FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JULIO CESAR GOMEZ, *Defendant-Appellant.*	No. 19-50313 D.C. No. 2:16-cr-00401-ODW-1 OPINION

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued and Submitted April 16, 2021
Pasadena, California

Filed July 28, 2021

Before: Milan D. Smith, Jr. and Sandra S. Ikuta, Circuit Judges, and John E. Steele,[*] District Judge.

Opinion by Judge Ikuta;
Dissent by Judge Steele

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[*] The Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

SUMMARY[**]

Criminal Law

The panel affirmed Julio Cesar Gomez's convictions and sentence for conspiracy with intent to distribute at least 50 grams of methamphetamine, distribution of methamphetamine, and being a felon in possession of a firearm.

The panel held that because Gomez clearly indicated that he would present an entrapment defense at trial, the district court did not err by allowing the government to preemptively rebut that defense by presenting predisposition evidence in its case in chief.

The panel held that the district court did not abuse its discretion in allowing the government to present gang-affiliation evidence. The panel explained that the evidence presented by the government, which showed Gomez's predisposition to commit drug offenses and to possess and use firearms, was permissible under Fed. R. Evid. 405(a) as evidence about Gomez's reputation and character. The panel noted that the gang-affiliation witnesses did not identify any specific prior crimes or bad acts of Gomez to show that Gomez had a propensity to commit similar bad acts. The panel rejected Gomez's argument that the evidence was unfairly prejudicial.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Assuming without deciding that the district court erred by allowing Gomez's parole officer to testify that Gomez had been convicted of a carjacking offense, the panel held that any error was harmless because the evidence against Gomez was overwhelming.

The panel held that the district court did not clearly err in applying a two-level enhancement under U.S.S.G. § 2D1.1(b)(1) for possession of a firearm during a drug-trafficking offense, where the sale of the firearm and methamphetamine were bundled together.

Dissenting, District Judge Steele wrote that the trial court committed reversible error by allowing the government to present evidence to the jury in its case-in-chief to "rebut" an anticipated entrapment defense which was never presented by the defendant. He wrote that given the overwhelmingly prejudicial nature of the evidence, the harmless error doctrine cannot save the government's convictions, and he would therefore reverse the convictions and remand for a new trial.

COUNSEL

Todd W. Burns (argued), Burns & Cohan, San Diego, California, for Defendant-Appellant.

Julius J. Nam (argued), Sonah Lee, and Sean D. Peterson, Assistant United States Attorneys; L. Ashley Aull, Chief, Criminal Appeals Section; Nicola T. Hanna, United States Attorney; United States Attorney's Office, Riverside, California; for Plaintiff-Appellee.

OPINION

IKUTA, Circuit Judge:

Julio Cesar Gomez appeals his convictions and subsequent sentence for conspiracy with intent to distribute at least 50 grams of methamphetamine, distribution of methamphetamine, and being a felon in possession of a firearm. We hold that the district court did not err by allowing the government to rebut Gomez's entrapment defense in its case in chief, or by allowing the government to introduce evidence of Gomez's affiliation with gangs to rebut that defense. Any error in allowing Gomez's parole officer to testify was harmless. Finally, the district court did not err by applying a two-level sentence enhancement for possession of a firearm during a drug-trafficking offense. We therefore affirm Gomez's conviction and sentence.

I

A

Gomez was indicted for various offenses relating to the sale of methamphetamine and firearms, and possessing firearms after being convicted of a felony. According to the evidence adduced at trial, on January 7, 2016, Gomez and his co-conspirator, Angel Carmona, met with two confidential informants, Lopez (CI-5) and Gabe (CI-489), in Cathedral City, California. The informants wore concealed recording devices during the meeting, and they recorded Gomez and Carmona agreeing to sell them methamphetamine the following week. At the meeting, Gomez stated that Steven Andrew Gonzalez, a co-defendant, might also be able to sell a firearm to Gabe.

A week later, on January 14, 2016, Gomez, Carmona, and Gonzalez met Lopez and Gabe at a residence in Indio, California. Law enforcement tracked the participants in the meeting using a GPS device installed in the informants' vehicle, and the informants again secretly recorded the meeting. During the meeting, Lopez and Gabe purchased a quarter-pound of methamphetamine from Gomez, Carmona, and Gonzales. Lopez also purchased a firearm from Carmona.

After the January 14 meeting, Gomez and Gabe communicated through text messages to negotiate the sale of an additional half-pound of methamphetamine and firearms to Gabe. Gomez asked Gabe if he wanted a pound of methamphetamine rather than the half-pound they had previously discussed, but Gabe said that he did not have the money for the additional half-pound.

On February 17, 2016, Gomez met Gabe at a rest stop near Palm Springs, California. Gabe secretly recorded this meeting, and it was observed by law enforcement. Gomez and Gabe negotiated the quantity and price of the methamphetamine, as well as the price of the firearm. Gomez then sold Gabe a Smith & Wesson rifle and 222.9 grams (approximately a half-pound) of methamphetamine. In response to Gabe's question about how much a pound would cost, Gomez told him "three flat," meaning $3,000.

On June 16, 2016, officers from multiple law-enforcement agencies executed a search warrant at the residence of Gomez's girlfriend. The officers found Gomez in a bedroom and arrested him. The officers also found a loaded Smith & Wesson pistol, a box with 38 rounds of

ammunition, and 3.23 grams of methamphetamine in the bedroom.

B

A federal grand jury indicted Gomez on seven criminal counts.[1] Count 1 alleged a conspiracy among Gomez, Gonzalez, and Carmona, among others, with intent to distribute at least 50 grams of methamphetamine, in violation of 21 U.S.C. § 846. This count identified overt acts occurring at the January 7 meeting between Gomez, Carmona, and the informants, and the January 14 sale of a firearm and methamphetamine. Count 2 alleged distribution of at least 108.1 grams of methamphetamine at the January 14 sale, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(viii), and 18 U.S.C. § 2(a). Count 3 alleged distribution of 219.3 grams of methamphetamine on February 17, 2016 in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(viii). Count 4 alleged that on or about February 17, 2016, Gomez knowingly possessed specified firearms and ammunition, after being convicted of one or more felonies (specifically, carjacking and possession of drugs where prisoners are kept) in violation of 18 U.S.C. § 922(g)(1).[2]

Carmona and Gonzalez entered guilty pleas and admitted to meeting with Gomez and the informants, and to selling methamphetamine and a firearm on January 14.

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[1] The first indictment charged Gomez, Carmona, and Gonzalez with five criminal counts. The operative first superseding indictment charged only Gomez and Gonzalez, and included seven criminal counts.

[2] At the close of trial, the district court dismissed Counts 5, 6, and 7 due to insufficient evidence.

Gomez moved to dismiss the indictment on the ground of outrageous government conduct. In support, he submitted a declaration by his co-conspirator, Carmona, which alleged that Lopez gave Gomez the methamphetamine that Gomez later sold to Gabe on January 14th. In other words, Carmona alleged that one confidential informant gave Gomez the drugs that Gomez subsequently sold to the other confidential informant. The court denied this motion.

Before trial, the government filed a notice that it intended to call Manuel Ortiz, Gomez's parole officer, to testify in the government's case in chief, and it provided a list of topics on which Ortiz would likely testify. Over Gomez's objection, the district court ruled that Ortiz's testimony was admissible.

In August 2018, Gomez filed a motion in limine seeking to preclude the government from offering expert testimony from Chuck Cervello, an investigator from the Riverside County District Attorney's gang unit, regarding drug trafficking and gangs. In opposition to Gomez's motion, the government stated that it would seek to introduce this expert testimony so long as Gomez pursued an entrapment defense or called Carmona as a witness.[3]

[3] The government argued to the district court in its March 2019 trial memorandum, that, "if the [district court did] not preclude an entrapment defense pre-trial, then the government must be permitted to present evidence regarding . . . the defendant's predisposition . . . in its case in chief," giving notice to the district court and Gomez. Therefore, it is irrelevant that a year before Gomez's trial the government responded to Gomez's *co-defendant's* motion in limine by stating it intended to offer gang expert testimony during rebuttal only if the co-defendant were to raise an entrapment defense. *See* Dissent at 33.

The day before trial, in April 2019, the district court heard arguments on Gomez's motion in limine. The district court indicated that it would likely preclude expert testimony on gangs if Gomez was not going to raise an entrapment defense. Gomez's counsel said that he was "leaving open" whether to pursue an entrapment defense, depending on the evidence.[4] The theory underlying Gomez's entrapment defense was similar to the theory underlying his motion to dismiss based on outrageous government conduct. According to Gomez, even though he had no prior inclination to be involved in drug trafficking, Lopez (the government's informant) facilitated Gomez's drug sale to Gabe (another government informant). Gomez's counsel further told the court that evidence supporting this theory could come in through Gomez's testimony, as well as from "some other evidence that may come out during the government's case in chief."

In response, the government argued that if Gomez intended to raise an entrapment defense, the government should have the opportunity to introduce evidence that would rebut such a defense in its case in chief. The court implicitly agreed, and the government asked Gomez's counsel to "declare itself by tomorrow morning," immediately before the trial began, whether Gomez intended to raise an entrapment defense. The district judge warned Gomez that invoking an entrapment defense would open him up "to an awful lot of negative evidence that could be avoided," including "the possibility of the government talking about the street gang as well as the connection to" the Mexican Mafia.

[4] Indeed, a few days before trial, the parties submitted joint proposed jury instructions that included an entrapment instruction.

The next morning, Gomez's counsel informed the court that Gomez would "be pursuing an entrapment defense." After warning Gomez that this was a risky decision because it would allow the government to introduce predisposition evidence, including evidence of Gomez's gang affiliations, the court denied Gomez's motion in limine to prevent the government from introducing gang-affiliation evidence. Gomez did not give an opening statement before the government's case in chief.

C

At trial, Ryan Monis testified that he was a senior investigator assigned to the major organized crime division within the Riverside County District Attorney's office, and that he participated in a multi-agency task force investigating organized crime within Riverside County. Monis first described the nature and purpose of his task force, explaining that, "we investigate major organized crime," meaning "we focus on the worst of the worst" and the "individuals that we believe [are] the most dangerous." Monis also explained that "[g]angs and drugs kind of interact with each other," and "as a gang investigator" he was aware of "how the gang members on the streets and within the prison system operate in distributing and making profit from narcotics." Monis stated that he first learned about Gomez from Gomez's parole officer, Ortiz, who said that he was supervising "a high-level risk individual by the name of Julio Gomez." Monis then testified about the surveillance of the meetings on January 7, January 14, and February 17, 2016, as well as text messages between Gomez and the confidential informants. After describing his participation in the investigation of Gomez and his co-defendants, Monis stated that based on his information, "not only was [Gomez] a member of the North Side Indio

[gang], but he was making a power play under the umbrella of the Mexican Mafia for control of the streets within the Coachella Valley." Monis stated that both the North Side Indio gang and the Mexican Mafia were involved in drug trafficking and handling firearms.

One of the government's confidential informants, Gabe, testified about his meetings with Gomez and other co-conspirators. The jury heard the secret recordings and saw the text messages. Gabe testified that Gomez was "apparently" going to take over Lopez's prior role collecting "taxes" for the Mexican Mafia.[5]

Paul Day, a special agent with the Bureau of Alcohol, Tobacco, and Firearms testified regarding the search of the residence on June 16, 2016. According to Day's testimony, the search uncovered two rounds of ammunition, a firearm, 4.1 grams of methamphetamine, and "sheets of paper with very, very small writing on them," which he said were commonly known as "kites," often used in prison.

Ortiz identified himself as Gomez's parole officer and stated that Gomez was placed on his caseload after his release from state prison in November 2015 for carjacking with the use of a firearm. Ortiz testified that Gomez was a documented member of North Side Indio based on his tattoos and his own admission. Ortiz stated that he discussed the parole conditions (including requirements for drug testing and GPS monitoring, and prohibitions on possession of firearms) with Gomez. Ortiz testified that Gomez's GPS monitoring

[5] In this context, the fees paid by retail drug sellers for the privilege of selling drugs in an area controlled by the Mexican Mafia are called "taxes," and the person who collects the fees is called a "tax collector."

device was at the location of the sale transaction that occurred on February 17, and at the residence where he was arrested on June 16. Ortiz also testified about his participation in Gomez's arrest on June 16, and his observation of the bedroom where Gomez was sleeping, where a firearm and ammunition were found. After Ortiz testified, the government stated that Gomez had stipulated that he had previously been convicted of a felony, an element of Count 4 (charging Gomez with knowingly possessing specified firearms and ammunition after being convicted of one or more felonies).

Finally, Charles Cervello, a supervising investigator with the Riverside County District Attorney's office, testified that he supervised a team tasked with investigating gang narcotic and other violent crimes. Cervello stated that he had expertise on "how gang members interact with narcotics." Cervello testified about the drugs and loaded Smith & Wesson pistol found in the June 16 search of the residence of Gomez's girlfriend. Cervello inferred that the pistol belonged to Gomez based on his "past history, the involvement in prior narcotics sales," and Cervello's opinion that the drugs found in the residence were in a "distribution amount" and possessed for sale. He explained that

> gang members will often arm themselves for various reasons, one of which is to protect from being robbed, because that happens within the criminal community. Another one is to collect debts, meaning if I sold some narcotics and you didn't pay me, I could use the gun to get the money back. And then in some cases also to use to assault law enforcement.

The defense then called Gomez's co-conspirator, Gonzalez, to support Gomez's entrapment defense. Gonzalez testified that on January 13, he met with Gomez, Lopez, and Carmona. Lopez brought a bag filled with brown paper bags to the meeting, and then had a separate meeting with Gomez and Carmona. On January 14, Gomez handed Gonzalez a brown paper bag filled with methamphetamine. Gonzalez testified that he did not know "where Gomez got the meth from." Later that day, Gonzalez gave the bag to Gomez, who sold it to Gabe.

Neither the prosecution nor defense counsel discussed a defense based on entrapment in closing arguments, and the court did not give any instruction on that theory. The court informed the jury that "as of February 17th, 2016, and June 16th, of 2016, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year." The court also instructed the jury that it "may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial," and provided general limiting instructions regarding expert and opinion testimony.

The jury returned guilty verdicts as to Counts 1 through 4. After applying a two-level sentence enhancement under § 2D1.1(b)(1) of the United States Sentencing Guidelines for possession of a firearm during a drug-trafficking offense, the district judge sentenced Gomez to 210 months in prison. Gomez appealed.

The district court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

II

On appeal, Gomez argues that the district court erred by allowing the government to offer evidence regarding Gomez's gang affiliation in its case in chief in anticipation of Gomez's entrapment defense, that the district court abused its discretion by allowing Ortiz, Gomez's parole officer, to testify at trial, and that the district court erred by applying a two-level enhancement when calculating Gomez's sentence.[6] We consider each of these issues in turn.

A

We first consider whether the government may present evidence in its case in chief to rebut an anticipated entrapment defense.

The Supreme Court has "firmly recognized the defense of entrapment in the federal courts." *Sherman v. United States*, 356 U.S. 369, 372 (1958). "Entrapment occurs only when the criminal conduct was the product of the creative activity of law-enforcement officials," in other words, "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Id.* (internal quotation marks omitted) (quoting *Sorrells v. United States*, 287 U.S. 435, 442, 451 (1932)). By contrast, "the fact that government agents merely afford opportunities or facilities for the commission of that offense does not

[6] We address and reject Gomez's remaining challenges in a memorandum disposition filed concurrently with this opinion. ____ Fed. App'x ____.

constitute entrapment." *Id.* (citation and internal quotation marks omitted).

In determining where to draw the line "between the trap for the unwary innocent and the trap for the unwary criminal," *id.*, we have held that the affirmative defense of entrapment has two elements: "[1] government inducement of the crime and [2] absence of predisposition on the part of the defendant" to engage in the criminal conduct, *United States v. Gurolla*, 333 F.3d 944, 951 (9th Cir. 2003). We have defined "inducement" broadly as "any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship." *Id.* at 954 (citation omitted). In examining predisposition, we consider the following five factors: "(1) the character or reputation of the defendant; (2) whether the government made the initial suggestion of criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement." *Id.* at 955. The government has the "burden of proving beyond reasonable doubt that [the defendant] was predisposed to break the law and hence was not entrapped." *Jacobson v. United States*, 503 U.S. 540, 542 (1992); *see also United States v. Thickstun*, 110 F.3d 1394, 1396 (9th Cir. 1997).

A defendant need not inform the court of his intent to invoke an entrapment defense. "A simple plea of not guilty puts the prosecution to its proof as to all elements of the crime charged, and raises the defense of entrapment." *Mathews v. United States*, 485 U.S. 58, 64–65 (1988)

(cleaned up).[7] Nor does the defendant have to present evidence to support the entrapment defense; rather, the defendant may rely on evidence presented by the government. In *Sherman v. United States*, for instance, the Supreme Court held that "entrapment was established as a matter of law" based solely on "the undisputed testimony of the prosecution's witnesses." 356 U.S. at 373. Similarly, we have explained that "[t]he evidence supporting the entrapment defense need not be presented by the defendant," and that "[e]ven when a defendant presents no evidence of entrapment, it may nonetheless become an issue at his trial if (1) the Government's case-in-chief suggests that the defendant who was not predisposed was induced to commit the crime charged, or (2) a defense or a government witness gives evidence suggesting entrapment." *United States v. Spentz*, 653 F.3d 815, 818 n.2 (9th Cir. 2011) (cleaned up); *see also Gurolla*, 333 F.3d at 956–57 (indicating that even when a criminal defendant did not introduce "affirmative evidence of entrapment," the defendant "may nevertheless be entitled to a jury instruction on that defense should the government's evidence justify such an instruction").

Because in our circuit a defendant can argue that he was entrapped, and may be entitled to an entrapment instruction,

[7] When a defendant notifies the court of his intent to invoke an entrapment defense, "[a] district court may require a defendant to submit a pretrial offer of proof on an entrapment defense." *Gurolla*, 333 F.3d at 951 n.8. If the defendant's offer of proof is "insufficient to establish all the elements of the defense," *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001), the "district court may preclude him from presenting the defense at trial," *Gurolla*, 333 F.3d at 951 n.8. Nevertheless, at the close of trial, a defendant may raise the entrapment defense if the evidence raised at trial supports it. *Id.* at 956–57.

based solely on evidence introduced by the government, we do not have a per se rule precluding the government from rebutting an anticipated entrapment defense in its case in chief, because such a rule would be unfair. Said otherwise, a blanket rule "that no evidence of a predisposition to commit the crime and no proof of prior convictions may ever be introduced by the government except in rebuttal to affirmative evidence of entrapment adduced by defendant" would "work grave prejudice to the government," because it would allow a defendant to invoke the defense without the government having had an opportunity to rebut it.[8] *United States v. Sherman*, 240 F.2d 949, 952–53 (2d Cir. 1957), *rev'd on other grounds*, 356 U.S. at 377–78; *see also United States v. Hicks*, 635 F.3d 1063, 1072 (7th Cir. 2011) (indicating that the government may preemptively rebut an entrapment defense in its case in chief when the defendant "clearly communicate[s] his intention to present an entrapment defense").[9]

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[8] The potential that a district court could address prejudice to the government in a different way, by allowing the government to re-open its case if the defendant raised the entrapment defense in closing argument, *see* Dissent at 37–38, does not have a direct bearing on our conclusion that a per se rule precluding the government from introducing rebuttal evidence in its case in chief would be unfair.

[9] *Hicks* does not support the dissent's argument that the government may not introduce predisposition evidence to rebut an anticipated entrapment defense in its case in chief. Dissent at 37. In *Hicks*, the Seventh Circuit held that the district court erred in permitting the government to introduce evidence of the defendant's prior drug convictions. 635 F.3d at 1073. The court rejected the government's argument that the evidence was admissible to rebut an entrapment defense, because the defendant had not placed the issue of entrapment into controversy. *Id.* at 1071–72. Although the defendant "discussed the possibility of raising an entrapment defense prior to trial," he "did not

Nevertheless, the government can introduce such evidence in only limited circumstances. We agree with the Second Circuit that evidence rebutting an anticipated entrapment defense "is admissible as part of the prosecution's case in chief" only "where it is clear . . . that the [entrapment] defense will be invoked."[10] *Sherman*, 240 F.2d at 952–53. A defendant clearly indicates that he will invoke an entrapment defense when defense counsel "raise[s] the defense of entrapment during his opening statement," *U.S. v. Parkin*, 917 F.2d 313, 316 (7th Cir. 1990), when the entrapment defense materializes "through a defendant's presentation of its own witnesses or through cross-examination of the government's witnesses," *United States v. Goodapple*, 958 F.2d 1402, 1407 (7th Cir. 1992), or when the defendant requests an entrapment instruction or tells the trial judge that

refer to his entrapment defense during an opening statement, which he waived, nor during the government's case-in-chief," and "it was not until after the convictions came in at the close of the government's case-in-chief," that the defendant "definitively informed the court that he would be raising an entrapment defense." *Id.* at 1072. The Seventh Circuit concluded that had the defendant "clearly communicated his intention to present an entrapment defense before the convictions were allowed into evidence, the government's contention that the convictions were admissible to show predisposition would have more force," but the defendant "did not do so." *Id*.

[10] The Seventh Circuit has similarly suggested that the government may preemptively rebut an entrapment defense in its case in chief when the defendant "clearly communicate[s] his intention to present an entrapment defense." *Hicks*, 635 F.3d at 1072.

he intends to invoke an entrapment defense, *Sherman*, 240 F.2d at 953.[11]

Applying these principles here, we conclude that the district court permissibly allowed the government to present predisposition evidence in its case in chief, because it was sufficiently clear that Gomez would invoke an entrapment defense. Even before the hearing on the motion in limine, Gomez requested an entrapment instruction. At the subsequent hearing, despite the district judge's warnings that doing so would open the door to the government's predisposition evidence, including gang-affiliation evidence, counsel for Gomez stated that he was reserving the right to pursue an entrapment defense. He then sketched out his theory of that defense, based on evidence that Lopez induced Gomez to sell methamphetamine to Gabe. When asked by the court to make his intention clear, Gomez's counsel stated unequivocally that Gomez would "be pursuing an entrapment

[11] Contrary to this authority, the Eighth Circuit has held that it is "error to permit the government in its case-in-chief to introduce evidence of predisposition, which is properly admissible only as rebuttal of the entrapment defense." *See United States v. McGuire*, 808 F.2d 694, 696 (8th Cir. 1987). But in the Eighth Circuit, such a rule does not raise the risk, present in our circuit, that a defendant will sandbag the government by electing not to introduce any evidence of entrapment and then raising the defense in closing argument based on the government's evidence. That is because in the Eighth Circuit, "[t]he defendant carries the initial burden of presenting some evidence that he or she was induced by government agents to commit the offense." *United States v. Abumayyaleh*, 530 F.3d 641, 646 (8th Cir. 2008) (citation omitted). Consistent with *Mathews*, we take a different approach to the defendant's burden of raising an entrapment defense, and thus we decline to follow the Eighth Circuit's per se rule precluding the government's rebuttal of an anticipated entrapment defense.

defense."[12] Unlike in *Hicks*, where the defendant's "counsel discussed the *possibility* of raising an entrapment defense prior to trial," but did not definitively inform the court that he would be raising an entrapment defense until after the government rested, 635 F.3d at 1072 (emphasis added), the statement from Gomez's counsel was definitive: Gomez intended to argue that he was entrapped. The government thus proceeded with its case in chief on the belief that Gomez would present an entrapment defense. Finally, during the government's case, Gomez obtained Gonzalez's testimony to support his theory that Lopez had induced Gomez to commit a crime, thus confirming defense counsel's prior indication that Gomez would be pursuing an entrapment defense. This is more than sufficient to make clear that Gomez intended to invoke an entrapment defense.[13]

[12] On appeal, Gomez states, in a cursory footnote, that the district court cannot require a defendant to elect before trial whether it will present an entrapment defense. Because we review only issues that are argued specifically and distinctly in a party's opening brief, *see Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986), we decline to address this issue here. Moreover, Gomez failed to raise this issue to the district court, and because there is no binding authority holding that a district court cannot require a defendant to make such an election, the district court did not plainly err in requiring Gomez to inform the court of his intent. *See United States v. Depue*, 912 F.3d 1227, 1234 (9th Cir. 2019).

[13] There is no support for the dissent's suggestion that the defendant must inform the jury—not just the district court—that the defendant intends to raise an entrapment defense, Dissent at 37, before the court may allow the government to introduce rebuttal evidence in its case-in-chief. *Cf. Hicks*, 635 F.3d at 1072.

Because Gomez clearly indicated that he would present an entrapment defense at trial, the district court did not err by allowing the government to preemptively rebut that defense.

B

Even though the district court did not abuse its discretion by giving the government leeway to present evidence rebutting Gomez's anticipated entrapment defense in its case in chief, we must still consider whether the gang-affiliation evidence that the government introduced was admissible.

Predisposition is a material issue in an entrapment case, because "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *United States v. Mendoza-Prado*, 314 F.3d 1099, 1103 (9th Cir. 2002) (internal quotation marks omitted). Of the five factors for proving predisposition, *see supra* Section II.A, the most important are "the character and reputation of the defendant," and "whether the defendant showed any reluctance." *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994); *see also United States v. Thomas*, 134 F.3d 975 (9th Cir. 1998). We have reasoned that "the well-settled rule that character must be considered is tantamount to a holding that it is an 'essential element' of the defense" of entrapment. *Thomas*, 134 F.3d at 980; *see also Mendoza-Prado*, 314 F.3d at 1103 ("The character of the defendant is one of the elements—indeed, it is an essential element—to be considered in determining predisposition."). Therefore, when a defendant raises an entrapment defense, character, reputation, and lack of reluctance constitute "essential elements" of the entrapment defense.

Under the Federal Rules of Evidence, when evidence of a person's character is admissible, it may be proven "by testimony about the person's reputation or by testimony in the form of an opinion." Fed. R. Evid. 405(a). When character "is an essential element of a charge, claim, or defense," it may be proven by "relevant specific instances of that person's conduct." Fed. R. Evid. 405(b). Because character evidence is both admissible and an essential element of an entrapment defense, it may be proved under Rule 405 of the Federal Rules of Evidence by reputation or opinion testimony, as well as by specific instances of conduct.

The government may meet its burden of proof "through inquiry into the defendant's record of conduct and reputation that he was predisposed to commit the crime and was not an otherwise innocent person who would not have committed the crime but for the inducement." *Pulido v. United States*, 425 F.2d 1391, 1393 (9th Cir. 1970). Reputation evidence may include evidence of the defendant's "past and current reputation in the community for involvement in the narcotics trade," including testimony from government agents and confidential informants. *Id*. By the same token, it may also include evidence of the defendant's reputation in the community for involvement in gang activity. "Both the Supreme Court and this court have ruled that evidence of gang affiliation is admissible when it is relevant to a material issue in the case," *United States v. Easter*, 66 F.3d 1018, 1021 (9th Cir. 1995), and either the Supreme Court or our court has previously admitted gang affiliation evidence when relevant to identity, *id.*; bias, *see United States v. Abel*, 469 U.S. 45, 49 (1984); coercion, *see United States v. Hankey*, 203 F.3d 1160, 1172–73 (9th Cir. 2000); and motive, *see United States*

v. Santiago, 46 F.3d 885, 889 (9th Cir. 1995).[14] Although the government may also present evidence of specific instances of a person's conduct, "[e]vidence of prior acts, whether offered under Rule 404(b) or 405(b) by the prosecution or by the defense, must be sufficiently related and proximate in time to the crime charged to be relevant under Rule 403." *United States v. Barry*, 814 F.2d 1400, 1404 (9th Cir. 1987); *see also Mendoza-Prado*, 314 F.3d at 1103 (holding that "evidence of prior bad acts is not relevant to prove predisposition unless the prior bad acts are similar to the charged crime").

The gang-affiliation evidence that Gomez challenges on appeal focused on two issues.[15] First, the government's witnesses presented evidence that Gomez had a significant role in the North Side Indio gang and the Mexican Mafia, including making a "power play" for control of the streets and taking over a role of collecting taxes. Evidence related to

[14] Several of these cases dealt explicitly with impeachment evidence. *See, e.g.*, *Abel*, 469 U.S. at 49; *Hankey*, 203 F.3d at 1172–73.

[15] Gomez challenged five items of gang-affiliation evidence: (1) Gomez was a member of the Mexican Mafia and North Side Indio gangs; (2) Gomez "was making a power play under the umbrella of the Mexican Mafia for control of the streets within the Coachella Valley," and he was going to take over "collect[ing] taxes for the Mexican Mafia" from Lopez; (3) Gomez was a "high risk individual"; (4) gang members like Gomez arm themselves with guns to, among other things, "assault law enforcement"; and (5) in his bedroom, Gomez had photographs of men making gang signs, "kites" with surreptitious prison communications, and a police report related to two Mexican Mafia associates. Gomez also challenges Ortiz's testimony about Gomez's prior conviction for carjacking with a firearm, but this testimony does not relate to gang affiliation. As discussed below, we conclude that any error in admitting that testimony was harmless.

gang paraphernalia at the residence where Gomez was arrested was relevant to showing this affiliation. Second, the witnesses testified that gangs were generally engaged in trafficking in drugs and used firearms in their enterprises, for purposes including protecting themselves, paying debts, and assaulting law enforcement.

This evidence is all relevant to Gomez's character, *see Pulido*, 425 F.2d at 1393, in that it shows Gomez's predisposition to commit drug offenses and to possess and use firearms. It also shows a lack of reluctance to engage in criminal activities related to drug trafficking. In other words, evidence that Gomez had the reputation of having a leadership position in gangs that are heavily involved in drug trafficking, and regularly use guns to facilitate such trafficking, is relevant to rebut Gomez's theory that he had no prior inclination to be involved in drug trafficking and to possess a firearm until the government's confidential informants induced him to do so.

The government did not introduce any evidence regarding Gomez's involvement in specific prior gang-related activity. *See Santiago*, 46 F.3d at 889 (holding that general evidence that a defendant was a gang member does not constitute evidence of prior bad acts, subject to Rule 404(b) of the Federal Rules of Evidence). Therefore, we reject Gomez's argument that under our decision in *Mendoza-Prado*, the government's gang-affiliation evidence was inadmissible because it was not sufficiently related to the charged crimes. In *Mendoza-Prado*, we held that the district court erred by admitting the transcript of a videotape in which the defendant bragged about several uncharged crimes that he had committed (namely, theft, extortion, and aiding a prison escape), when the crimes bore "little relationship to the drug-

trafficking crimes with which [the] [d]efendant was charged." 314 F.3d at 1104. We held that when a defendant raises an entrapment defense, the government can introduce evidence of specific instances of prior conduct under Rule 405(b) of the Federal Rules of Evidence, but only when the prior bad acts are similar to the charged crimes. *Id. Mendoza-Prado*'s ruling does not apply here, because the government's gang-affiliation witnesses did not identify any specific prior crimes or bad acts of Gomez to show that Gomez had a propensity to commit similar bad acts. Rather than rely on Rule 405(b), the government's testimony was permissible under Rule 405(a), as evidence about Gomez's reputation and character.

We also reject Gomez's argument that the gang-affiliation evidence was unfairly prejudicial. We give great deference to district courts when considering the admissibility of gang-affiliation evidence. "Assessing the probative value of common membership in any particular group, and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403 and ultimately, if the evidence is admitted, for the trier of fact." *Abel*, 469 U.S. at 54. If a defendant invokes an entrapment defense, "he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells*, 287 U.S. at 451. If, as a consequence of the defendant's decision to invoke the defense, "he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." *Id.* at 452; *see also United States v. McGuire*, 808 F.2d 694, 696 (8th Cir. 1987) (emphasizing that it is "disingenuous and inconsistent" for a defendant to indicate that he will pursue an entrapment defense and then fault the government for rebutting that defense). Here, the gang-affiliation evidence was not admitted for an improper purpose, such as "to prove

a substantive element of a crime," *Hankey*, 203 F.3d at 1172, or to prove "intent or culpability," *Kennedy v. Lockyer*, 379 F.3d 1041, 1055 (9th Cir. 2004). Nor was it introduced to prove "guilt by association," because it was not offered to prove that Gomez was guilty of the charged crimes. *See id.* at 1056 (internal quotation marks omitted); *see also Santiago*, 46 F.3d at 889 (holding that where gang-affiliation evidence was not "the entire theme of the trial," it did not "infect the trial with the threat of guilt by association") (cleaned up). Giving "considerable deference" to the district court's decision to allow the government to present gang-affiliation evidence, we hold that the district court did not abuse its discretion in admitting the evidence. *United States v. Cordoba*, 194 F.3d 1053, 1063 (9th Cir. 1999) (citation omitted).

III

We next consider whether, assuming without deciding that the district court erred by allowing Gomez's parole officer to testify at trial, any such error is grounds for reversing Gomez's conviction.

Gomez argues that the admission of Ortiz's testimony was irrelevant and unfairly prejudicial. As with Gomez's challenge to the admission of the gang-affiliation evidence, the district court's determination as to the admissibility of this evidence under Rule 403 of the Federal Rules of Evidence is reviewed for an abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1267 (9th Cir. 2009).

We weigh the probative value of a parole officer's testimony against its prejudicial effect on a case-by-case basis. *See United States v. Bagley*, 641 F.2d 1235, 1240 (9th

Cir. 1981) (holding that under the circumstances of that case, the probation officer's testimony was not prejudicial); *United States v. Butcher*, 557 F.2d 666, 669–70 (9th Cir. 1977) (balancing the probative value against the potential prejudice of police and parole-officer testimony, and ultimately determining that the testimony was admissible).[16]

Applying Rule 403, we have recognized that allowing a parole or probation officer to testify may have a prejudicial effect because it raises the inference that the defendant had a prior criminal conviction. *See United States v. Pavon*, 561 F.2d 799, 802 (9th Cir. 1977) (holding that "the jury could readily infer that [the defendant] had a prior criminal conviction" from the fact that the defendant's probation officer testified). Just as "[d]irect evidence of a defendant's past crimes is not admissible" absent an exception, *Pavon* reasoned that "evidence pointing strongly to an inference to the same effect should also be excluded." *Id.* Because we could not identify any applicable past-crimes exception and because the prosecution "could have presented the same evidence without calling the parole officer as a witness," *Pavon* held that the probative value of the parole officer's testimony was substantially outweighed by its prejudicial effect, and therefore that the testimony should have been excluded. *See id.* As suggested by *Pavon*, however, a district court may allow a probation officer to testify if the inference raised by such testimony (i.e., that the defendant has a prior

[16] Several of our sister circuits take a similar approach. *See United States v. Contreras*, 536 F.3d 1167, 1171–72 (10th Cir. 2008) (rejecting a per se rule); *United States v. Pace*, 10 F.3d 1106, 1115 (5th Cir. 1993) (same); *United States v. Garrison*, 849 F.2d 103, 107 (4th Cir. 1988) (same); *United States v. Farnsworth*, 729 F.2d 1158, 1161 (8th Cir. 1984) (same).

conviction) is permissible, such as when a defendant's past crimes or character is at issue in the trial. *See, e.g.*, *Bagley*, 641 F.2d at 1240.

Here, even assuming the district court erred in admitting Ortiz's statement that Gomez had been convicted of a carjacking offense, any such error was harmless. *See Pavon*, 561 F.2d at 803. We may raise harmless error sua sponte in consideration of "(1) the length and complexity of the record, (2) whether the harmlessness of an error is certain or debatable, and (3) the futility and costliness of reversal and further litigation." *United States v. Rodriguez*, 880 F.3d 1151, 1164 (9th Cir. 2018) (cleaned up). The certainty of the harmlessness is the most important factor. *Id.*

The evidence against Gomez was overwhelming. All of the relevant transactions and meetings between Gomez and one or more of the government's informants were secretly recorded. The jury heard those recordings. The government also conducted surveillance of the meetings and transactions. Further, Gabe, who was present for the transactions and involved in the sales of methamphetamine and firearms, testified against Gomez. The jury also heard recordings of conversations and saw text messages between Gomez and Gabe. Finally, co-defendant Gonzalez testified that he watched Gomez sell Gabe methamphetamine and a firearm. Based on this evidence, "the harmlessness of any error is clear beyond serious debate and further proceedings are certain to replicate the original result." *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005). Further, the record of Gomez's two-day trial is not especially long or complex, and reversal would be both costly and futile. Therefore, we conclude that any error related to Ortiz's testimony was harmless.

IV

Finally, we consider whether the district court erred by applying a two-level sentence enhancement under § 2D1.1(b)(1) of the United States Sentencing Guidelines.

Section 2D1.1 applies to Gomez's drug-trafficking offenses, and § 2D1.1(b) provides the specific offense characteristics for such offenses. Under the guidelines, specific offense characteristics are determined on the basis of all relevant conduct, broadly defined, that occurred in relation to the offense of conviction. *See* U.S.S.G. § 1B1.3(a).[17]

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[17] Section 1B1.3(a)(1) provides that "specific offense characteristics . . . shall be determined on the basis of the following":

> (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—
>
> (i) within the scope of the jointly undertaken criminal activity,
>
> (ii) in furtherance of that criminal activity, and
>
> (iii) reasonably foreseeable in connection with that criminal activity;
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

Under § 2D1.1(b)(1), "[i]f a dangerous weapon (including a firearm) was possessed," a two-level enhancement is applicable. *Id.* § 2D1.1(b)(1). We have interpreted the § 2D1.1(b)(1) enhancement broadly. We have held that possession of the firearm may be actual or constructive, *United States v. Lopez-Sandoval*, 146 F.3d 712, 714–15 (9th Cir. 1998), and that the firearms and drugs need not "be found in proximity to each other," *United States v. Willard*, 919 F.2d 606, 610 (9th Cir. 1990). Even when defendants were arrested miles away from the firearms stored at their homes or places of business, we held that the defendants possessed weapons during the commission of the drug-trafficking offenses for purposes of this sentencing enhancement. *Lopez-Sandoval*, 146 F.3d at 715; *see also United States v. Stewart*, 926 F.2d 899, 901–02 (9th Cir. 1991).

Application Note 11 to § 2D1.1(b)(1) provides that "[t]he enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1) comment n.11(A). "For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet." *Id.* The application note also states that this enhancement "reflects the increased danger of violence when drug traffickers possess weapons." *Id.* We have also interpreted this application note broadly. In determining whether the weapon "was connected with the offense," *id.*, we have concluded that the "offense" in this context refers to "the entire course of criminal conduct," not just the crime of conviction, *Willard*, 919 F.2d at 609–10. This is consistent with the broad language of § 1B1.3, which provides that specific offense characteristics such as § 2D1.1(b)(1) take into account all acts and omissions that

occurred "during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3(1)(B). We have also held that the fact that a firearm was unloaded does not make it "clearly improbable that the weapon was connected to" the drug offense. *Lopez-Sandoval*, 146 F.3d at 716 (cleaned up).

Here, the probation office's Presentence Investigation Report (PSR) recommended a sentence enhancement under § 2D1.1(b)(1) for two reasons. First, on January 14, 2016, Carmona provided Gabe with a firearm "just minutes before Gomez, Gonzalez, and Carmona sold [Gabe] methamphetamine." Second, on February 17, 2016, Gomez sold Gabe the firearm and the methamphetamine at the same time. In his objections to the PSR, Gomez argued that the two-level enhancement was improper because there was no evidence that he had been involved in Carmona's sale of a firearm to Gabe at the January 14 transaction. Gomez did not mention the sale of the firearm during the February 17 transaction. The district court adopted the PSR's recommendation and applied the enhancement at sentencing.

On appeal, Gomez argues that it was "clearly improbable that the weapon was connected with the offense," U.S.S.G. § 2D1.1(b)(1) comment n.11(A), and therefore that the enhancement was inappropriate. He reasons that if he were using the firearms for the purpose of protecting or facilitating the drug transaction, they would not be unloaded and would not be sold to the drug buyer. In making this argument, he relies on *United States v. Lagasse*, a First Circuit opinion holding that a defendant's use of a knife to rob other members of the conspiracy did not facilitate the offense conduct, and so could not be the basis for a sentencing

enhancement. *See* 87 F.3d 18, 23 (1st Cir. 1996). Gomez also argues that he could not be responsible for the January 14 incident, because Carmona, not Gomez, sold the firearm to Gabe.

We review the district court's finding that the defendant possessed a firearm during the commission of a drug offense for clear error. *See United States v. Garcia*, 909 F.2d 1346, 1349 (9th Cir. 1990).[18] We conclude that the district court's § 2D1.1(b)(1) enhancement was not clearly erroneous here. Because an enhancement under § 2D1.1(b)(1) can be appropriate "based on all of the offense conduct, not just the crime of conviction," *United States v. Boykin*, 785 F.3d 1352, 1364 (9th Cir. 2015), we may determine whether any of Gomez's underlying offense conduct was sufficient to justify the enhancement.[19]

During the February 17 transaction, Gomez possessed a firearm to sell to Gabe, and the weapon was present during the drug-trafficking offense. Therefore, the enhancement was applicable "unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1)

[18] Because Gomez did not mention the February 17 transaction in his objections to the PSR, the government argues that we should review the district court's application of the § 2D1.1(b)(1) enhancement for plain error. Because we conclude that there is no error at all, let alone plain error, we do not reach this issue.

[19] Therefore, we do not need to reach the question whether the enhancement was appropriately tied to the January 14 transaction. Even if we reached this issue, however, we would conclude that it would also be appropriate to impose a sentencing enhancement on Gomez for the sale of the firearm during the January 14 transaction, due to Gomez's involvement in a jointly undertaken criminal activity. *See* U.S.S.G. § 1B1.3.

comment n.11(A). Unlike the example of a hunting rifle locked in a closet, *id.*, the firearm here was connected to the offense, because the sale of the firearm and methamphetamine were bundled together. Under our case law, the government does not have to establish that the defendant possessed the firearm for the purpose of protecting or facilitating the drug transaction. Indeed, the firearms need not be "involved in the crime of conviction." *Willard*, 919 F.2d at 609; *cf. Smith v. United States*, 508 U.S. 223, 235 (1993) (holding that a person who sells a firearm "uses" it within the meaning of 18 U.S.C. § 924(d)(1) "even though those actions do not involve using the firearm as a weapon"). Nor is it relevant that the firearms were unloaded. *Lopez-Sandoval*, 146 F.3d at 714–15. *Lagasse* is not to the contrary; rather, it held that possession of a firearm that was adverse to the offense of conviction was not connected to that offense. 87 F.3d at 23. Therefore, the district court did not err in applying the two-level § 2D1.1(b) enhancement to Gomez's sentence.

AFFIRMED.

STEELE, District Judge, dissenting:

In my view, the trial court committed reversible error by allowing the government to present evidence to the jury in its case-in-chief to "rebut" an anticipated entrapment defense which was never presented by the defendant. Given the overwhelmingly prejudicial nature of that evidence, the harmless error doctrine cannot save the government's convictions. Accordingly, I would reverse the convictions in

this case, remand for a new trial, and not reach the other issues raised by appellant.

I.

This case presents a relatively common fact-pattern involving illegal drugs and guns. Law enforcement officers utilized the services of two informants to negotiate for and ultimately purchase quantities of methamphetamine and firearms from three persons. Law enforcement officers surveilled the transactions and made recordings of the transactions. Three participants were indicted on various federal charges, two of whom resolved their case with guilty pleas.

In April 2018 appellant Gomez adopted a co-defendant's *in limine* motion to preclude the government from offering the testimony of a gang expert. The government responded that it did not intend to introduce such testimony at trial, but reserved the right to introduce evidence of gang membership or affiliation on rebuttal should it become necessary. Specifically, the government asserted that it "would elicit such testimony during rebuttal only if defendants were to raise a defense, such as entrapment . . . ." The co-defendant ultimately plead guilty and the motion was never decided by the trial court.

In August 2018 Gomez filed his own motion *in limine* to preclude the government from introducing evidence about the *modus operandi* of gang members and indicia of gang membership. The government opposed the motion, in part because it appeared Gomez was pursuing an entrapment defense and such evidence was relevant to that defense.

On April 1, 2019, the day before trial, the trial judge heard oral arguments on Gomez's motion *in limine*. The court asked new defense counsel whether an entrapment defense was being pursued, and counsel stated he was leaving that option open. The trial court gave defense counsel until the morning of trial to decide whether an entrapment defense would be pursued. On the morning of trial, defense counsel stated Gomez would be pursuing an entrapment defense. The trial court then denied Gomez's motion *in limine*, indicated that the gang-related evidence would be admitted in its entirety in the government's case-in-chief, and granted Gomez a standing objection to the gang-related evidence.

Defense counsel did not give an opening statement prior to the beginning of the government's evidence, and therefore did not assert an entrapment defense to the jury. The government wasted no time, however, in "rebutting" the anticipated entrapment defense. The government's first witness testified he worked for the district attorney's office and investigated major organized crime, which he described as "gang members within the prison and the street-level-type of environment." The investigator testified his unit focused "on the worst of the worst," and identified Gomez as a member of the North Side Indio gang and the Mexican Mafia. The investigator also testified that Gomez was on parole and his parole officer supervised "high risk gang members" and "higher-level gang members in the community." The investigator also testified he had received information that Gomez was "making a power play under the umbrella of the Mexican Mafia for control of the streets within the Coachella Valley." Finally, the investigator testified that both the North Side Indio and the Mexican Mafia are involved in drug trafficking and handling firearms.

The government's next witnesses continued the testimony about gangs and Gomez's membership in gangs. One of the confidential informants testified that Gomez was apparently going to take over collecting taxes for the Mexican Mafia. Gomez's parole officer testified his caseload was "strictly with documented street gang members" and that Gomez was a documented member of the North Side Indio gang, a gang known for "criminal activities." The parole officer also testified that Gomez had been released from state prison after a carjacking conviction. A supervising investigator for the district attorney's office, who was qualified as an expert in drug trafficking, testified about the "close correlation between gangs and narcotics." The investigator also testified about the relationship between firearms and gangs and the various reasons why gang members arm themselves, which included "to use to assault law enforcement."

Gomez was unable to support an entrapment defense through cross examination of the government's witnesses. As it turned out, the witness called by Gomez also did not support an entrapment defense. In a determination which is unchallenged by Gomez, the trial court held there was insufficient evidence to allow an entrapment defense to be decided by the jury, and declined to give any jury instruction concerning entrapment. Gomez was convicted of all counts submitted to the jury.

II.

It is clear that gang-related evidence may be admissible in some situations. "Both the Supreme Court and this court have ruled that evidence of gang affiliation is admissible when it is relevant to a material issue in the case." *U.S. v.*

Easter, 66 F.3d 1018, 1021 (9th Cir. 1995). Rebutting an entrapment defense may be one such situation.

The majority correctly discusses the general principles relating to entrapment, including that a defendant may rely upon the government's evidence in its case-in-chief to establish an entrapment defense and that there are limited circumstances which allow the government to introduce entrapment rebuttal evidence in its case-in-chief. My disagreement is with the finding that this case falls within such limited circumstances. While defense counsel told the trial court and the government that entrapment would be a defense and submitted a proposed jury instruction before trial, this alone is insufficient to allow introduction of rebuttal evidence in the government's case-in-chief. I am not persuaded by the only decision cited by the majority which supports the admission of such evidence. *United States v. Sherman*, 240 F.2d 949, 952–53 (2d Cir. 1957), *rev'd on other grounds*, *Sherman v. United States*, 356 U.S. 369, 377–78 (1958). The difficulty here is that the trial court admitted the totality of the government's anti-entrapment evidence before Gomez had uttered a single word to the jury suggesting entrapment or introduced any evidence suggesting entrapment. *See United States v. Salisbury*, 662 F.2d 738, 741 (11th Cir. 1981) ("Although the government normally may not introduce evidence of a defendant's predisposition to engage in criminal activity in its case in chief, it may do so once a defendant submits some evidence which raises the possibility that he was induced to commit the crime." (marks and citation omitted)); *see also United States v. Cohen*, 489 F.2d 945, 950 (2d Cir. 1973) (holding government was entitled to anticipate entrapment defense and prove predisposition and propensity when defense counsel raised the issue of entrapment in his opening statement); *United*

States v. Brown, 453 F.2d 101, 108 (8th Cir. 1971) ("The defense of entrapment may be raised by cross-examination of the Government's witnesses."). And in the end, no evidence of entrapment was ever presented to the jury. *See United States v. Hicks*, 635 F.3d 1063, 1071–72 (7th Cir. 2011) (holding evidence of prior convictions was inadmissible in government's case-in-chief because although defense counsel discussed the possibility of raising an entrapment defense prior to trial, "the entrapment defense did not materialize until the defense presented its case"); *United States v. McGuire*, 808 F.2d 694, 696 (8th Cir. 1987) ("We agree that it was error for the district court to allow the government to introduce rebuttal evidence in its case-in-chief in anticipation of an entrapment defense that was proposed, but that never actually materialized.").

In this case, defense counsel did not inform the jury of entrapment in an opening statement (counsel did not give one prior to the government's evidence). The evidence presented by the government did not support an entrapment defense. Gomez's witness did not support an entrapment defense. The lack of entrapment evidence caused the trial court to properly decline to give a requested entrapment jury instruction. While Gomez may have been sufficiently clear that he intended to invoke an entrapment defense, he did not actually do so. Thus, in this case the government rebutted an issue which was not presented to the jury with highly inflammatory and prejudicial evidence which cannot be said to have been harmless.

While the majority is concerned with the possibility of sandbagging by a defendant, that did not occur in this case. Additionally, a trial court has the ability to control the proceedings and certainly can allow the government to re-

open its case under proper circumstances. *See Dietz v. Bouldin*, 136 S.Ct. 1885, 1891 (2016) ("[A] district court possesses inherent powers that are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962)). Further, it is well-established that rulings on motions *in limine* can be changed as a case proceeds. *See Luce v. United States*, 469 U.S. 38, 41–42 (1984) ("The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling.").

I would reverse the convictions in this case, remand for a new trial, and not reach the other issues raised by appellant.