

I. BACKGROUND

1
2 Norse, a vociferous advocate for the homeless and a frequent attendee and speaker at City of
3 Santa Cruz City Council meetings, brought claims against the City of Santa Cruz, former Mayors
4 Christopher Krohn and Scott Kennedy (now deceased and dropped from the case) and former
5 Councilmember Tim Fitzmaurice (collectively "Santa Cruz"). Norse asserts that defendants
6 violated his First and Fourth Amendment rights during incidents at Santa Cruz City Council
7 meetings on March 12, 2002 and January 13, 2004.

8 At the March 12, 2002 meeting, Mayor Krohn closed the public comment period after thirty
9 minutes. A boisterous individual then made some sort of protesting comments and Mayor Krohn
10 asked him to leave. As the man left, he apparently yelled some sort of threat. An additional speaker
11 then attempted to speak and Mayor Krohn asked her to sit down without speaking because the
12 public comment period had ended. Although she protested not having her chance to speak, she
13 eventually gave up after the mayor said that she would have to leave the meeting if she did not step
14 away from the microphone. As she returned to her seat, Norse gave the council a "Nazi salute" in
15 protest of the mayor's refusal to hear from the final speaker. Krohn did not notice the salute when it
16 occurred and kept reading from his notes. After a few moments, Councilmember Fitzmaurice
17 interrupted Krohn for a point of order, was recognized, and notified the mayor of Norse's action. As
18 Fitzmaurice was trying to make his point of order, Norse interrupted him multiple times. Krohn
19 then asked Norse to leave. When he refused to leave, Krohn called a recess during which a police
20 officer arrested Norse who continued to refuse to leave the council chambers.

21 At the January 13, 2004 meeting, Norse entered the meeting with a group of protesters
22 carrying signs. Although Norse was not carrying a sign, he joined the other protesters in marching
23 around the city council chamber. Mayor Kennedy asked the protesters to stop marching so that they
24 would not block the views of the other members of the public and told them that this was their first
25 warning. Sometime later during the meeting, Kennedy told Norse that he was giving him his second
26 warning for whispering during the meeting. Norse challenged this asking what his first warning
27 was. The Mayor then said that was his third warning and asked him to leave. Norse left, but later
28 returned to participate in oral communications. When Norse returned to the meeting, the Mayor

1 reminded everyone of the rules of decorum that govern the council meetings and then asked Norse
2 to leave after reminding him of his previous warnings and the previous request for him to leave.
3 When Norse refused, the Mayor recessed the meeting and Norse was arrested.

4 Norse filed a complaint against the City of Santa Cruz, Krohn, Fitzmaurice and Kennedy for
5 violations of his First and Fourth Amendment rights. On November 7, 2012, a jury found for the
6 defendants. The jury found no First or Fourth Amendment violations by any of the defendants at
7 either council meeting. Norse now moves for a new trial arguing that the jury's verdict was contrary
8 to the clear weight of the evidence.

9 II. ANALYSIS

10 Norse argues for a new trial under Rule 59. Rule 59(a) does not specify the grounds on
11 which a new trial may be granted. Rather, it provides that a new trial may be granted "for any
12 reason for which a new trial has heretofore been granted in an action at law in federal court."
13 Fed.R.Civ.P. 59(a)(1)(a). Courts have traditionally granted new trials where "the verdict is against
14 the weight of the evidence." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). In
15 evaluating this standard, the court has a duty to weigh the evidence, "and to set aside the verdict of
16 the jury, even though supported by substantial evidence, where, in [the court's] conscientious
17 opinion, the verdict is contrary to the clear weight of the evidence." *Molski v. M.J. Cable, Inc.*, 481
18 F.3d 724, 729 (9th Cir. 2007) (modification in original) (quoting *Murphy v. City of Long Beach*, 914
19 F.2d 183, 187 (9th Cir.1990)). A motion for new trial, however, should not be granted "simply
20 because the court would have arrived at a different verdict." *Pavao v. Pagay*, 307 F.3d 915, 918
21 (9th Cir. 2002).

22 A. The March 12, 2002 Incident

23 Norse argues that his Nazi salute did not disturb the March 12, 2002 meeting and thus
24 defendants did not have probable cause to arrest him. Although he provides little exposition, Norse
25 extensively cites to trial record evidence that supports his argument that he did not disturb the
26 meeting. Pl.'s Br. 1-5. To rebut this evidence, Santa Cruz directs the court to its closing arguments.
27 The crux of the parties' dispute is whether Norse's actions were disruptive. Norse argues that he was
28 ordered to leave the meeting for his short, silent Nazi salute. Santa Cruz argues that the disruption

1 was not only the Nazi salute, but also his approaching the podium and arguing with Fitzmaurice
2 while Fitzmaurice was trying to make his point of order.

3 The court agrees with Norse that the Nazi salute alone did not cause a disruption and that a
4 conclusion that it did would be contrary to the clear weight of evidence. Other than Fitzmaurice, no
5 one seemed to notice the salute and the salute itself did not disturb Krohn who was looking at his
6 notes until Fitzmaurice raised his point of order. However, Norse was not ordered to leave the
7 meeting until he interrupted Fitzmaurice multiple times while Fitzmaurice was trying to make his
8 point of order. This was a more serious interruption. The mayor had recognized Fitzmaurice and
9 thus Fitzmaurice was the only person who was supposed to be speaking. Norse was speaking out of
10 turn and his interruptions required Fitzmaurice to repeat himself. These interruptions combined
11 with the Nazi salute provide enough evidence supporting the jury's verdict that the court cannot find
12 the verdict was contrary to the clear weight of evidence.

13 **B. The January 13, 2004 Incident**

14 The jury's finding of no liability in favor of the defendants for the January 13, 2004 incident
15 was not contrary to the clear weight of evidence. Norse engaged in a protest staged during a city
16 council meeting, which involved walking between the audience and the council members. This
17 conduct alone was disruptive. Although the parties disagree about how disruptive Norse's
18 whispering and subsequent challenge to the mayor's warnings were, a jury could reasonably have
19 found he caused a disruption. Given that his actions interrupted normal council business, the court
20 finds that the jury's verdict was not contrary to the clear weight of the evidence.

21 **C. Other Arguments for New Trial**

22 Norse makes a number of other arguments about First Amendment standards, probable
23 cause, municipal liability, and the meaning of "committed in the presence" under California Penal
24 Code section 837. The court does not find that any of these arguments support a new trial.

25 **III. QUALIFIED IMMUNITY**

26 Defendants made a motion for judgment as a matter of law at the close of Norse's case on
27 the basis that the mayors' decisions to order Norse to leave the meetings were reasonable and,
28 therefore, the mayors are entitled to qualified immunity. The court deferred ruling on the motion

1 pending the jury's verdict. Since the jury found in favor of the defendants, the motion was mooted
2 and not ruled upon. Now, however, the defendants have renewed their motion in their opposition to
3 plaintiff's motion for new trial presumably to support a defense verdict even if the court were to
4 determine that plaintiff's constitutional rights were violated.

5 If Krohn or Kennedy violated Norse's constitutional rights by expelling him from a council
6 meeting, Santa Cruz submits that they are nevertheless entitled to the defense of qualified immunity
7 because their action resulted from a reasonable mistake as to what the law allowed under the
8 circumstances presented. *See Saucier v. Katz*, 533 U.S. 194, 205 (2001). Defendants submit that a
9 reasonable mayor could have believed that his conduct was within the guidance of *White v. City of*
10 *Norwalk*, 900 F.2d 1421 (9th Cir. 1990) and *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266
11 (9th Cir. 1995), the two leading cases at the time dealing with conduct at city council or board
12 meetings. *White* points out

13 [T]he nature of a Council meeting means that a speaker can become
14 "disruptive" in ways that would not meet the test of actual breach of the
15 peace, or of "fighting words" likely to provoke immediate combat. A
16 speaker may disrupt a Council meeting by speaking too long, by being
17 unduly repetitious, or by extended discussion of irrelevancies. The
meeting is disrupted because the Council is prevented from accomplishing
its business in a reasonably efficient manner. Indeed, such conduct may
interfere with the rights of other speakers.

18 *White*, 900 F.2d at 1425-26 (internal citations omitted). As *White* also points out, "[t]he role of a
19 moderator involves a great deal of discretion." *Id.* at 1426. *Kindt* affirms that the entity has a great
20 deal of discretion. *Kindt*, 67 F.3d at 272.

21 The court concludes that if Krohn or Kennedy violated Norse's constitution rights by
22 expelling him, their mistake was reasonable and they are entitled to qualified immunity. At the
23 March 12, 2002 meeting, Mayor Krohn had just dealt with two citizens who objected to his cut-off
24 of the public comment period, he had an upset councilmember who was raising an issue concerning
25 Norse's "Nazi salute" and he had Norse coming to the podium to argue with the point of order the
26 councilmember was raising. Under these circumstances, a reasonable mayor could have concluded
27 that it was within his authority to expel Norse.
28

1 At the January 13, 2004 meeting, Mayor Kennedy was dealing with protesters, including
2 Norse, who were walking around a meeting and impairing the audience's view of the council. The
3 parading around clearly could have been viewed by a reasonable mayor as disruptive. A reasonable
4 mayor could also view Norse's challenge to Mayor Kennedy's instruction that Norse take his
5 conversation outside and his questioning of Kennedy's warnings as further disruption.

6 **IV. ORDER**

7 The court DENIES Norse's motion for a new trial.

8
9
10 Dated: June 13, 2013



11 Ronald M. Whyte

12 United States District Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28