An officer in uniform, in a marked patrol unit, investigating a call from dispatch would be considered lawfully discharging his duties as a public servant.[In the Matter of B.S.](16-1-6)

On November 17, 2015, the Amarillo Court of Appeals held that an officer is lawfully discharging his duties if he is not “criminally or tortiously abusing his office as a public servant.”

¶ 16-1-6. **In the Matter of B.S.**, MEMORANDUM, No. 07-15-00148-CV, 2015 WL 7271731 (Tex.App.-Amarillo, 11/17/2015).

**Facts:** While on patrol in a marked vehicle, a uniformed Austin police officer received a dispatched call for assistance in locating J.M. a juvenile escapee from the county juvenile detention center. The call came after J.M.’s mother reported seeing her son within the past five minutes in the area of an apartment complex.

The officer spotted a juvenile he believed might be J.M. In fact, it was B.S. B.S. refused to provide his name when the officer asked. The officer attempted to handcuff and frisk B.S. As he placed his hand on B.S.’s arm, B.S. jerked away from the officer’s grasp and attempted to pull away.

A second officer arrived and the two officers took B.S. to the ground. On the ground, B.S. continued resisting and struggling. When a third officer arrived B.S. was subdued, handcuffed, and frisked.

Officers noticed B.S.’s nose was bleeding. The first officer told B.S. he was under arrest for resisting the search. B.S. responded with profanity and racial slurs directed at the officer and other officers. A group of B.S.’s friends and apartment-complex residents gathered at the location. With concern for officer safety, and because EMS personnel will not respond to an unsecure location, officers placed B.S. in a patrol vehicle and transported him about a half-block away to a youth center.

At the youth center, EMS personnel examined B.S. while the officer stood some five to ten feet away. As the EMS evaluation concluded, B.S. looked directly at the officer and spit saliva and blood onto the officer’s uniform, face, and arms. Afterward, B.S. remarked, “Hoped you liked that, f–––a–––cop.” The officer then went to a local hospital for “blood-exposure precautions.”

The State filed a petition alleging B.S. engaged in delinquent conduct by committing the offenses of harassment of a public servant and resisting arrest. At a contested adjudication hearing, tried to the bench, the court found the resisting-arrest allegation not true but it found the harassment of a public servant charge true. At the disposition hearing, the court placed B.S. under an order of probation.

Through his first issue, B.S. argues the State’s evidence was legally insufficient because the State failed to prove that the officer was lawfully discharging an official duty at the time B.S. spit saliva on him.

**Held:** Affirmed.

**Memorandum Opinion:** As alleged in the State’s petition, the elements of harassment of a public servant are that B.S. “with the intent to assault, harass, or alarm [the officer], cause the said [officer] (sic) [B.S.] knows to be a public servant to contact the blood and saliva of [B.S.] while the said [officer] is lawfully discharging an official duty and in retaliation and on account of an exercise of the said [officer’s] official power and performance of an official duty.” TEX. PENAL CODE ANN. § 22.11(a)(2).

An officer lawfully discharges his duties if the officer is “acting within his capacity as a peace officer.” Johnson v. State, 172 S.W.3d 6, 11 (Tex.App.–Austin 2005, pet. refused) (quoting Guerra v. State, 771 S.W.2d 453, 461 (Tex.Crim.App.1988); Hughes v. State, 897 S.W.2d 285, 298 (Tex.Crim.App.1994)). Determining whether an officer acted within his capacity as a peace officer, we look to the details of the encounter, including whether the officer was in uniform, on duty, and whether he was on regular patrol at the time of the occurrence. Johnson, 172 S.W.3d at 11. An officer is lawfully discharging his duties if he is not “criminally or tortiously abusing his office as a public servant.” Id.; Hall v. State, 158 S.W.3d 470, 474–75 (Tex.Crim.App.2005) (“the ‘lawful discharge’ of official duties in this context means that the public servant is not criminally or tortiously abusing his office as a public servant by acts of, for example, ‘official oppression’ or ‘violations of the civil rights of a person in custody’ or the use of unlawful, unjustified force”) (footnotes omitted)).

B.S. spends much of his argument under this issue analyzing the detention and its rationale, and the officer’s use of force. He concludes the use of force was not justified and “[t]he incident snowballed into an assault of [B.S.].” As such, he continues, actions of the officer were not a lawful discharge of official duty. We find no merit to this assessment.

B.S. chose not to testify at the adjudication hearing and the trial court found the officer’s testimony credible. The officer’s testimony and other evidence showed the officer was in uniform in a marked patrol unit investigating a call from dispatch of an escaped juvenile detainee in the area. Spotting B.S. the officer attempted to make contact but B.S. refused to provide his name. B.S. resisted the officer’s attempt to handcuff and frisk him. B.S. was subdued only after a second and third officer arrived. In the occurrence, B.S. sustained a bloody nose. The officer then transported B.S. to the parking lot of a youth center for emergency medical evaluation of B.S. As the EMS worker concluded the examination, and while the officer stood beside his patrol vehicle, B.S. spat blood and saliva on the officer. We find a reasonable trier of fact could have found beyond a reasonable doubt that at the time B.S. spat on the officer, the officer was lawfully discharging his official duty. See Hughes, 897 S.W.2d at 298 (“Whether or not [a trooper’s] stop of [the defendant] was constitutionally reasonable is not relevant to determining if [the trooper] was acting in the lawful discharge of his duties.... The record reflects that [the trooper] was acting within his capacity as a peace officer at the time of the offense. He was on duty, in uniform and patrolling Interstate 10 with his partner when they heard and responded to the dispatcher’s report” (quotation marks and citation omitted)); see also Guerra, 771 S.W.2d at 461 (similar analysis). B.S.’s first issue is overruled

Through his second issue B.S. argues the State’s evidence was factually insufficient to support his adjudication for harassment of a public servant because the State failed to prove that the officer was lawfully discharging an official duty at the time B.S. spit saliva on him. Appellate courts are authorized to conduct a factual sufficiency review only if the burden of proof is less than beyond a reasonable doubt. Moon v. State, 451 S.W.3d 28, 45 (Tex.Crim.App.2014) (citing In re C.H., 89 S.W.3d 17, 25 (Tex.2002)). In a juvenile adjudication hearing, the State’s burden requires proof beyond a reasonable doubt. Id. (citing TEX. FAM.CODE ANN. § 54.30(f)). Therefore, under the criminal standard we apply for measuring the sufficiency of evidence supporting a juvenile adjudication, the strength of the evidence is not gauged by a separate factual sufficiency standard. In re R.A., 2012 Tex.App. LEXIS 5909, at \*7, 2012 WL 2989224 (“In the criminal context, the factual-sufficiency standard has been eliminated, and the Jackson v. Virginia legal-sufficiency standard is ‘the only standard that a reviewing court should apply in determining whether the evidence is sufficient’ ”); In re A.O., 342 S.W.3d 236, 239 (Tex.App.–Amarillo 2011, pet. refused) (refusing in light of Brooks v. State, to apply a factual sufficiency standard for reviewing a finding that a juvenile engaged in delinquent conduct). B.S.’s second issue is overruled.

**Conclusion:** Having overruled B.S.’s two issues, we affirm the judgment of the trial court.