. 611. Appellant's testimony regarding the amount of money that Cloia gave him and her stated reasons for doing so was relevant to both his complaint and the estate's counterclaim. Accordingly, we find the trial court did not err in admitting Morris' testimony or decedent's handwritten note, as both were admissible under Evid.R. 804(B)(5) as a prior statement by a deceased person used to rebut prior testimony. Appellant's first assignment of error is overruled.

{¶ 20} Assignment of Error No. 3:

{¶ 21} THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF BY

PERMITTING HEARSAY TESTIMONY BY DETERMINING THAT SUCH TESTIMONY WAS ADMISSIBLE PURSUANT TO EVIDENCE RULE 803(3).

{¶ 22} In his third assignment of error, appellant separately argues that the trial court erred by permitting Morris to testify as to statements made by Cloia based on the hearsay exception contained in Evid.R. 803(3). However, as noted above, the statements were admissible under Evid.R. 804(B)(5) as set forth in our resolution of appellant's first assignment of error. Therefore, Morris' testimony was admissible. Accordingly, we find appellant's third assignment of error is without merit.

{¶ 23} Assignment of Error No. 2:

{¶ 24} THE JUDGMENT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 25} In his second assignment of error, appellant claims the trial court's decision was against the manifest weight of the evidence.

{¶ 26} When evaluating whether a judgment is against the manifest weight of the evidence in a civil case, the standard of review is the same as in the criminal context. *Jones v. Holmes*, 12th Dist. Butler No. CA2012-07-133, 2013-Ohio-448, ¶ 24, citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 17. As such, we weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the finder of fact "clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered." *Eastley* at ¶ 20, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶ 27} If the evidence presented to the trial court is susceptible to more than one interpretation, we are bound to give it the construction that is consistent with the trial court's judgment and finding of facts. *Holmes* at ¶ 24. A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses

and the evidence submitted before the trial court. *Miami Poplar Rentals, L.L.C. v. Hudoba*, 12th Dist. Butler No. CA2013-06-094, 2014-Ohio-1323, ¶ 14. The underlying rationale of this deferential standard rests with the understanding that "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Mike Castrucci Ford Sales, Inc. v. Hoover*, 12th Dist. Clermont No. CA2007-02-022, 2008-Ohio-1358, at ¶ 19.

{¶ 28} On appeal, appellant raises several issues with respect to the trial court's decision. First, appellant makes several arguments related to allegedly inconsistent or imprecise testimony offered by the estate. For example, appellant argues that none of the witnesses knew that Cloia maintained that large of an amount of money at her house and the executor did not fully investigate how Cloia came into possession of such a large sum of money. In addition, appellant argues that other people had access to Cloia's home and could have stolen the money. Next, appellant raises several arguments with respect to the trial court's award of \$80,000. In so doing, appellant notes that Cloia's original counterclaim demanded only \$75,000 in damages for the failure to return the disputed amount of cash instead of \$80,000 that the trial court awarded. Appellant contends that the additional \$5,000 is not recoverable because Cloia was attempting to revoke an unrelated prior gift. As support, appellant points to testimony provided by Symonds and Jones stating that Cloia was seeking the return of the \$75,000, as well as a return of a prior gift or car loan totaling \$5,000 for a grand total of \$80,000.

{¶ 29} Based on our review of the record, we find there is competent, credible evidence to support the trial court's factual findings and its decision was not against the manifest weight of the evidence. The estate presented testimony from Cloia's three daughters who testified as to Cloia's prior statements regarding appellant's failure to return money that she gave to appellant prior to her admission to the hospital. Although appellant's

daughters acknowledged that they were surprised that Cloia would keep such a large amount of money in her bedroom, none of them disputed or questioned Cloia's veracity with respect to those statements. Cloia's ability to amass large amounts of money was corroborated by Symonds who testified about some of Cloia's financial dealings and inheritances and also provided evidence that Cloia had been receiving a steady stream of interest income from various investments and interest in loan proceeds. Finally, the trial court also found Cloia's handwritten note to be credible. The handwritten note specified that appellant owed Cloia \$80,000 and he refused to return it when she came back from the hospital. While appellant denied the facts underlying Cloia's claim, and also disputes the amount that Cloia gave him, the trial court, as the trier of fact, was in the best position to weigh the credibility of the witnesses and resolve conflicts in the evidence.

{¶ 30} Furthermore, we also note that the trial court's award of \$80,000, as opposed to \$75,000, was supported by the weight of the evidence. Although there was conflicting testimony with respect to whether Cloia's request for \$80,000 also included a \$5,000 gift, which would not be recoverable in damages, we find there is evidence sufficient to support the award of \$80,000. Here, Cloia's handwritten note indicated that she gave appellant \$80,000 without mention of an alleged \$5,000 gift included in that amount. In addition, Morris testified that Cloia told her that appellant would not return the money to her and specifically stated "she had told me it was 80 grand is what she told me." Therefore, finding the evidence susceptible to more than one interpretation, we are bound to give it the reasonable construction consistent with the trial court's finding. Accordingly, the trial court's judgment of \$80,000 based on appellant's failure to return that sum to Cloia after she entrusted that amount to him prior to her admission to the hospital is not against the weight of the evidence. Appellant's second assignment of error is without merit.

{¶ 31} Judgment affirmed.

PIPER, P.J., and HENDRICKSON, J., concur.