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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

VICTORIA M. JIM,

Defendant - Appellant.

No. 11-30102

D.C. No. 2:09-cr-02035-EFS-2

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Edward F. Shea, District Judge, Presiding

Argued and Submitted October 9, 2012
Seattle, Washington

Before: KOZINSKI, Chief Judge, TASHIMA and M. SMITH, Circuit Judges.

Defendant-Appellant Victoria Jim argues that she was subject to custodial interrogation without being advised of her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), but she did not bring a motion to suppress on this basis prior to

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

trial. Failure to bring a motion to suppress prior to trial waives the issue for appeal. *United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002).

Although we may in our discretion address the *Miranda* issue for “cause shown,” *id.*; *United States v. Restrepo-Rua*, 815 F.2d 1327, 1329 (9th Cir. 1987), Jim has provided no explanation for her failure to bring the motion prior to trial. *See United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 2000).

In an opinion filed contemporaneously with this Memorandum, in the case of *United States v. Wahchumwah*, No. 11-30101, we determined that Counts 4 and 5 of the indictment involving Ricky Wahchumwah, Jim’s co-defendant, are multiplicitous. Both Jim and Wahchumwah are named in Counts 4 and 5, and Jim challenged the counts as multiplicitous at trial. However, only Wahchumwah appealed the issue. “We ‘will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.’” *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992) (quoting *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986)). However, “we may review an issue if the failure to raise the issue properly did not prejudice the defense of the opposing party.” *Id.* Here, the government fully addressed the multiplicity issue in its answering brief to Wahchumwah and has not been prejudiced. Thus, for the reasons addressed in the *Wahchumwah* opinion, one of Jim’s convictions on

Counts 4 and 5 must be vacated. We leave to the district court the decision of which count to vacate.

AFFIRMED in part and REVERSED AND REMANDED in part.